Circuit Court for Prince George's County
Case No. CAL14-11945

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1074

September Term, 2016

M. MONICA ST. JEAN

v.

THE TJX COMPANIES, INC.,
MARSHALLS OF MA, INC. t/a
MARSHALLS DEPARTMENT STORE

Woodward, C.J.,
Nazarian,
Leahy,

JJ.

Opinion by Leahy, J.

Filed: July 14, 2017

M. Monica St. Jean ("Appellant") appeals from the Circuit Court for Prince George's County's decisions in her personal injury suit against The TJX Companies, Inc. ("TJX") and Marshalls of MA, Inc. (collectively with TJX as "Appellees"). The uncontroverted evidence presented during St. Jean's jury trial was that, while shopping at Marshalls on Memorial Day in 2011, she suffered an injury when a griddle fell from a shelf and landed on her foot. St. Jean proceeded initially on a theory of premises liability negligence, but ultimately failed to adduce sufficient evidence to prove that theory. Instead, she submitted the case to the jury on a theory of *res ipsa loquitur*.

Appellees moved for judgment before the case was submitted to the jury, but the circuit court reserved. After the jury returned judgment in favor of St. Jean, Appellees renewed their motion, seeking JNOV, or alternatively, a new trial. The circuit court granted Appellees' motions and St. Jean appealed, presenting the following questions for our review:

1. "Did the trial court err by granting Marshalls' motion for judgment notwithstanding the verdict when there was sufficient evidence to allow the jury to decide the question of negligence under the doctrine of *res ipsa loquitur*?"

2. "Did the trial court err in granting Marshalls a new trial on the grounds that it should not have instructed the jury on *res ipsa loquitur* and negligence, when those instructions were specifically requested, accurate statements of the applicable law, and Marshalls failed to promptly and distinctly object in accordance with Rule 2-520?"

We affirm. St. Jean failed to establish that the griddle was in Appellees' exclusive control and, therefore, she was not entitled to rely on the *res ipsa loquitur* inference.

BACKGROUND

St. Jean filed a complaint against Appellees on May 28, 2014, alleging that she suffered injuries as a direct and proximate result of the Appellees' negligent breach of the duty of care they owed business invitees by failing to maintain the merchandise on their shelves in a safe manner. The case proceeded to trial on January 27, 2016, and the following testimony was presented to a jury.

A. The Trial

At 2:00 p.m. on a busy Memorial Day, St. Jean and her husband, Paul McNelly, were shopping for bird houses in the home department of a Marshalls department store in Laurel, Maryland. According to St. Jean, she was in an aisle about five feet behind her husband, pushing a shopping cart. She was looking at a vase on the top shelf, but because she could not reach it, she turned to ask her husband to reach it for her. As she turned, a cast iron griddle that sits over two stove burners fell from a bottom shelf and landed on her right foot. St. Jean was the only witness when the griddle fell. She maintained that she did not make contact with the shelf or the griddle and that neither she nor her husband saw the griddle on the shelf before it fell. St. Jean also testified that she did not recall seeing anything askew or amiss with that area of the shelf.

St. Jean's husband, Paul McNelly, corroborated much of her account in his own testimony. According to McNelly, he was at the end of the aisle as St. Jean turned into the aisle with her shopping cart about 10 to 15 feet behind him, at which point she stopped to look at something on the top shelf. He had not looked much at the shelves in the aisle or

took notice of the shelves' contents or organization while he walked down the aisle and did not notice anything in a dangerous condition. Once he heard his wife scream out, he went back to check on her. Although the griddle landed on her right foot, he saw his wife on the ground by the shelves on the left side of the aisle. McNelly indicated that, once he reached his wife, he observed that the griddle had probably been on the second shelf, about "a foot or two off of the floor." He further testified that the shelf "had a bunch of griddles and other things just shoved into it."

