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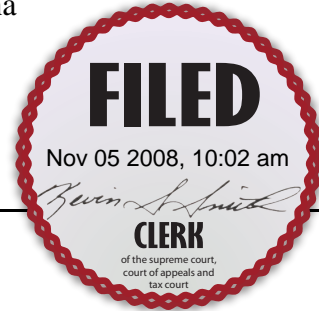
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**IN THE  
COURT OF APPEALS OF INDIANA**

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ALEKSANDER STOJCESKI, GEORGE )  
KIRIAKOPOULOS, JR., and GORAN )  
PRENTOSKI, )

Appellants-Plaintiffs/Cross-Appellees, )

vs. )

NORTHERN INDIANA PUBLIC )  
SERVICE COMPANY, )

Appellee-Defendant/Cross-Appellant. )

No. 45A03-0712-CV-583

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APPEAL FROM THE LAKE SUPERIOR COURT  
CIVIL DIVISION, ROOM 6  
The Honorable John R. Pera, Judge  
Cause No. 45D10-0510-CT-177

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**November 5, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**RILEY, Judge**

## STATEMENT OF THE CASE

Appellants-Plaintiffs/Cross-Appellees, Aleksander Stojceski (Stojceski), George Kiriakopoulos, Jr. (Kiriakopoulos), and Goran Prentoski (Prentoski) (collectively, Appellants), appeal the trial court's judgment entered pursuant to a jury verdict in their favor and against Appellee-Defendant/Cross-Appellant, Northern Indiana Public Service Company (NIPSCO).

We affirm in part, reverse in part, and remand for further proceedings.

## ISSUES

Appellants raise two issues on appeal, which we restate as follows:

- (1) Whether the trial court erred by denying Appellants' Motion for Judgment on the Evidence seeking to remove the issue of comparative fault from the consideration of the jury; and
- (2) Whether the trial court properly instructed the jury.

On cross-appeal, NIPSCO raises one issue, which we restate as follows: Whether the trial court erred in denying NIPSCO's Motion for Judgment on the Evidence regarding Kiriakopoulos' personal injuries.

## FACTS AND PROCEDURAL HISTORY

On Saturday, January 17, 2004, at approximately 7:00 p.m., Stojceski drove his car to Prentoski's house in Hobart, Indiana, traveling through the intersection at Colorado Street and 61<sup>st</sup> Street. Later that night, at around 11:30 p.m., Michael White (White) drove the same route, lost control of his vehicle, and ran into one of NIPSCO's utility poles, which was the third pole to the east from the intersection. Kiriakopoulos, on his way to Prentoski's house,

witnessed White's accident. Kiriakopoulos pulled over and helped White, whose leg was pinned against the steering wheel, exit the car. Soon thereafter, the police arrived and Kiriakopoulos provided them with a statement. The police notified NIPSCO of the accident involving their pole.

Upon arriving at Prentoski's house, Kiriakopoulos informed Stojceski and Prentoski what had happened, detailing how the utility pole was cracked, splintering, and leaning. He told them that it was obvious the pole needed to be replaced. After half an hour at Prentoski's house, the trio left in Stojceski's car for one of Kiriakopoulos' friends' house near the border of Hammond and East Chicago. Because of White's collision with the pole, they decided to drive a different route, avoiding 61<sup>st</sup> street. They remained in Hammond until approximately 3:30 a.m.

Meanwhile, around 12:15 a.m., Harold Bates (Bates), NIPSCO's serviceman, arrived at the intersection of Colorado Street and 61<sup>st</sup> Street. Because he did not notice a crack or lean in the pole, Bates had trouble locating the struck pole. Instead, the police officers on the scene had to show Bates the pole in question. Personnel employed by other utilities were also called to the scene to locate or verify the underground facilities so that excavations for a possible new pole would not cause any damage. After evaluating the pole, Bates concluded that it could stand without replacement until Monday. However, after Bates informed his supervisor, Milo Rosco (Rosco), Rosco decided the replacement should occur immediately as it was a safer alternative than waiting till Monday when the road would be busy with traffic. Rosco began gathering sufficient crew and the necessary equipment. However, because several unrelated emergencies at different locations had occurred by this time which required

a NIPSCO response, Rosco determined these emergencies to be of a higher priority than the seemingly stable pole. Bates remained at the scene until 3:00 a.m. During this time, he did not take any action in firming up the pole, closing the road, or placing barricades around the pole.

