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IN THE INDIANA COURT OF APPEALS

CASE NO. 23A-CT-01332

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.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Kiera Isgrig ("ISGRIG"), the Appellant and Plaintiff below filed this civil action against the Appellee, Defendant below, Indiana University and Trustees of Indiana University (hereinafter collectively referred to as "IU" for injuries she sustained on April 28, 2018, when she was struck from behind by a window that fell out of its window frame and landed on her head and upper body. On that date, KIERA was in a classroom in Francis Morgan Swain Hall studying for finals with friends when a window directly behind where she was sitting fell, landing on her head.

ISGRIG filed her Complaint for Damages and Jury Demand against IU in the Monroe County Circuit Court on April 23, 2020. *Appellant's App., v. 2, pp.26-29.*

IU filed its Answer to Plaintiff's Complaint on May 20, 2020. *Appellant's App., v. 2, pp.30-36.*

On June 27, 2022, IU filed its Motion for Summary Judgment (*Appellant's App., v. 2, pp. 37-39)* along with its Brief in Support of Summary Judgment (*Appellant's App., v. 2, pp. 40-51)* and its Designation in support of its Motion for Summary Judgment (*Appellant's App., v. 2, pp. 52-83)*.

On July 20, 2022, ISGRIG filed Plaintiff's Unopposed Motion for Enlargement of Time to Respond to Defendant's Motion for Summary Judgment seeking additional time to conduct discovery. (*Appellant's App., v. 2, pp. 84-86.)* The Trial Court entered its Order Granting Plaintiff's Unopposed Motion for Enlargement of Time to Respond to Defendant. Indiana University's Motion for Summary Judgment on July 20, 2022. (*Appellant's App., v. 2, pp. 87-88.)*

On October 17, 2022, ISGRIG filed Plaintiff's Second Unopposed Motion for Enlargement of Time to Respond to Defendant's Motion for Summary Judgment (*Appellant's App., v. 2, pp. 89-91)* and the Trial Court entered its Order Granting Plaintiff's Second Unopposed Motion for

Enlargement of Time to Respond to Defendant's Motion for Summary Judgment on October 17, 2022. *Appellant's App., v. 2, p. 92.*

On December 7, 2022, ISGRIG filed Plaintiff's Third Unopposed Motion for Enlargement of Time to Respond to Defendant's Motion for Summary Judgment (*Appellant's App., v. 2, pp. 93-96)* and the Trial Court entered its Order Granting Plaintiff's Third Unopposed Motion for Enlargement of Time to Respond to Defendant's Motion for Summary Judgment on December 7, 2022. (*Appellant's App., v. 2, p. 97.)*

On January 19, 2023, ISGRIG filed Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment (*Appellant's App., v. 2, pp. 98-110)* along with Plaintiff's Designation of Evidence in Opposition to Defendant's Motion for Summary Judgment. (*Appellant's App., v. 2, pp. 111-237 and v. 3, pp. 2-97.)*

IU filed Defendant's Reply Brief in Support of Motion for Summary Judgment on January 30, 2023. (*Appellant's App., v. 3, pp. 98-105.)*

On February 2, 2023, ISGRIG filed Plaintiff's Request for Hearing on Defendant's Motion for Summary Judgment and Plaintiff's Response in Opposition. (*Appellant's App., v. 3, pp. 106-108.)* The Trial Court entered its Order Setting Hearing on Defendant's Motion for Summary Judgment and Plaintiff's Response in Opposition on February 8, 2023 setting a hearing dated for April 12, 2023. (*Appellant's App., v. 3, p. 109.)*

On February 15, 2023, the Trial Court, on its own Motion, rescheduled the Hearing on Defendant's Motion for Summary Judgment and Plaintiff's Response in Opposition for April 14, 2023. (*Appellant's App., v. 3, pp. 110-112.)*

The Trial Court conducted the April 14, 2023 hearing and on May 24, 2023 entered its Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment. (*Appellant's App., v. 3, pp. 113-124.)*

On June 14, 2023, ISGRIG filed her Notice of Appeal with this Court. (*Appellant's App., v. 3, pp. 125-139.)*

On June 14, 2023 the Clerk for Monroe Circuit Court filed a Notice of Completion of Clerk's Record noting that the transcript from the April 14, 22023 hearing had been requested but the transcript was not yet completed. (*Appellant's App., v. 3, pp. 140-151.)*

On July 11, 2023, the Court Reporter of the Monroe Circuit Court filed its Notice of Filing of Transcript with this Court. (*Appellant's App., v. 3, pp. 152-177.)*

STATEMENT OF THE FACTS

This litigation arises out of the injuries sustained by Kiera Isgrig ("ISGRIG") on April 28, 2018, when she was struck from behind by a window that fell out of its window frame and landed on her head and upper body. On that date, ISGRIG was in a classroom in Francis Morgan Swain Hall studying for finals with friends when a window directly behind where she was sitting fell, landing on her head, shattering glass all over her and the table. ISGRIG's friends pulled the heavy window off of her and immediately drove KIERA to the Emergency Room at IU Bloomington Hospital.