Diane Moore also testified at trial. Moore worked as a "key carrier" for TJX at the Marshalls in Laurel, where she essentially served as manager on-duty during some shifts when the manager was not present. She was acting manager on-duty the day of St. Jean's injury and filled out an accident report detailing the incident. Through Moore's testimony, St. Jean elicited the fact that the home department, where the accident occurred, had a "merchandising coordinator," who supervised the employees in that department and whose responsibility it was to ensure that the shelves in the department were neat and orderly. Moore was unsure who the merchandising coordinator of the homes department was at the time of St. Jean's injury. Moore testified, however, that any employee assigned to that department would also be responsible for making sure the merchandise was stocked correctly and safely. Additionally, every employee in the store is tasked with "recovering" merchandise store-wide—meaning that they clean up the shelves and aisles to make sure the merchandise is placed properly so that it's safe and customers can see and buy the merchandise. Moore explained that there was no policy in place requiring any employee

or merchandising coordinator to record the times at which they checked or recovered a department of the store.

B. Appellees' Motion for Judgment

At the close of the plaintiff's case, Appellees moved for judgment, but the court reserved ruling until the close of all evidence, and the parties deferred their argument to that point. Then, at the close of their own presentation of evidence, Appellees renewed their motion for judgment, arguing that St. Jean failed to present evidence that could sustain a case for premises liability because she did not demonstrate that Appellees had notice of the dangerous condition or how long the condition lasted to prove Appellees' failure to act. Appellees contended that St. Jean had not observed the condition of the shelf before the griddle fell, and that Marshalls is the type of store where other customers are free to pick up and move items on the shelves—meaning that "any amount of people" may have handled the griddle before it fell. Appellees stressed that there was a strong chance St. Jean knocked into the griddle herself and, without evidence proving how the griddle fell, the jury would be left to rely on pure speculation.

In regard to Appellant's *res ipsa loquitur* ("*res ipsa*") theory, Appellees argued that St. Jean was not entitled to a *res ipsa* instruction because she had not demonstrated the three elements of the doctrine. Appellees maintained that the facts presented did not fit the "classic" *res ipsa* pattern because: (1) a movable piece of inventory in a retail store falling off of a shelf is not unusual like the shelf itself falling, (2) St. Jean did not establish that Appellees had exclusive control over the griddle, and (3) the negligence of another

customer or St. Jean herself could have just as easily caused the griddle to fall.

In opposition to the motion for judgment, St. Jean conceded, at the outset, that she presented insufficient evidence to support a claim for traditional premises liability negligence. She insisted that she could support her claim of negligence, however, by invoking *res ipsa*, which she argued did not require the jury to make an inference and did not change the burden of proof. *Res ipsa* applied, St. Jean urged, because (1) "heavy objects do not fall off shelves in the absence of negligence"; (2) the conclusory contention that other customers may have tampered with the griddle was insufficient to defeat Appellees' exclusive control; and (3) the evidence demonstrated that neither St. Jean, her husband, nor Moore saw any other customers tamper with the griddle.

The court determined that it would reserve on Appellees' motion for judgment and proceeded to discussing jury instructions with the parties. Appellees' counsel argued:

> With respect to the special instructions, I think that the issue that was raised in the argument on the motion for judgment is that the Plaintiffs are not relying upon negligence, they're only relying upon *res ipsa* and so I think that a lot of the standard instructions actually need to go and some of our special instructions aren't necessary at this point either, because the only instruction that the court has stated it intends to give is the *res ipsa* instruction.

Then the court gave the jury the following instruction on the issue of negligence and *res ipsa*:

> Negligence is doing something that a person using reasonable care would not do or not doing something that a person using reasonable care would do. Reasonable care means the caution, attention or skill a reasonable person would use under similar circumstances.
>
> Ordinarily, the fact that an accident happened does not mean that it was caused by negligence, however, in each of the following circumstances

> it is more probable than not you may conclude that there was negligence. One, the event would not ordinarily happen without negligence, two, the cause of the event was within the Defendants' exclusive control, and, three, no action by anyone else, including the Plaintiff, was the cause of the event.

Following its instructions, the court asked whether either party had any exceptions to the given instructions that they wished to put on the record. Counsel for the Appellees responded: "Only those we previously mentioned, Your Honor."

C. The Verdict

Just over two hours later, the jury returned to the courtroom with a verdict. The jury found that the Appellees were negligent, that the Appellees' negligence proximately caused St. Jean's injuries, and that St. Jean was not contributorily negligent. It awarded St. Jean $48,713 in past and future medical expenses, $86,262 in lost wages, and $250,000 in pain and suffering.