Around 3:30 a.m., the Appellants decided to return home. Stojceski drove his car, Kiriakopoulos was in the front passenger's seat, and Prentoski was in the back seat behind the front passenger seat. As they arrived at the intersection of 61<sup>st</sup> Street and Colorado Street, they noticed that the street was open to the public and no NIPSCO truck, nor barricades or cones were to be seen. When Stojceski approached the place of White's accident, Kiriakopoulos rolled down the window to identify the pole involved. Simultaneously, the pole snapped and fell, breaking the top wire, swinging on its connecting wires, and then hitting the side of Stojceski's car. Stojceski attempted to avoid colliding with the pole by accelerating. Nevertheless, the bottom of the pole hit the side of the vehicle, sending it into a 360 degree spin. The car came to a stop in the south ditch. Kiriakopoulos exited the vehicle and telephoned the police. He informed the dispatcher that they were "fine." (Transcript p. 441-42). According to Prentoski, several live electrical wires came down on the car and continued sparking while Appellants waited for the officers to arrive. Hobart police officer Garret L. Ciszewski (Officer Ciszewski) arrived shortly after the 911 call was received. He noticed that the Appellants were "jovial" and were "[j]ust kind of laughing about the accident." (Tr. p. 167). Officer Ciszewski reported that the Appellants did not complain of any injuries.

On October 5, 2003, Appellants filed a Complaint for Damages and Jury Demand against NIPSCO, alleging personal injuries and property damages due to NIPSCO's negligence. On November 5 through November 8, 2007, a jury trial was held. The physical evidence introduced at trial appeared to conflict with the Appellants' testimony about the events that had occurred during the night of January 17, 2004. Officer Ciszewski testified that Appellants did not tell him about live electrical wires, and he did not recall seeing any. Also, NIPSCO retained the services of Steven Neese (Neese), a consultant and expert in the field of accident reconstruction. Neese reviewed the police report, diagram, depositions of Appellants, and photographs of Stojceski's car. Based on his review, Neese opined that the accident could not have happened the way Appellants explained it. He concluded that the pictures of the car's damage were inconsistent with the car traveling 20 to 35 m.p.h. when the pole fell on it. Additionally, he testified that the damage to the tires did not appear to be consistent with a 360 degree spin. He also stated that had the car performed a 360 degree spin, there would be gouge marks and skid marks on the pavement. However, there was no objective evidence of pre-collision braking or maneuvering which would confirm that Appellants spun the wheels or attempted to prevent the accident. He stated that the damage to the car was inconsistent with a force sufficient to spin the car.

At the close of the evidence, the Appellants moved for a judgment on the evidence pursuant to Indiana Trial Rule 50 seeking to have the doctrine of comparative fault removed from the consideration of the jury. The trial court denied their motion. In turn, NIPSCO filed its own motion for judgment on the evidence, attempting to remove Kiriakopoulos' personal injury claim from the jury for lack of expert medical evidence on causation. The

trial court denied this motion as well. After ruling on these motions, the trial court, over Appellants' objection, instructed the jury on comparative fault and incurred risk. At the same time, the trial court refused to give Appellants' tendered instruction on *Res Ipsa Loquitur*.

After deliberating, the jury found each Appellant fifty percent at fault for their respective claims and NIPSCO fifty percent at fault for each of Appellants' respective claims. Based on this division of fault, the jury awarded Stojceski \$12,800.00, Kiriakopoulos \$8,000.00 and Prentoski \$10,800.00. The trial court entered judgment on these verdicts in favor of the Appellants and against NIPSCO.

