Filed: 8/8/2023 3:27 PM

STATE OF INDIANA) IN THE MONROE CIRCUIT COURT
) SS:
COUNTY OF MONROE) CAUSE NO. 53C01-2004-CT-000723

KIERA ISGRIG,
Plaintiff,

v.

INDIANA UNIVERSITY[1]
and TRUSTEES OF INDIANA
UNIVERSITY,
Defendants.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Defendant filed its *Motion for Summary Judgment* (hereinafter "*Def.'s Mot.*") and its designation of evidence on June 27, 2022. Plaintiff filed her *Response in Opposition to Defendant's Motion for Summary Judgment* (hereinafter "*Pl.'s Resp.*") and her designation of evidence on January 19, 2023. Defendant submitted its *Reply Brief in Support of Defendant's Motion for Summary Judgment* (hereinafter "*Def.'s Reply*") on January 30, 2023. Plaintiff filed her *Motion Requesting for Hearing on Defendant Trustees of Indiana University's Motion for Summary Judgment and Plaintiff's Response in Opposition* on February 2, 2023. The Court conducted a summary judgment hearing on April 14, 2023. Present at the hearing was Counsel for Plaintiff, Timothy Francis Devereux, and Counsel for Defendant, Angela J. Della Rocco.

After conducting the hearing, reviewing the parties' filings, the arguments of counsel and the relevant law, the Court now **DOES FIND** and **ORDER:**

---

[1] Indiana University is not a properly named defendant. *See* Ind. Code § 21-27-4-2.

I. FACTUAL BACKGROUND

1. Kiera Isgrig (hereinafter "Plaintiff") is a resident of Manhattan Beach, California. (*Compl.* ¶ 1).
2. Defendant, Trustees of Indiana University (hereinafter "Indiana University"), is a state agency of the State of Indiana, domiciled in Bloomington, Monroe County, Indiana. (*Compl.* ¶ 3).
3. At all times relevant to this action, Defendant owned, operated, managed, and maintained Francis Morgan Swain Hall Building located at 727 E. Third Street, Bloomington, Indiana (hereinafter "the Premises"). (*Compl.* ¶ 5).
4. At all times relevant to this action, Plaintiff was a student enrolled at Indiana University. (*Compl.* ¶ 6).
5. Plaintiff alleges that, as a student, she was an invitee of the Defendant. Defendant does not dispute this fact for the purposes of summary judgment. (*Compl.* ¶ 7; *Def.'s Mot.* at 6).
6. On April 28, 2018, Plaintiff was studying in Room 138 of the Premises with a few classmates. (*Compl.* ¶¶ 7-8; *Isgrig Dep.*, 43:24-44:3, *Ex. 1*).
7. While studying in Room 138, the southeast window of the classroom spontaneously fell from its casing and struck Plaintiff in the head. Plaintiff alleges that no one interfered with the window before it fell, and Defendant does not dispute this for the purposes of summary judgment. (*Compl.* ¶ 9; *Isgrig Dep.*, 46:9-47:1, *Ex. 1*).

8. Shortly after the incident, Kevin Ashley, then Indiana University Bloomington Physical Plant Carpenter, was dispatched to the Premises to secure the window opening, clean Room 138, and take the window to a workshop for repairs. (*Ashley Aff.* ¶¶ 2, 5, *Ex. C*).
9. Ashley was employed as a carpenter for Indiana University for over 25 years, with approximately 15 years of experience in window-work. (*Id.* ¶¶ 3-4).
10. Ashley stated in his deposition that two of the window's four sash springs were broken. Ashley did not recall the condition of the other sash springs. Ashley found no other damage to the window or its casing to explain how the window came out of its track in the casing without human involvement at some point in time. (*Id.* ¶¶ 6, 14).
11. The window had a metal frame with adjustable blinds encased between two panes of glass. When installed in the casing, the bottom window panel could be lifted open to open the window vertically, and the blinds could be adjusted with an external magnet. (*Id.* ¶ 8).
12. On April 28, 2018, occupants of Room 138 could utilize the magnetic sash to manipulate the blinds or could lift the bottom window panel to open the window. (*Id.* ¶ 9).
13. Ashley stated the following in his deposition regarding the function of sash springs in windows like the one in Room 138:

> [S]ash springs provide the tension which allow the window to stay in place when raised and lowered. The sash springs are located within

> a vertical track built into both sides of the window casing. The window itself is then hooked to the sash springs and secured inside the track. The sash springs allow the window to stay in place when raised and lowered, and the track secures the window in its casing. Unless something is broken, the sash springs cannot be seen unless the window is removed from the window casing.
>
> Sash springs . . . wear down over time, break, and sometimes need to be replaced . . . . Typically, when a sash spring is broken, a window may be difficult to open/close or may not stay in place. Sometimes sash springs break when a window is removed from its casing for other repairs. . . .
>
> Broken sash springs . . . do not allow a sash spring window like the one in [R]oom 138 to fall out of its casing without warning. Even with four broken sash springs, such a window is still held in its track in the casing. The window must be maneuvered in a precise manner and the sash springs unhooked to fully remove the window from its track.

(*Id.* ¶¶ 10-11, 13).

14. Indiana University conducts reactive maintenance on its windows and does not conduct any preventative maintenance. Windows are not removed from their casings, or raised and lowered, unless a work order regarding the window is submitted. (*Thompson Dep.* 57:8-58:3. *Ex. 2*).
15. Indiana University maintenance staff repaired the window in question in March 2017, responding to a work order stating that the southeast window's blinds would not rise. (*Ex. 4; Ex. 5*, p. 4).
16. Repairing the blinds requires maintenance staff to remove the window from its casing, during which time any other faults discovered are repaired, such as broken sash springs. (*Ashley Aff.* ¶ 16, *Ex. C*).

17. Keith Thompson, Indiana University's Assistant Vice President of Facilities Operations, Energy Management, described windows as "fixtures" of buildings. Defendant does not dispute characterizing windows as "fixtures" of a building for the purposes of summary judgment. (*Thompson Dep.* 15:19-16:8, *Ex. 2*; *Reply Br. in Supp. of Def.'s Mot. for Summ. J.* at 2).
18. For the purposes of summary judgment, neither party disputes any material fact alleged in the parties' designation of evidence.

II. STANDARD OF REVIEW

A. Summary Judgment Standard

A court should grant a motion for summary judgment "if the designated evidentiary matter shows there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Ind. T.R. 56(C). "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 v. State*, 15 N.E.3d 1000, 1004 (Ind. 2014) (*quoting* Ind. T.R. 56(C)). Once the moving party makes a "prima facie showing that (1) there is no issue as to any material fact, and (2) that the movant is entitled to judgment as a matter of law . . . the burden shifts to the nonmoving party to show specific facts indicating an issue of material fact." *Babinchak v. Town of Chesterton*, 598 N.E.2d 1099, 1101 (Ind. Ct. App. 1992).

B. Premises Liability Standard

A plaintiff seeking damages for negligence must establish: (1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty; and (3) an injury proximately caused by the breach of that duty. *Pfenning v. Lineman*, 947 N.E.2d 392, 403 (Ind. 2011). In a premises liability claim, 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). A landowner owes an invitee a duty to exercise reasonable care for her protection while she is on the premises. *Id.* A defendant is liable for injury to an invitee causes by the property's condition only if the defendant: (1) knew or by the exercise of reasonable care would have discovered the condition and should have realized that the condition was unreasonably dangerous; (2) should have expected the invitee would not discover or realize the dangerous condition; and (3) failed to use reasonable care to protect the invitee against the dangerous condition. *Griffin v. Menard, Inc.*, 175 N.E.3d 811, 813 (*citing Burrell*, 947 N.E.2d at 639-40).

"[B]efore liability may be imposed upon [an] invitor, it must have actual or constructive knowledge of the danger." *Schulz v. Kroger Co.*, 963 N.E.2d 1141, 1144 (Ind. Ct. App. 2012). Actual knowledge is defined as the premises owner being aware of the dangerous condition on the property.[2] *See Id.* Constructive knowledge exists where a "condition has existed for such a length of time and under such circumstances that it would have been discovered in time to have prevented injury

[2] Neither party argues that Defendant had actual knowledge of any defect or dangerous condition with the window.