On April 28, 2018, KIERA was in Classroom 138 in the Francis Morgan Swain Hall (also designated by Defendants as Student Building BL017) studying for finals with friends when a large window directly behind where she was sitting fell out of its frame, landing on her head and shattering glass all over her and the table (hereinafter referred to as the "INCIDENT").

At the time of the INCIDENT, KIERA was seated at a table with her back to the window. The eyewitness testimony in this case establishes that, at the time the window fell, no one was

touching or interacting with it. (*Appellant's App., v. 2, pp. 157-159*) Below are photographs of the window taken immediately after the INCIDENT.

Keith Thompson, the T.R. 30(B)(6) corporate designee for IU and the Assistant Vice President of Facilities Operations, Energy Management and Utilities, was deposed on December 22, 2022 and he testified that the window in question weighed approximately 40 pounds. (*Appellant's App., v. 3, p. 52*.)

The evidence in this case is uncontroverted. KIERA was sitting at the desk closest to the window with her back turned towards that window. (*Appellant's App., v. 2, p. 157*.) She was wearing headphones while she was studying so she did not hear any sounds from the window before it fell on her. (*Appellant's App., v. 2, p. 158*.) There was no one standing behind her or next to her right before the window fell. (*Appellant's App., v. 2, p. 158*.) There were no warning signs that the window was about to fall from its casing. (*Appellant's App., v. 2, pp. 158-159*.) KIERA had absolutely no interaction with the window before it fell and struck her from behind nor did any of the other students studying in that room.

When questioned, Keith Thompson testified that Defendants Indiana University and Trustees of Indiana University (hereinafter collectively referred to as "IU") are not aware of any evidence or information to refute the testimony concerning how the INCIDENT occurred. (*Appellant's App., v. 3, pp. 53-54 and pp. 18-21*) In fact, when questioned, Keith Thompson admitted as follows:

> Q. And what is your understanding as to how the window came to fall out of the frame on April 28th of 2018?
>
> A. I have no idea how that window came out.
>
> Q. Is that something that is a common occurrence?
>
> A. No.

(*Appellant's App., v. 3, p. 22) See also Appellant's App., v. 3, p., 50* (IU's investigation did not determine what caused the window to fall out of the frame); *Appellant's App., v. 3, p. 53* ("I have no idea how that window came out of its casing."); and *Appellant's App., v. 3, pp. 53-54* (IU is not aware of anyone interacting with the window before the INCIDENT and has no evidence to refute the testimony of other witnesses that the window fell out of the frame on its own.)

The window in question was installed in Room 138 sometime in 1991 or 1992 when the building was renovated. (*Appellant's App., v. 3, p. 78*.) Despite being in possession of the window in question for approximately 28 years, IU is unable to identify the window's manufacturer, make, model, serial number or date of manufacture. (*Appellant's App., v. 3, p. 78*.) The window in question is the same model as the other windows in Room 138 as well as all of the windows in that building. (*Appellant's App., v. 3, pp. 25-26 and p. 23*.) Moreover, this same type of window is also used in various other buildings at IU's Bloomington, Indiana campus. (*Appellant's App., v. 3, p. 23*.)

Additionally, although IU maintains maintenance records for the buildings on its campus, many of those maintenance records lack critical details such as what particular window was the subject of the maintenance work. For example, there are four (4) windows in Room 138 (*Appellant's App., v. 3, p. 23*) yet many of IU's maintenance records do not indicate which specific window or what component of a window was the subject of various maintenance calls. (*Appellant's App., v. 3, p. 41, 43 and 57*.) (See also Maintenance Records for Room 138 and Building BL017; *Appellant's App., v. 3, pp. 85-97.*) Keith Thompson also confirmed that if the maintenance technician doesn't enter any notes in the maintenance records or list out what materials were used on a maintenance call, then there would be no way of tracking what maintenance work was performed. (*Appellant's App., v. 3, p. 32-33*.)