Appellants now appeal. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

### *I. Cross-Appeal*

We first discuss NIPSCO's claim raised on cross-appeal. NIPSCO appeals the trial court's denial of its Motion for Judgment on the Evidence. Essentially, NIPSCO argues that its motion should have been granted as Appellants did not present sufficient evidence to prove that Kiriakopoulos' personal injuries arose from the accident with the utility pole. As above, we apply the same standard of review as the trial court in determining the propriety of a judgment on the evidence, and look only to the evidence and reasonable inferences therefrom in the light most favorable to the non-moving party. *Wellington Green Homeowners' Ass'n*, 768 N.E.2d at 925. Judgment may be entered only if there is no substantial evidence or reasonable inferences to be drawn therefrom to support an essential element of the claim. *City of Hammond*, 789 N.E.2d at 1001.

An important element in a cause of action for negligence is the requirement of a reasonable connection between a defendant's conduct and the damages which a plaintiff has suffered. *Daub v. Daub*, 629 N.E.2d 873, 877 (Ind. Ct. App. 1994), *trans. denied*. The element of causation requires that the harm would not have occurred but for the defendant's conduct. *City of East Chicago v. Litera*, 692 N.E.2d 898, 901 (Ind. Ct. App. 1998), *reh'g denied, trans. denied*. The "but for" analysis presupposes that, absent the tortious conduct, a plaintiff would have been spared suffering the claimed harm. *Daub*, 629 N.E.2d at 877.

With regard to establishing the causation between personal injuries and tortious conduct, we have said in *Daub* that "[w]hen an injury is objective in nature, the plaintiff is competent to testify as to the injury and such testimony may be sufficient for the jury to render a verdict without expert medical testimony." *Id.* However, we noted that the question of the causal connection between a permanent condition, an injury, and a pre-existing affliction or condition is a complicated medical question. *Id.* at 877-78. We concluded that "[w]hen the issue of cause is not within the understanding of a lay person, testimony of an expert witness on the issue is necessary." *Id.* at 878.

In *Topp v. Leffers*, 838 N.E.2d 1027 (Ind. Ct. App. 2005), *trans. denied*, Topp was a passenger in a car that was rear-ended by Leffers. *Id.* at 1029. As a result of the accident, she hit her head, causing her to feel intense pain. *Id.* She refused to be taken to the hospital. *Id.* The next day, she suffered from pain in her neck and back. *Id.* She eventually made an appointment with her chiropractor who had treated her for neck and back pain in the previous months. *Id.* During her initial visits with the chiropractor, she informed him that she had been involved in several automobile accidents. *Id.* Later, Topp saw Dr. Schreier, a

physician, who noted in his medical chart that her injuries were “apparently due to the motor vehicle accident.” *Id.* Topp filed a complaint against Leffers, alleging negligence and seeking damages for the aggravation of her pre-existing injuries from prior accidents. *Id.* at 1029-30.

At trial, Topp testified that her existing neck and back problems were exacerbated after the accident. *Id.* at 1030. She did not present testimony by either her chiropractor or Dr. Schreier; instead, she entered into evidence her physician’s medical records and the deposition of Dr. Reecer, the physician who performed an IMA. *Id.* In his deposition, Dr. Reecer stated that even though Topp suffered an impairment, he could not relate it specifically to the accident. *Id.* The trial court entered a directed verdict in favor of Leffers because Topp did not have an expert “that lock[ed] up the causation to the injury. Without that you don’t meet the *Daub* test . . .” *Id.* at 1031.