D. Post Judgement Motions

On February 11, 2016, Appellees filed a motion for judgment notwithstanding the verdict, or, in the alternative, motion for a new trial. The court heard oral argument on April 22, 2016. The parties largely repeated the arguments they made with respect to Appellees' motion for judgment at the close of evidence—the same arguments they make again on appeal to this Court. Appellees argued that St. Jean failed to demonstrate that there was a greater probability that her injury was caused by Appellees' negligence, as opposed to that of St. Jean or another customer. They argued further that the traditional negligence theory and the *res ipsa* theory were mutually exclusive and that the court erred by instructing the jury on both theories. St. Jean argued that she was entitled to the *res ipsa*

instruction because there was no evidence that another customer tampered with the display, and therefore, whether Appellees' negligence was the more probable explanation for her injury was an issue for the jury to decide, not the court. Further, St. Jean contended, it was proper for the court to instruct the jury on traditional negligence because the court merely defined negligence for the jury—a concept the jury would need to know to decide the case.

E. The Ruling Below

1. JNOV

The court began its ruling by finding that the evidence, viewed in the light most favorable to St. Jean, would not support a finding of ordinary premises liability negligence—a point that St. Jean implicitly conceded when, at oral argument on the motion for judgment, she stated that she was relying solely on the theory of *res ipsa*. Moving to the issue of the *res ipsa* inference, the court found that the evidence that St. Jean adduced at trial did not establish the elements of *res ipsa*. The court explained that St. Jean had to establish that: (1) "the cooking grate falling was an incident 'of a kind that does not ordinarily occur absent negligence,'" (2) "that the cooking grate was in the exclusive control of Defendants," *and* (3) "that the accident was not caused by an act or omission of [St. Jean] or anyone else in the store besides Defendants."

On the first issue, the court found that St. Jean's "version of the incident seem[ed] to defy a reasonable person's understanding of both common sense and gravity." The court opined that it was far less probable that the heavy griddle remained unstable—yet balanced perfectly—on the shelf for an unknown period of time only to fall at the precise moment

St. Jean walked by than it was that St. Jean unknowingly bumped into the shelf and caused the griddle to fall. Additionally, the court reasoned that St. Jean's "concession that anyone in the store ha[d] access to the item further demonstrate[d] the improper application" of *res ipsa* because it was just as likely that another patron dislodged the griddle. The court concluded that, "while the placement of the cooking grate on the shelf may have been unstable, [St. Jean] failed to present evidence that it was more probable than not due to the negligence of the Defendants."

The court then explained that the second and third elements of *res ipsa* required St. Jean to establish that the griddle was within the Appellees' exclusive control. It found that St. Jean "failed to prove that any possible negligence attributable to the Defendants more probably caused the accident than any other potential sources." To have satisfied this element, the court continued, the plaintiff must have produced evidence not just showing that it was probable that the defendants' negligence caused the accident, but that it was more probable than not that the defendants' negligence did so. The court reasoned that it was *not* more probable that an employee placed the griddle in the dangerous position almost six hours prior when the store opened than it was that another customer did so at some point prior to St. Jean's injury. And, "[w]ithout evidence to support either contention," the court determined that it could "not assume that one instance is more probable than the other." The court concluded that St. Jean "failed to show that the Defendants had exclusive control of the cooking grate and that it was more probable than not the negligence of the Defendants and not the negligence of [St. Jean] or a third party

that caused the accident." Thus, having found that St. Jean did not establish the elements of *res ipsa*, the court granted the motion for JNOV.

2. Motion for a New Trial

After granting Appellees' JNOV, the court explained that Maryland Rules 2-532(e) and 2-533(c) provide that it should decide whether to grant Appellees a new trial preemptively in the event that its grant of JNOV is reversed on appeal. The court explained that a new trial was proper when "a jury's consideration of a case is seriously distorted by information that should not have been before the jury." The court determined that it erred by instructing the jury on ordinary negligence after St. Jean had conceded that she was relying solely on *res ipsa*. This error was prejudicial, the court found, because the additional instruction allowed the jury to speculate on an unavailable theory of recovery and that prejudice was probable, not merely possible, because the court could not separate the erroneous instruction from the facts of the case or "decipher which instruction(s) the jurors relied [upon.]" Accordingly, the court ruled that the Appellees were entitled to a new trial in the absence of the JNOV.

St. Jean noted her timely appeal to this Court on July 27, 2016.