Importantly, Keith Thompson admitted the IU's maintenance department does not provide preventative maintenance or even inspect windows in its buildings. Rather, when questioned by counsel for IU, Keith Thompson testified:

> Q [Counsel for IU] Just wanted to make one clarification to some of the questioning earlier, just to make sure the record is clear. You were asked a little bit about preventative maintenance and anything IU does with respect to preventative maintenance for windows.
>
> And I wanted to clarify, does IU do preventative maintenance review for windows?
>
> A. Well, we do clean windows, so that is part of our program. But we're not actively out raising and lowering movable windows, checking for problems. We're more reactionary in that regard.
>
> Q. So there is not a procedure for preventative maintenance for windows?
>
> A. If we have an issue with a window, we do follow a procedure to fix said window. So there are things we look at to fix the window. We have a procedure for that. But we're not out raising and lowering windows, looking for problems.
>
> **Q. So any procedure you have for windows is purely reactionary?**

A. Yes.

(*Appellant's App., v. 3, p. 59-60*.) [Emphasis added.]

KIERA's friends who were studying in Room 138 with her pulled the heavy window off of her and immediately drove KIERA to the Emergency Room at IU Bloomington Hospital.

Additional facts will be supplied below as needed.

STANDARD OF REVIEW

This is an appeal from an order denying summary judgment as a matter of law under Indiana Trial Rule 56, and since this Court evaluates questions of law *de novo*, it owes no deference to the trial court's determination of such questions. *See, e.g., Bules v. Marshall County*, 920 N.E.2d 247, 250 (Ind. 2010); *Shields v. Taylor*, 976 N.E.2d 1237, 1244 (Ind. Ct. App. 2012). Thus, when reviewing an entry of summary judgment, the Court stands in the shoes of the trial court. *State v. Cornelius*, 637 N.E.2d 195, 198 (Ind. Ct. App. 1994). The Court does not weigh the evidence, but it will consider the facts in the light most favorable to the nonmoving party. *Id.*

The Indiana Supreme Court has re-affirmed that the standard of review is well-settled:

> We review summary judgment de novo, applying the same standard as the trial court: "Drawing all reasonable inferences in favor of . . . the non-moving parties, summary judgment is appropriate 'if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (quoting 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." Id. (internal citations omitted).
>
> The initial burden is on the summary-judgment movant to "demonstrate[] the absence of any genuine issue of fact as to a determinative issue," at which point the burden shifts to the nonmovant to "come forward with contrary evidence" showing an issue for the trier of fact. *Id.* at 761-62 (internal quotation marks and substitution omitted). And "[a]lthough the non-moving party has the

> burden on appeal of persuading us that the grant of summary judgment was erroneous, we carefully assess the trial court's decision to ensure that he was not improperly denied his day in court." *McSwane v. Bloomington Hosp. & Healthcare Sys.*, 916 N.E.2d 906, 909-10 (Ind. 2009) (internal quotation marks omitted).

Hughley v. State, 15 N.E.3d 1000, 1003 (Ind. 2014) (alterations original to Hughley). See also *Kroger Co. v. Plonski*, 930 N.E.2d 1, 4-5 (Ind. 2010).

Summary judgment proceedings are designed to provide a speedy determination of whether a genuine issue of fact is present and must be tried. William F. Harvey, 3 Ind. Practice, page 609 (1992 Supp.). Summary Judgment is appropriate if the moving party can establish that the designated evidentiary materials show that there is no genuine issue as to a material fact, and that the moving party is entitled to judgment as a matter of law. *Koenig v. Bedell*, 601 N.E. 2d 453 (Ind. App., 1992).

The burden is on the party moving for summary judgment to demonstrate entitlement to summary judgment as a matter of law. *Majd Pour v. Basic American Medical, Inc.*, 555 N.E.2d 155 (Ind. App., 1990), reh' g. denied. If the moving party does *prima facie* establish the lack of a genuine issue of material fact, the burden then shifts to the non-moving party who must come forward with materials which demonstrate that a genuine issue of material fact exists. Id. The non-moving party may not rest upon bare allegations made in pleadings, but must respond with affidavits or other evidence setting forth specific facts showing the genuine factual issue in dispute. *Sutton v. Sanders*, 556 N.E.2d 1362 (Ind. App. 1990).

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"). To this end, a plaintiff is not subject to summary judgment merely because it is unlikely that he will succeed at trial. *Brannon v. Wilson*, 733 N.E.2d 1000, 1001 (Ind. Ct. App. 2000) (citations omitted).