On appeal, we affirmed the trial court. Relying on *Daub*, we first noted that Topp’s injuries were subjective in nature as the injury was “perceived or experienced by a patient and reported to the patient’s doctor but is not directly observable by the doctor.” *Id.* at 1033. Thus, Topp’s testimony alone, without any testimony from an expert medical witness, would not be sufficient to prove causation. *Id.* at 1036. Furthermore, we stated that because of Topp’s pre-existing injuries, discerning the causal connection between the previous accidents and Topp’s resulting injury from Leffers’ rear-ending is a complicated medical question that is not within the understanding of a lay person. *Id.* at 1033. As such, we concluded that it was necessary for Topp to introduce the testimony of an expert medical witness on the issue of causation. *Id.* at 1033. We added that even considering Topp’s testimony in conjunction



with Dr. Reecer and Dr. Schreier's opinions, it does not amount to sufficient evidence to establish causation because the physicians' testimonies lack reasonable medical certainty. *Id.* at 1036.

Here, Kiriakopoulos expressed no pain or injury to the responding officer at the time of the accident on January 18, 2004. He did not seek any treatment on the night of the accident or for several days thereafter. It was not until January 28, 2004, that Kiriakopoulos sought medical treatment. As in *Topp*, he did not present an expert medical witness at trial; instead, he relied upon his own testimony regarding his injuries and symptoms and his medical records to establish the causation element of his negligence claim. Although he testified that he had no pain right after the accident, the medical records show that on January 28, 2004, he complained of "severe neck pain. Having hard time breathing + swallowing . . . pain scale: 12 at night." (Appellee's App. p. 64). The physician diagnosed him with cervical myositis. Further testing revealed:

There is no evidence of fracture or dislocation. The disc spaces are well maintained. There is no significant narrowing of the neural foramina. The flexation and extension views do not show any abnormal motion. The C1-C2 articulation is unremarkable.

Impression: normal cervical spine.

(Appellee's App. p. 138).

In addition, during his testimony Kiriakopoulos also admitted that "I already had preexisting neck injuries . . . I've been in an accident before so I had neck pain." (Tr. p. 60). According to his medical records, Kiriakopoulos complained of severe neck pain to his physician on December 13, 2003, approximately one month prior to the accident. The physician noted "neck pain x 4 yrs – but been acting up mostly every day this month. Pain

scale: 10. Can't move his neck or body – has to lay down to calm it.” (Appellee’s App. p. 65). The physician diagnosed Kiriakopoulos with myositis.

Pursuant to *Daub* and its progeny, we find that because of Kiriakopoulos’ pre-existing injuries, discerning the causal connection between the previous injuries and Kiriakopoulos’ resulting injury from the utility pole’s collapse is a complicated medical question that is not within the understanding of a lay person. The medical records entered into evidence failed to include any opinions that his current injury had been caused by the utility pole. Accordingly, as Kiriakopoulos’ testimony was merely a “lay report of the facts which [he] experienced first hand” without amounting to anything more than his own hypothesis that the injuries were caused by NIPSCO’s pole, he should have introduced a medical expert establishing the causation element of his negligence claim. *See Daub*, 838 N.E.2d at 878. As Kiriakopoulos failed to do this, we find that the trial court abused its discretion by refusing to grant NIPSCO’s Motion for Judgment on the Evidence. We reverse the trial court.

## II. Appeal

Next, we turn to Appellants’ issues on appeal as they relate to the remaining claims of Stojceski’s and Prentoski’s request for damages. Even though they received a verdict in their favor, Appellants raise two issues for our review. In essence, they contest the trial court’s ruling on each of their evidentiary motions, filed after presentation of the evidence to the jury. Specifically, they claim that the trial court (1) erred by denying their Motion for

Judgment on the Evidence regarding comparative fault; and (2) abused its discretion in tendering jury instructions.

A. *Motion for Judgment on the Evidence*

First, Appellants contend that they were entitled to judgment on the evidence pursuant to Ind. Trial Rule 50. Indiana Trial Rule 50 provides, in part, that

Where all or some of the issues in a case tried before a jury or an advisory jury are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict.