DISCUSSION

"It is the responsibility of the court to aid a jury in the correct discharge of its duty and to correct error. The Maryland Rules equip circuit courts with several means to minimize or correct trial errors." *Blue Ink, Ltd. v. Two Farms, Inc.*, 218 Md. App. 77, 90 (2014) (footnote and citation omitted). The circuit court here employed two of those

available means. In its primary ruling, the court granted JNOV pursuant to Rule 2-532, which "'test[s] the legal sufficiency of the evidence[,]'" and "gives the circuit court a last chance to order the judgment that the law requires." *Id.* (quoting *Impala Platinum, Ltd. v. Impala Sales (USA), Inc.*, 283 Md. 296, 326 (1978) (other citations omitted)). Alternatively, in the event we were to reverse the court's primary judgment, the court granted a new trial pursuant to Maryland Rule 2-533(c).

St. Jean challenges both of these decisions on appeal. First, she contends that the circuit court erred by substituting its own judgment for that of the jury because there was sufficient evidence to support the jury's finding that Appellees were negligent under the doctrine of *res ipsa*. Second, she argues that Appellees are not entitled to a new trial based on the jury instructions because they never objected to the instruction that was the basis for the court's ruling and thereby waived the issue. Because we hold that the circuit court did not err in granting Appellees' motion for JNOV, we need not address the second question.

I.

A. Contentions on Appeal

Citing *Chesapeake & Potomac Tele. Co. of Maryland v. Hicks*, 25 Md. App. 503, 516 (1975), St. Jean argues that a jury could have reasonably found that the evidence adduced at trial satisfied each element of *res ipsa*'s tripartite test: (1) a griddle would not fall from a shelf absent negligence; (2) Appellees' control over the merchandise was uninterrupted; and (3) St. Jean testified that she did not cause the griddle to fall. Thus, St. Jean was entitled to an instruction on the *res ipsa* presumption and any conflicting

inferences as to whether the evidence satisfied the conditions for the *res ipsa* presumption was the province of the jury to decide. According to St. Jean, the circuit court invaded the jury's province to consider St. Jean's testimony in light of the court's own "common sense and experience." St. Jean complains that the circuit court found that it was quite common for customers to tamper with griddles despite Appellees' not offering evidence that other customers do so. St. Jean relies heavily on this Court's decision in *Norris v. Ross Stores, Inc.*, 159 Md. App. 323 (2004), which she asserts is "materially indistinguishable from the facts" here.

Appellees respond that the circuit court entered the JNOV correctly because St. Jean failed to make a *prima facie* showing of ordinary premises liability negligence and failed to show the right to rely on *res ipsa*. They contend that in Maryland, tools or other objects falling in areas where they are likely to be found or used is insufficient to trigger the *res ipsa* inference. Appellees maintain that, regularly, Maryland courts refuse to allow the inference when a reasonable possibility exists that the injurious item was not in the defendant's exclusive control. They argue that St. Jean did not produce evidence capable of demonstrating the three elements of a *res ipsa* inference, "because merchandise-related accidents do occur in self-service stores without the storeowner's negligence, the allegedly injurious instrumentality here was not within the storeowner's exclusive control, and [St. Jean] could not exclude either herself, her husband, or customers who visited the store earlier in the day as potential contributing causes of the accident." Appellees distinguishes *Norris*, the main case on which St. Jean relies, because the falling object in *Norris* was a

shelf—a fixture in the store—and not merely an item on the shelf.

B. Standard of Review

"On review of a circuit court's decision to grant or deny a motion for JNOV, we are concerned with the dichotomy between the role of the judge, to apply the law, and the role of the jury, to decide the facts." *Blue Ink*, 218 Md. App. at 91. "Only where reasonable minds cannot differ in conclusions to be drawn from the evidence, after it has been viewed in the light most favorable to the plaintiff, does the issue in question become one of law for the court and not of fact for the jury." *Pickett v. Haislip*, 73 Md. App. 89, 98 (1987) (citation omitted). We must, therefore, determine whether a reasonable fact-finder could have determined that the evidence presented to the jury satisfied, by a preponderance of the evidence, the elements of the plaintiff's claim. *Blue Ink*, 218 Md. App. at 91 (citation omitted).