Although summary judgment is rarely appropriate in negligence actions, the question concerning whether any duty of care is owed is one of law, which may in certain cases be decided on motion for summary judgment. *See Christmas v. Kindred Nursing Centers Ltd. Partnership*, 952 N.E.2d 872, 878 (Ind. Ct. App. 2011); *Brewster v. Rankins*, 600 N.E.2d 154, 156 (Ind. Ct. App. 1992). At the same time, "factual questions may be interwoven with the determination of the existence of a relationship, rendering the existence of a duty a mixed question of law and fact *to be resolved by the fact finder*." *Claxton v. Hutton*, 615 N.E.2d 471, 474 (Ind. Ct. App. 1993) (emphasis added). Accordingly, even a single, genuine dispute as to a material fact that bears on the duty question will suffice to remove the matter from resolution as a matter of law, i.e. by summary judgment.

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).

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. 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 Courts of Indiana have long recognized the doctrine of res ipsa loquitor. See *New York, C. & S. L. R. Co. v. Henderson*, 146 N.E.2d 531 (Ind. 1957); *Wass v. Suter*, 84 N.E.2d 734 (Ind. App. 1949); *Prest-O-Lite Co. v. Skeel*, 106 N.E. 365 (Ind. 1914); and *Pittsburgh, etc. R. Co. v. Arnott, Admx*, 126 N.E. 13 (Ind. 1920); *Pittsburgh, Cincinnati and St. Louis R. R. Co. v. Williams*, 74 Ind. 462 (Ind. 1881.).

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.

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.

The United States Supreme Court has similarly 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).

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

The Indiana Court of Appeals in *Hammond. Scot Lad Foods, Inc*., 436 N.E.2d 362, 364 (Ind. App. 1982) recognized:

> *Res ipsa loquitur* is a rule of evidence and under the doctrine an inference of negligence can be drawn from certain facts. The doctrine can be applied where the injuring instrumentality is shown to have been exclusively under the management and control 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 and control use proper care. 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.*

It has also been recognized by the Courts of Indiana that:

> Under the doctrine of res ipsa loquitur, it is not necessary for a plaintiff to exclude every possibility other than the defendant's negligence as a cause for the plaintiff's injury. *Gold v. Ishak*, 720 N.E.2d 1175, 1182 (Ind. Ct. App. 1999), trans. denied. All that is needed is evidence from which reasonable persons could say that on the whole it is more likely that there was negligence associated with the cause of an event than that there was not. *Sharp v. LaBrec, Inc*., 642 N.E.2d 990, 993 (Ind. Ct. App. 1994), trans. denied. **To prove the "exclusive control" requirement of res ipsa loquitur, the plaintiff is simply required to show either that a specific instrument caused the injury and that the defendant had control over that instrument or that any reasonably probable causes for the injury were under the control of the defendant.** *Slease v. Hughbanks*, 684 N.E.2d 496, 499 (Ind. Ct. App. 1997). At a minimum, the plaintiff is required to point to an instrument in the control of the defendant that was a probable cause of his or her injury. See id. at 500.

Aldana v. Sch. City of E. Chicago, 769 N.E.2d 1201, 1205-1206 (Ind. App. 2002). [Emphasis added.]

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. In reaching its conclusion, the Court relied upon *Griffin v. Menard, Inc*., 175 N.E.3d 811 (Ind. 2021); however, the Court in *Griffin* was faced with an entirely different factual scenario. There, a customer at a big box hardware store was injured when a box

containing a sink – that was being removed by the customer from a shelf – failed and the bottom of the box opened causing the sink to fall and strike the customer below. The Indiana Supreme Court found that the doctrine *of res ipsa loquitor* didn't apply because the box containing the sink was not in Menard's exclusive management and control as the customer was moving the box when it failed. The injured party was in actual control of and was in the process of moving the box when it failed.

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

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. When asked about fixtures during his deposition, Keith Thompson testified as follows:

> Q. Based on your experience in facilities management, do you know what the term "fixture" is?
>
> A. Yes.
>
> Q. Could you tell me, explain for me what your understanding of that phrase is?
>
> A. A fixture is something -- in the plumbing world, a fixture is the sink, the toilet. Those are fixtures.
>
> Q. Right. Things that are affixed to the building?
>
> A. Yes.