On appeal, we apply the same standard of review as the trial court in determining the propriety of a judgment on the evidence, and look only to the evidence and reasonable inferences therefrom in the light most favorable to the non-moving party. *Wellington Green Homeowners' Ass'n v. Parsons*, 768 N.E.2d 923, 925 (Ind. Ct. App. 2002), *trans. denied*. Judgment may be entered only if there is no substantial evidence or reasonable inferences to be drawn therefrom to support an essential element of the claim. *City of Hammond v. Reffit*, 789 N.E.2d 998, 1001 (Ind. Ct. App. 2003), *trans. denied*. However, if there is any probative evidence or reasonable inference to be drawn from the evidence or if there is evidence allowing reasonable people to differ as to the result, judgment on the evidence is improper. *Patel v. Barker*, 742 N.E.2d 28, 34 (Ind. Ct. App. 2001), *reh'g denied, trans. denied*.

At trial, Appellants presented evidence on their assertion that NIPSCO was negligent in inspecting and maintaining its utility pole after it had been hit by White. NIPSCO denied any negligence but, in case it was found negligent, NIPSCO also asserted the affirmative defense that Appellants were comparatively at fault and incurred the risk. By filing their

motion for judgment on the evidence, Appellants contended that no substantive evidence existed to support NIPSCO's raised defense and specifically sought to remove the issue of comparative fault from the consideration of the jury.

Indiana adopted the Comparative Fault Act in 1985, which replaced our common law system of contributory negligence. Ind. Code §§34-51-2-1 to 19. Pursuant to the Act, the jury considers "the fault of all persons who caused or contributed to cause the alleged injury." I.C. § 34-51-2-7(b). Fault is defined as "any act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages." I.C. § 34-6-2-45(b). In this regard, incurred risk is an affirmative defense that, as a component of the Indiana Comparative Fault Act's apportionment scheme, "reduces or eliminates the plaintiff's recovery depending on the degree of the plaintiff's fault." *Heck v. Robey*, 659 N.E.2d 498, 504 (Ind. 1995), *abrogated on other grounds by Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104 (Ind. 2002). We have stated that incurred risk demands a subjective analysis with inquiry into the particular actor's knowledge, is concerned with the voluntariness of a risk, and is blind as to reasonableness of risk acceptance. *Wallace v. Rosen*, 765 N.E.2d 192, 200 (Ind. Ct. App. 2002). Incurred risk also involves a mental state of venturousness and has been described as negating a duty and therefore precluding negligence. *Id.*

As with the theory of contributory negligence, incurred risk has been subsumed by the doctrine of comparative fault for all defendants who are not governmental entities or public

employees. *See, e.g.*, I.C. § 34-51-2-2 (providing that the Comparative Fault Act does not apply to “tort claims against governmental entities or public employees”); *see also, Smith v. Baxter*, 796 N.E.2d 242, 245 (Ind. 2003) (reaffirming that the defense of incurred risk as a complete defense “no longer exists; it is subsumed by the concept of fault in our comparative fault scheme”); *Heck*, 659 N.E.2d at 504 (“As a comparative fault statute, the [Indiana Comparative Fault Act] eliminated contributory negligence as a complete defense, as well as other common-law defenses.”).

Additionally, we note that the process by which a jury analyzes the evidence, reconciles the views of its members, and reaches a unanimous decision is inherently subjective and is entitled to maximum deference. *Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048, 1056 (Ind. 2003). The Comparative Fault Act entrusts the allocation of fault to the sound judgment of the fact-finder. *Id.*

