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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

APPELLANT, KIERA ISGRIG'S BRIEF IN RESPONSE TO APPELLEE'S PETITION TO TRANSFER

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III. ARGUMENT

I. THE COURT OF APPEALS DECISION BELOW IS CONSISTENT WITH AND DOES NOT CONFLICT WITH THE SUPREME COURT'S DECISION IN *GRIFFIN V. MENARD, INC.*, 175 N.E.3D 811 (IND. 2021)

IU's Petition for Transfer should be denied as it fails to satisfy the criteria for transfer as set forth in the Indiana Rules of Appellate Procedure, Rule 57(H)(2). Appellate Rule 57(H)(2) provides, in pertinent part:

> **H. Considerations Governing the Grant of Transfer.**
>
> The grant of transfer is a matter of judicial discretion. The following provisions articulate the principal considerations governing the Supreme Court's decision whether to grant transfer.
>
> . . .
>
> (2) *Conflict with Supreme Court Decision.* The court of Appeals has entered a decision in conflict with a decision of the Supreme Court on an important decision.

IU's argument in support of its Petition to Transfer is premised upon the assertion that the Court of Appeals decision below is inconsistent with the Supreme Court's decision in *Griffin v. Menard, Inc.*, 175 N.E.3D 811 (Ind. 2021). In particular, IU's argument is that res ipsa loquitor cannot be applied to the facts of this case due to the holding in *Griffin*. However, IU's argument fails to acknowledge the clear language contained in Griffin that specifically acknowledges that the doctrine of res ipsa loquitor can and does still apply to cases involving fixtures.

Although the Court in *Griffin* ruled that the doctrine of res ipsa loquitor did not apply under the facts present in that case, 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 at 816. [Emphasis added.]

Here, there is no dispute that the window in question was a fixture. When asked about fixtures during his deposition, Keith Thompson, the T.R. 30(B)(6) corporate designee for IU and the Assistant Vice President of Facilities Operations, Energy Management and Utilities, 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 Court of Appeals properly concluded that, in light of the Supreme Court's statement in *Griffin* that res ipsa loquitor still applies to fixtures, this doctrine could be applied to the facts of this case. In fact, the Court of Appeals decision below specifically focused on the discussion of fixtures found in the *Griffin* opinion.

Contrary to IU's argument, the Court of Appeals decision below is consistent with the specific language found in the *Griffin* opinion. If the *Griffin* Court intended to completely abrogate the application of res ipsa loquitor to premise liability cases, it could have easily so stated. However, the clear language used by the Supreme Court holding that res ipsa can still be applied to premises liability cases involving injuries caused by permanently attached fixtures failing off of a building and causing injuries to an occupant of that building.

As will be discussed below in the discussion of "exclusive management and control," neither Isgrig nor any other person interacted or touched the window in question on the day of her injury. The undisputed evidence before the Trial Court was that Isgrig and other students had been studying in the classroom in question for many hours before the window spontaneously fell from its casing and struck Isgrig from behind.

This is a text book example of an ". . . incident that would not normally occur absent negligence" *Griffin v. Menard, Inc.*, 175 N.E.3d at 816.

Rather than conflicting, the opinion of the Court of Appeals below is entirely consistent with the Supreme Court's decision in *Griffin v. Menard, Inc.* and IU's Petition for Transfer should be denied.

II. THE COURT OF APPEALS PROPERLY APPLIED INDIANA LAW AND THE SUPREME COURT'S DECISION IN *GRIFFIN V. MENARD, INC.*, 175 N.E.3D 811 (IND. 2021) IN REACHING ITS OPINION

Contrary to the arguments of Appellee IU and Amicus Defense Trial Counsel of Indiana ("DTCI"), the Court of Appeals decision below does not create any new duty on a landowner such as IU. Rather, the Court of Appeals correctly applied the long standing and well recognized law in Indiana concerning the doctrine of res ipsa loquitor.

For over 140 years the Courts of Indiana have 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).