C. Res Ipsa Loquitur

In an action for negligence, the plaintiff must present evidence tending to show that the defendant was legally responsible for her injury because causes other than the defendant's negligence may also cause a plaintiff's injury. *Hicks*, *supra*, 25 Md. App. at 511. "'In no instance can the bare fact that an injury has happened, of itself and divorced from all the surrounding circumstances, justify the inference that the injury was caused by negligence." *Id.* (quoting *Benedick v. Potts*, 88 Md. 52, 54-58 (1898)); *see also Munzert v. American Stores Co.*, 232 Md. 97, 104 (1963) (citation omitted) ("[A] presumption of negligence on the part of the owner or lessee does not arise merely by showing that an

injury has been sustained by a person rightfully on the premises.").

Direct proof of negligence, however, is not required. The plaintiff may instead invoke *res ipsa* to "rely on the inference of negligence to be deduced from all the circumstances." *Hickory Transfer Co. v. Nezbed*, 202 Md. 253, 262 (1953). *Res ipsa loquitur*, which means "the thing speaks for itself," *Benedick*, 88 Md. at 55, "allows a plaintiff the opportunity to establish a *prima facie* case 'when he could not otherwise satisfy the traditional requirements for proof of negligence.'" *Dover Elevator Co. v. Swann*, 334 Md. 231, 236 (1994) (citation omitted).

We justify the "relaxation of the normal rules of proof" when "the instrumentality causing injury is in the exclusive control of the defendant, and it is assumed he is in the best position to explain how the accident happened." *Peterson v. Underwood*, 258 Md. 9, 19 (1970) (citation omitted). The defendant's exclusive control is a necessary condition to *res ipsa* because the doctrine works to compel the defendant to produce evidence relating to the cause of the plaintiff's injury. In other words, *res ipsa* permits the fact finder to infer that the defendant would have produced any exculpatory evidence in its sole possession, and that the defendant's failure to do so is, in and of itself, circumstantial evidence of the defendant's negligence. *See Blankenship v. Wagner*, 261 Md. 37, 41, 46 (1971). "'The rule is not applied by the courts except where the facts and the demands of justice make its application essential, depending upon the facts and circumstances in each particular case.'" *Dover*, 334 Md. at 246 (quoting *Blankenship*, 261 Md. at 41).

Although the elements of *res ipsa* have varied and evolved "since 1863 when a

barrel of flour rolled out of a warehouse window in England and injured a person passing on the public street," *Hicks*, 25 Md. App. at 509, 513-18, the Court of Appeals' most recent statement came in *District of Columbia v. Singleton*, 425 Md. 398 (2012). There, the Court set out that, "[t]o invoke successfully the doctrine, the plaintiff must establish that the accident was '(1) of a kind that does not ordinarily occur absent negligence, (2) that was caused by an instrumentality exclusively in the defendant's control, and (3) that was not caused by an act or omission of the plaintiff.'" *Id.* at 408 (quoting *Holzhauer v. Saks & Co.*, 346 Md. 328, 335-36 (1997)).

If and when a plaintiff satisfies these three elements, *res ipsa* permits, but does not compel, the jury "to infer a defendant's negligence without the aid of any direct evidence. Even when the doctrine applies, however, the burden of proving the defendant's negligence remains upon the plaintiff." *Dover*, 334 Md. at 236 (citations omitted). *Res ipsa* does not shift the burden of proof or create a rebuttable presumption. In order to be entitled to a "permissible inference" of the defendant's negligence, the plaintiff must prove each element of the doctrine by a preponderance of the evidence. *See Hicks*, 527-33. The defendant, on the other hand, bears no burden to disprove the elements of plaintiff's claim, but it does shoulder what the Court of Appeals has described as the "risk of non-persuasion." *Hickory Transfer Co.*, 202 Md. at 262.

D. Applying Res Ipsa

There have been seemingly innumerable circumstances in which Maryland courts have decided whether or not *res ipsa* applies to a plaintiff's injuries—usually in cases

involving business invitees. But we have found none directly on point with the facts here. So we begin our analysis with a series of cases that annunciate the principles and concepts that we then go on to apply to St. Jean's claim.