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) (*citing F.W. Woolworth Co. v. Jones*, 130 N.E.2d 672, 673 (Ind. Ct. App. 1955))). Once the defendant establishes an absence of genuine material fact as to its actual or constructive knowledge, the burden shifts to the plaintiff to produce evidence creating an issue of material fact. *Griffin*, 175 N.E.3d at 814 (*citing Hughley*, 15 N.E.3d at 1003). Criticism of a defendant's policies and procedures does not create an issue of material fact. *Id.*

C. *Res Ipsa Loquitur* Doctrine and its Applicability to Premises Liability Actions

"The doctrine of *res ipsa loquitur* recognizes that in some situations, an occurrence is so unusual, that absent reasonable justification, the person in control of the situation should be held responsible." *Id.* at 815 (*citing Cergnul v. Heritage Inn of Indiana, Inc.*, 785 N.E.2d 328, 331 (Ind. Ct. App. 2003)). The inference of negligence created by *res ipsa loquitur* must be established through the plaintiff demonstrating: "(1) that the injuring instrumentality was within the *exclusive management and control* of the defendant, and (2) the accident is of the type that ordinarily does not happen if those who have management or control exercise proper care." *Id.* (*citing Balfour v. Kimberly Home Health Care, Inc.*, 830 N.E.2d 145, 148 (Ind. Ct. App. 2005)). However, in a premises liability action, if the plaintiff cannot establish liability under a premises liability standard, *res ipsa loquitur* cannot apply. *Id.* Whether *res ipsa loquitur* applies in a negligence case is a

mixed question of law and fact. *Id.* (*citing Syfu v. Quinn*, 826 N.E.2d 699, 703 (Ind. Ct. App. 2005)).

III. THE INJURING WINDOW WAS NOT IN THE DEFENDANT'S EXCLUSIVE CONTROL OR MANAGEMENT

Plaintiff argues that *res ipsa loquitur* applies and that an inference of negligence is warranted in this case because the injuring instrumentality was a window and a fixture in a building. (*Pl.'s Resp.* at 12). In *Griffin,* the plaintiff was injured by a cardboard box opening and dropping a sink on the plaintiff, causing injury. *Griffin,* 175 N.E.3d at 811. The Indiana Supreme Court declined to grant an inference of negligence under *res ipsa loquitur* because the injuring instrumentality was neither under the exclusive management and control of the defendant and because the accident was not so unusual that it would not ordinarily occur in the absence of negligence. *Id.* at 816. Plaintiff attempts to distinguish *Griffin,* contending that because the window is a fixture of the Premises and, as a result, Defendant is in exclusive management and control. (*Pl.'s Resp.* at 9-12). Plaintiff argues that the cardboard box was not in exclusive control of the defendant in *Griffin* because it was a moveable box that the plaintiff was manipulating when he was injured. (*Id* at 9). Plaintiff argues that Defendant's reactive maintenance is insufficient, and that Defendant did not exercise reasonable care over the Premises. (*Id.* at 11-12). Plaintiff contends that she is entitled to summary judgment on the grounds of this inference under *res ipsa loquitur*, which allows her to prevail on her premises liability claim. At the hearing, Plaintiff noted a paragraph in *Griffin*, in

which the Indiana Supreme Court wrote "[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 – and the incident would not normally occur absent negligence, *res ipsa [loquitur]* could be appropriate." 175 N.E.3d at 816.

Defendant counters that *Griffin*'s holding still applies to this case, and that an inference of negligence is not permitted under *res ipsa loquitur* unless Plaintiff properly establishes the elements of a premises liability claim. (*Def.'s Reply* at 9). Defendant argues that there is an absence of any record that Defendant had actual or constructive knowledge of any dangerous or defective conditions of the window, prior to April 28, 2018. (*Id.* at 7). Defendant next argues that, under *Griffin*, an inference of negligence under *res ipsa loquitur* is not warranted because the window was not under exclusive control of the Defendant. Defendant notes that courts applying *res ipsa loquitur* to premises liability actions are more concerned with outside tampering with the injuring instrumentality, rather than a concern for limiting the doctrine to fixtures attached to the premises. (*Id.* at 2). Defendant disputes Plaintiff's characterization of the evidence that Defendant was in exclusive control of the window such that the window could not have fallen absent Defendant's negligence. (*Id.* at 3). Defendant argues that while Plaintiff and her fellow students may not have interfered with the window, there is insufficient evidence in the record that a previous occupant of Room 138 did not tamper with the window. (*Id.* at 4).