Contrary to the arguments of Appellee IU and Amicus DTCI, an injured party need not prove that a defendant landowner was in "actual physical control" of the instrumentality that caused the injury in order for the doctrine of res ipsa loquitor to be applicable. The position asserted by IU ignores the well settled law in Indiana that 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.

According to IU's argument, if a fixture is accessible for use by third-parties at any time in the past, then an injured party can never satisfy the exclusive control requirement of res ipsa loquitor. Such an argument is overly simplistic and fails to take into account the very nature of fixtures.

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.

IU's argument fails 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.

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.)*

IU's Petition to Transfer also asserts that since its witness testified (based upon pure speculation) that some unknown person may have used the window at some unknown time in the past in such a way as to cause it to fall out of its casing, it is entitled to have summary judgment granted in its favor. Such an argument ignores long recognized Indiana law.

> 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). [Emphasis added.]

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 practical effect of the result urged by both IU and Amicus DTCI; namely, that building owners should be protected from liability to entirely innocent individuals injured by fixtures spontaneously falling from their buildings, 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.

As building owners enjoy all of the financial benefits that accompany owning real property, those same building owners should also bear the financial responsibility for injuries caused by defective conditions of those buildings resulting from fixtures falling off of those buildings. It is the building owners and not the innocently injured occupants that possess the right or power to manage and control along with the opportunity to exercise that management and/or control over fixtures attached to their buildings.

As is clear from its opinion in *Griffin*, the Indiana Supreme Court did not intend to entirely abrogate to application of res ipsa loquitor to all premise liability cases. Rather, the Supreme Court specifically noted that the doctrine of res ipsa loquitor still applies to fixtures attached to buildings.

Lastly, it must be noted that the Amicus DTCI's assertion that the Opinion below somehow creates a new duty upon landowners is simply incorrect. As noted by the Court of Appeals, the duty owed by IU to Isgrig was based upon her status as an invitee. The Court of Appeal's Opinion properly applied Indiana's law on premise liability to the facts of this case when it found that the doctrine of res ipsa loquitor can be applied to injuries caused by fixtures spontaneously falling from buildings. The Opinion by the Court of Appeals is narrowly limited to fixtures and does not create the Pandora's Box of consequences asserted by Amicus, DTCI.

IV. CONCLUSION

IU's Petition to Transfer fails to satisfy the considerations for transfer found in Indiana Rules of Appellate Procedure, Rule 57(H) in that the Court of Appeals decision below is consistent with – and is not in conflict with – the Supreme Court's decision in *Griffin v. Menard, Inc.*, 175 N.E.3d 811 (Ind. 2021). Additionally, the Court of appeals correctly applied Indiana's long recognized law on the doctrine of res ipsa loquitor to the specific facts of this case and properly determined that Isgrig presented sufficient evidence for her claims against IU to proceed to trial.

IU's alternative, albeit speculative, explanation as to what caused the window to fall from its casing does not overcome and/or defeat the inference of negligence created by the doctrine of res ipsa loquitor. Rather, the inference remains and all the relevant evidence is to be placed upon the scales to be

weighed by the trier of facts. This is precisely the decision reached by the Court of Appeals below and that opinion should not be disturbed.

Wherefore, in light of the case law and authorities cited above, Appellant, Kiera Isgrig respectfully requests this Court to deny Appellee, IU's Petition for Transfer.

Respectfully submitted,

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V. VERIFIED STATEMENT OF WORD COUNT OF BRIEF

Pursuant to Indiana Appellate Rules 44 (E) & (F), I verify that the Brief contains no more than 4,200 words as counted by Microsoft Word, the word processing system used to prepare the Brief.

Dated: 03/11/2024

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VI. VERIFIED PROOF OF SERVICE

I hereby certify that on this 11th day of March, 2024 a copy of the forgoing Appellant's Brief in Response to Appellee's Petition to Transfer was filed with the Clerk of the Indiana Supreme Court, Court of Appeals and Tax Court through the Court's IEFS System:

I also certify that on this 11th day of March, 2024, the foregoing Appellant's Brief in Response to Appellee's Petition to Transfer was served upon the following through the Court's IEFS System:

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