Q. And they're attached in a permanent way to the building?

A. Yes.

Q. Would you consider a window to be a fixture?

A. Yes.

(See *Appellant's App., v. 3, pp. 17-18.)*

The Trial Court concluded that since other students may have used the window at some point in the past prior to the day it fell, it could not be under the exclusive control of IU. However, the Trial Court failed to acknowledge that the fixtures given as examples by the Indiana Supreme Court in *Griffin* to which res ipsa loquitor could apply are of the type that would be used by occupants of a building. The chandelier given as an example in *Griffin* would have been turned on and off by occupants of the building and, more importantly, the "set of shelves bolted to the wall" would have been used by occupants of the building as well.

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.)*

Just as the Court declined to apply res ipsa loquitor to the *Griffin* case because the injured party was actively engaged in moving the box containing the sink, the Court in *Cergnul v. Heritage Inn of Ind., Inc.*, 785 N.E.2d 328 (Ind. App. 2003) declined to apply the doctrine of res ipsa loquitor to injuries caused when a railing on a stairwell came loose from the wall as the injured party was pulling on it while using the stairs. Just as in the *Griffin* case, the injured party was actively interacting with the instrumentality that caused their injury and their conduct played a significant role in causing the incidents in question.

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.)*

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, 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 Trial Court's ruling adopts an overly narrow reading of the term "exclusive control." The Indiana Court of Appeals in *Gold v. Ishak*, 720 N.E.2d 1175, 1182 (Ind. Ct. App. 1999), trans. denied, addressed 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.

There is no question that IU had the right and power to control the window and the opportunity to exercise that right.

The facts of this case mirror those in the leading case which established the rule of *res ipsa loquitur.* In *Byrne* v. *Boadle* (1863), 2 H. & C. 722, 159 Eng. Reprint 299 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 and the court held the plaintiff had made out a prima facie case.

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. 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.

> 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).

It has also been recognized by the Courts of Indiana that:

> Under the doctrine of res ipsa loquitur, it is not necessary for a plaintiff to exclude every possibility other than the defendant's negligence as a cause for the plaintiff's injury. *Gold v. Ishak*, 720 N.E.2d 1175, 1182 (Ind. Ct. App. 1999), trans. denied. **All that is needed is evidence from which reasonable persons could say that on the whole it is more likely that there was negligence associated with the cause of an event than that there was not.** *Sharp v. LaBrec, Inc*., 642 N.E.2d 990, 993 (Ind. Ct. App. 1994), trans. denied.

Aldana v. Sch. City of E. Chicago, 769 N.E.2d 1201, 1205-1206 (Ind. App. 2002). [Emphasis added.]

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 manner in which the doctrine of res ipsa loquitor has been applied in Indiana has undergone an evolution in the Courts. For example, in *Ogden Estate v. Decatur County Hospital*, 509 N.E.2d 901, 904 (Ind. App. 1987) the Indiana Court of Appeals concluded that the doctrine of res ipsa loquitor is inapplicable in most slip and fall cases. There, the Court noted that Ogden attempted to rely solely upon the fact that the injured party was found lying on the floor to prove that the floor was slick and in turn the Hospital was negligence. The *Ogden* Court specifically noted that "Falling and injuring one's self proves nothing. Such happenings are commonplace wherever humans go." *Id.* at 903 quoting from *Alterman Foods, Inc. v. Ligon,* 272 S.E.2d 327, 331-332 (Ga. 1980). In noting that negligence cannot be inferred from the mere fact of an accident absent special circumstances the *Ogden* Court concluded that the mere fact that a party experienced a fall did not constitute the "special circumstances" required in order to invoke res ipsa loquitor. While falls may be commonplace, permanently attached fixtures spontaneously falling off of buildings are not.

The Indiana Supreme Court in *Griffin* acknowledged as much when it cautioned:

> . . . 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.]

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 for the serious brain injury caused by being struck by the falling window 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.

Not only is the result bad public policy but it likely violates the Indiana Constitution's Open Courts Clause.

> Indiana's Open Courts Clause mandates, "All courts shall be open; and *every person*, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; *completely*, and without denial; speedily, and without delay." *Ind. Const. art. 1, § 12* (emphases added). This Clause thus "guarantees access to the courts to redress injuries to the extent the substantive law recognizes an actionable wrong." *Smith v. Ind. Dep't of Corr.*, 883 N.E.2d 802, 807 (Ind. 2008).

Escamilla v. Shiel Sexton Company, Inc., 73 N.E.3d 663 (Ind. 2017) [Emphasis added.]

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.

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.

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 14,000 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 Brief and Appendix, consisting of three (3) Volumes and 418 pages, was electronically filed with the Clerk of the Indiana Court of Appeals on this 8th day of August, 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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