First, this Court finds that there is insufficient evidence in the record to demonstrate that the Defendant had actual or constructive knowledge of any defect or dangerous condition of the window. The record reveals that maintenance staff last removed and inspected the injuring window in Room 138 in March 2017, approximately one year before the incident. Defendant did not receive any additional work orders denoting a problem with the southeast window. There are no notes on the work order in March 2017 that reveal a defect or dangerous condition with the southeast window. Defendant could not have noticed that any sash springs were broken while the window was in its frame. While Plaintiff criticizes the Defendant for only conducting reactive maintenance, this criticism is insufficient for establishing a landowner's constructive knowledge. *See Griffin,* 175 N.E.3d at 814. While Defendant did owe Plaintiff a duty to exercise reasonable care as an invitor, there is no evidence of constructive knowledge to establish a premises liability claim.

Second, this Court finds that the holding in *Griffin* requires this Court applying *res ipsa loquitur* to this case. A plaintiff relying on the *res ipsa loquitur* doctrine must first satisfy the underlying elements of a premises liability claim before she can rely on the doctrine of *res ipsa loquitur* to create an inference of negligence. *Id.* at 815. As stated above, Plaintiff has failed to establish that Defendant had constructive knowledge of any defect of the window.

Third, even if this Court was permitted to grant an inference of *res ipsa loquitur*, it is not warranted in this case. Plaintiff cites *dicta* in *Griffin* in which the

Indiana Supreme Court provided examples of instrumentalities that would be under the exclusive control or management of the invitor such as fixtures like chandeliers or bolted shelves. The Court does not read this passage to state that *any* fixture is under the exclusive control of the invitor. To the contrary, the Indiana Supreme Court analogized the injuring box in *Griffin* to a defective handrail in an Indiana Court of Appeals case. *See Griffin,* 175 N.E.3d at 815-16 (*citing Cergnul v. Heritage Inn of Indiana, Inc.*, 785 N.E.2d 328, 328, 330-31 (Ind. Ct. App. 2003)). In *Cergnul,* a hotel patron was injured when a handrail came out of the wall. *Cergnul,* 785 N.E.2d at 330. The court held that a jury instruction of *res ipsa loquitur* was inappropriate in that case because the hotel was not in exclusive control since other patrons could have vandalized it. *Id.* at 331. The Indiana Supreme Court emphasized this point, stating "the showing of exclusive control is difficult when the injuring instrumentality is accessible to customers." *Griffin,* 175 N.E.3d at 816.

The defendant did not have exclusive control over the injuring window merely because it is a fixture of the Premises. Any occupant of Room 138 could have interfered with the southeastern window. An occupant could have manipulated the magnetic strip to raise or lower the blinds to adjust the amount of natural light in the room. An occupant could have also opened or closed the window by lifting the bottom panel. While the Defendant exercised exclusive control of the window when installing the window and when performing any necessary maintenance, the window could have been manipulated by any occupant of Room 138 outside of those times. This Court finds that the facts of *Cergnul* control this case. The court in

Cergnul noted that the hotel was in exclusive control of the handrail when it was installed but it could not retain that exclusive control because patrons regularly utilized it. *Cergnul,* 785 N.E.2d at 331. Furthermore, this lack of exclusive control in the injuring instrumentality prevents this Court from finding that the second element of the test for *res ipsa loquitur* is satisfied. In *Cergnul,* the court noted that there were too many other reasons, like vandalism from other patrons, that could explain why the injuring handrail became loose and ultimately injured the plaintiff. *Id.* 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.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

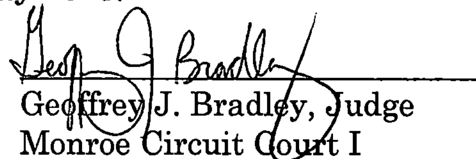
1. Indiana University is an improperly named party and is dismissed pursuant to Ind. Code § 21-27-4-2.

2. Plaintiff's motion for summary judgment is hereby DENIED.

3. Defendant's, Trustees of Indiana University, motion for summary judgment is hereby GRANTED.

4. This constitutes a final appealable order.

SO ORDERED this 24th day of May 2023.



Geoffrey J. Bradley, Judge
Monroe Circuit Court I

Distribution to all parties of record