Viewing the evidence most favorable to NIPSCO, we conclude that the trial court properly denied Appellants’ motion. Here, NIPSCO introduced testimony at trial which indicated that the Appellants’ version of events displayed inconsistencies with the physical evidence gathered at the scene of the accident. Whereas Kiriakopoulos testified that it was obvious that the utility pole needed to be replaced as it was splintering and leaning after White struck it, Bates, NIPSCO’s serviceman, testified after failing to initially locate the pole, he determined that it could safely stand until Monday. Appellants also claim that their vehicle was struck by the pole in a battering ram fashion in the rear quarter panel causing it to spin 360 degrees and then stop in the ditch on the south side of the road. After the pole had fallen, Officer Ciszewski was the first officer to arrive. He testified that Stojceski did not

inform him that the car was sent into a 360 degree spin after he accelerated to avoid the falling pole, nor did Officer Ciszewski see any skid marks. Additionally, Officer Ciszewski did not recall seeing any sparking wires when he arrived at the accident. Also, Neese, NIPSCO's expert in accident reconstruction, opined that the Appellants' version of a 360 degree spin is inconsistent with an impact from the right, which would push Stojceski's vehicle to the left. Neese also testified that the force from the fallen pole should have pushed the car northward toward the ditch on the north side, not toward the south against the direction of the impact.

In light of this evidence, a reasonable inference can be drawn that the accident did not occur as Appellants assert. Mindful of the great deference we award to a unanimous jury verdict, we conclude that there is sufficient probative evidence to reasonably infer that Appellants are comparatively at fault. *Paragon Family Rest.*, 799 N.E.2d at 1056; *Patel*, 742 N.E.2d at 34. As such, we find that the trial court properly denied judgment on the evidence.

#### B. *Jury Instructions*

Next, Appellants assert that the trial court abused its discretion in instructing the jury. In this regard, Appellants raise a three-fold argument. They contend that the trial court abused its discretion (1) by refusing Appellants' tendered instruction on *Res Ipsa Loquitur*, (2) by giving a jury instruction on comparative fault, and (3) by instructing the jury on a motorist's duties.

Jury instructions serve to inform the jury of the law applicable to the facts presented at trial, enabling it to comprehend the case sufficiently to arrive at a just and correct verdict. *Hamilton v. Hamilton*, 858 N.E.2d 1032, 1035 (Ind. Ct. App. 2006), *reh'g denied, trans.*

*denied*. Jury instructions are committed to the sound discretion of the trial court. *Id.* In evaluating the propriety of a given instruction, we consider: (1) whether the instruction correctly states the law, (2) whether there is evidence in the record supporting the instruction, and (3) whether the substance of the instruction is covered by other instructions. *Id.* at 1035-36. An erroneous instruction warrants reversal only if it could have formed the basis for the jury's verdict. *Id.*

### 1. *Res Ipsa Loquitur*

Appellants contend that the trial court erroneously refused to tender an instruction on *Res Ipsa Loquitur* to the jury. Specifically, they assert that the trial court erred when it concluded that the doctrine of *Res Ipsa Loquitur* was inapplicable to the facts underlying their negligence case. As such, only the second requirement on the propriety of jury instructions, that is, the sufficiency of the evidence to give a jury instruction on *Res Ipsa Loquitur* is contested by the parties.

The doctrine literally means “the thing speaks for itself.” *Rector v. Oliver*, 809 N.E.2d 887, 889 (Ind. Ct. App. 2004), *trans. denied*. *Res Ipsa Loquitur* is a rule of evidence which permits an inference of negligence to be drawn based upon the surrounding facts and circumstances of the injury. *Id.* The doctrine operates on the premise that negligence, like any other fact or condition, may be proved by circumstantial evidence. *Id.* at 889-90. To create an inference of negligence, the plaintiff must establish that: (1) the injuring instrumentality was within the exclusive management and control of the defendant or its servants, and (2) the accident is of the type that does not ordinarily happen if those who have the management and control exercise proper care. *Id.* In determining if the doctrine is

applicable, the question is whether the incident more probably resulted from defendant's negligence as opposed to another cause. *Id.* A plaintiff may rely upon common sense and experience or expert testimony to prove that the incident more probably resulted from negligence. *Id.*

The element of exclusive control is a broad concept which focuses on who had the right or power of control and the opportunity to exercise it, rather than actual physical control. *Gold v. Ishak*, 720 N.E.2d 1175, 1181 (Ind. Ct. App. 1999), *trans. denied*. Exclusive control is satisfied if the defendant had control at the time of the alleged negligence. *Id.* Exclusive control may be shared control if multiple defendants each have a nondelegable duty to use due care. *Id.* 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.*

Appellants assert that *Res Ipsa Loquitur* applies because NIPSCO was negligent in its care and maintenance of the damaged utility pole. On the other hand, NIPSCO's argument focuses on the exclusive control element of the doctrine. It contends that because of White's accident it lost exclusive control over the pole. Also, alluding to other factors causing the pole's fall, NIPSCO claims that "the breaking and falling of a utility pole usually occurs from



outside factors not related to NIPSCO such as storms and car accidents.” (Appellee’s Brief pp. 24-25).

The record reveals that after White collided with the pole, Bates was dispatched to inspect and evaluate the utility pole for possible damage. After assessment, Bates opined that the pole could stand without replacing until Monday. However, upon consulting with his supervisor, the decision was made to immediately replace the pole. Because of unforeseen emergencies, NIPSCO’s replacement crew was diverted to other locations. When Appellants arrived at the intersection of 61<sup>st</sup> Street and Colorado Street, they noticed the street to be open to the public and that no NIPSCO truck, barricades, or cones were present. While they approached the place of White’s accident, the utility pole snapped and fell, damaging Stojceski’s car and injuring Appellants. Even though NIPSCO might have temporarily lost exclusive control over the pole at the time of White’s accident, the evidence clearly establishes that at the time the utility pole collapsed, NIPSCO was exclusively in control.

Furthermore, the existence of multiple defendants or the possibility of multiple causes does not automatically defeat the application of *Res Ipsa Loquitur*. *Vogler v. Dominguez*, 624 N.E.2d 56, 62 (Ind. Ct. App. 1993), *reh’g denied, trans. denied*. At the same time, it is not necessary to prove that the only cause of the accident was the defendant’s negligence. *K-Mart Corp. v. Gipson*, 563 N.E.2d 667, 671 (Ind. Ct. App. 1990), *trans. denied*. The doctrine is designed to allow an inference of negligence to be drawn when direct evidence is lacking. *Id.* This does not mean that the plaintiff wins by default, for the doctrine of *Res Ipsa Loquitur* simply allows an inference of negligence which may or may not be drawn by the trier of fact. *See Deming Hotel Co. v. Prox*, 236 N.E.2d 613 (Ind. Ct. App. 1968), *reh’g*.

*denied*. Here, while White’s accident might have contributed to the pole’s fall, the jury could also reasonably infer that the negligence was NIPSCO’s failure to properly inspect and evaluate the pole and subsequently secure the site. *See also, e.g., id.* at 618-20 (while the injuring instrumentality had been installed by another party, the jury could reasonably conclude that mirrors do not ordinarily fall off walls unless the defendant was negligent in providing a safe place for its dining room patrons). Accordingly, we conclude that the trial court abused its discretion in refusing to tender a jury instruction on *Res Ipsa Loquitur*. As the jury verdict might have been different had an instruction on *Res Ipsa Loquitur* been given, we fail to find the absence of the instruction to be harmless error. *See, e.g., Aldana v. School City of East Chicago*, 769 N.E.2d 1201, 1209 (Ind. Ct. App. 2002), *trans. denied* (“It is not possible to positively conclude that the verdict in this case would have been no different if the jury had been properly instructed.”). As such, we reverse the trial court and remand for further proceedings.

## 2. *Comparative Fault*

Next, Appellants challenge the trial court’s decision to tender a jury instruction on comparative fault. Again, Appellants assert that the trial court lacked sufficient evidence supporting the giving of the instruction. For the same reason we concluded that the trial court properly denied Appellants’ motion for judgment on the evidence, we find that there is sufficient evidence that warrants the trial court’s decision to give the disputed jury instruction. In support of our conclusion, it suffices to reiterate briefly that Appellants’ version of events conflicted with the physical evidence collected at the scene. Specifically, we note that Officer Ciszewski was never informed that the car was sent into a 360 degree

spin after being struck by the pole. Furthermore, Neese testified that the Appellants' version of a 360 degree spin is inconsistent with an impact from the right, which would push Stojceski's vehicle to the left. Neese also opined that the force from the fallen pole should have pushed the car northward toward the ditch on the north side, not toward the south against the direction of the impact.

### 3. *Motorist's Duties*

Lastly, Appellants allege that the trial court abused its discretion when it instructed the jury on a motorist's duties, as the evidence was insufficient to warrant giving the instruction.

Specifically, the trial court instructed the jury over Appellants' objection as follows:

Every driver of a motor vehicle using a public highway has a duty to exercise the care an ordinary prudent person would use, under the same or similar circumstances. The failure to exercise such care is negligence.

All motorists have a specific duty to maintain a proper lookout while operating their vehicles, which means they have a duty to see that which is clearly visible or which in the exercise of due care would be visible. Motorists also have a specific duty to use reasonable care to avoid a collision and to maintain their vehicles under reasonable control.

If you find that the driver in this case failed to keep a proper lookout or maintain reasonable vehicular control, such a failure would constitute negligence.

It is well established that a motorist has a duty to maintain a proper lookout. *Koroniotis v. LaPorte Transit, Inc.* 397 N.E.2d 656, 659 (Ind. Ct. App. 1979). This duty is imposed so that motorists may acquire knowledge of dangerous situations and conditions and to enable them to take appropriate precautionary measures to avoid injury. *Brock v. Walton*, 456 N.E.2d 1087, 1092 (Ind. Ct. App. 1983). However, a motorist is not required to

anticipate extraordinary hazards or to constantly expect or search for unusual dangers. *Id* at 1091.

Here, the record reflects that Kiriakopoulos informed Stojceski and Prentoski about the accident and the perceived damage to the utility pole when he arrived at Prentoski's house. He also told them that, in his opinion, the pole needed to be replaced. After they returned from Hammond, Stojceski passed the intersection of 61<sup>st</sup> Street and Colorado Street. When they approached the place of White's accident, Kiriakopoulos rolled down the window to identify the pole involved. Simultaneously, the pole snapped and fell. Seeing the pole fall, Stojceski accelerated. Nevertheless, the bottom of the pole hit the side of the car, sending it into a 360 degree spin.

Although we tend to agree with Appellants that "it would be hard pressed to believe that a driver needs to keep a proper lookout for falling NIPSCO poles," we do acknowledge that Appellants had been forewarned of a possible damaged utility pole at that location. (Appellants' Br. p. 23). Precisely because of Appellants' knowledge, this situation no longer fits within the realm of extraordinary hazards that motorists are not required to keep a lookout for. While we recognize the close call in the instant case, in light of our deferential standard of review, we affirm the trial court's decision to tender the instruction on a motorist's duties to the jury.

### CONCLUSION

Based on the foregoing, we reverse the trial court's denial of NIPSCO's Motion for Judgment on the Evidence with regard to Kiriakopoulos' damages. With regard to the remaining claims of Stojceski and Prentoski, we find that the trial court properly denied

Appellants' Motion for Judgment on the Evidence concerning comparative fault. Also, we affirm the trial court with regard to its jury instructions on comparative fault and a motorist's duties, but reverse the trial court with regard to the *Res Ipsa Loquitur* jury instruction.

Affirmed in part, reversed in part, and remanded for further proceedings with regard to Stojceski's and Prentoski's claims for damages.

BAILEY, J., and BRADFORD, J., concur.