In *Munzert*, a store clerk left a dolly of crates on the sidewalk in front of the defendant's store. 232 Md. at 100-01. A few minutes later, the plaintiff drove her car up to the sidewalk near the dolly and began loading her groceries when the crates fell, causing her injury. *Id.* at 102. The store clerk testified that the crates were stacked properly when he left them, but the plaintiff testified that neither she nor her car touched the dolly or the crates. *Id.* at 101-02. The trial court submitted the case to the jury despite the plaintiff's argument that she was entitled to a directed verdict. *Id.* at 100-01. The jury found for the defendant. *Id.* On appeal, the Court of Appeals discussed the applicability of *res ipsa*. *Id.* at 103. The Court reasoned that, under *res ipsa*, when the facts furnish circumstantial evidence of negligence and call for, but do not require, rebuttal evidence from the defendant, "the question of negligence is usually one of fact for the jury to decide," rather than one of law. *Id.* (citations omitted). The Court held that the plaintiff was entitled to the *res ipsa* inference, because "[t]here was sufficient evidence to permit an inference that the [crates] had been carelessly stacked on the dolly by the defendant[,]" that "the initial exclusive control of the dolly had not been interrupted[,]" in addition to her own testimony "that she had not caused the [crates] to topple over on her." *Id.* at 104-05.

In *Gillespie v. Ruby Tuesday, Inc.*, the United States District Court for the District of Maryland concluded that a plaintiff was entitled to the *res ipsa* inference when a lamp

fell from the ceiling and struck her while she ate lunch at Ruby Tuesday. 861 F. Supp. 2d 637, 639-40, 643-44 (2012). The plaintiff photographed the area after the incident, but Ruby Tuesday failed to preserve the fallen lamp. *Id.* at 639. Relying on *Norris*, the court reasoned that the plaintiff demonstrated Ruby Tuesday's exclusive control by establishing that the lamp had been hanging in its restaurant and that she did not need to prove the actual mechanism that caused the injurious incident. *Id.* at 643. The court found that a falling lamp was not the type of incident that ordinarily happens absent negligence, comparing it to

> when a pile of blocks topples onto a passerby, *Leidenfrost v. Atlantic Masonry*, 234 Md. 244 (1964); when steps crumble beneath a person's feet, *Blankenship*[], 261 Md. 37 (1971); when a soda bottle explodes and strikes its owner in the eye, *Leikach v. Royal Crown Bottling Co. of Baltimore*, 261 Md. 541 (1971); and when glass shelves in a [department] store shatter onto a shopper, *Norris*, 159 Md. App. 323.

Id. at 644.

The plaintiffs in the foregoing cases were permitted the *res ipsa* inference because the cause of their injuries were determined to be within the store owners' exclusive control. Maryland cases also recognize that not all parts of a store are in the owner's exclusive control. In *Holzhauer*, *supra*, the Court of Appeals held that an injured shopper was not entitled to a *res ipsa* inference when his injury was caused by an escalator that stopped abruptly and without explanation. 346 Md. at 331, 335-36. The Court concluded that there was an explanation for the abrupt stop that was "equally likely" as the owner's negligence. *Id.* at 336. The escalator had two emergency stop buttons that any person present could press, and, although there was no evidence that someone pressed one of the buttons, the

facts "need only show that something other than the [owner's] negligence was just as likely to cause the escalator to stop." *Id.* "Hundreds of Saks & Co.'s customers have unlimited access to the emergency buttons each day[,]" the Court reasoned. *Id.* at 337. It explained that *res ipsa* was "often" inapplicable "when the opportunity for third-party interference prevented a finding that the defendant maintained exclusive control of the injury-causing instrumentality." *Id.* (citations omitted). The Court then ruled that the inference is impermissible when "'the opportunity for interference by others weakens the probability that the injury is attributable to the defendant's act or omission.'" *Id.* (quoting *Lee v. Housing Auth. of Baltimore*, 203 Md. 453, 462 (1954)).

Similarly, the Court of Appeals in *Singleton* found that plaintiffs were not entitled to the *res ipsa* inference because they failed to adduce evidence sufficient to establish that the defendant's negligence "more probably than not" caused their injury. 425 Md. at 412-13. The plaintiffs, a father and son, were injured when the bus on which they were riding left the roadway and crashed. *Id.* at 402-03. At the time of the crash, however, the father was asleep and his young son was unable to comprehend or recount what happened. *Id.* The plaintiffs urged that were entitled to rely on *res ipsa* because their evidence established that the driving conditions were clear, there were tire marks on the road leading up to the crash site, and the bus "jumped the median." *Id.* at 412. The Court of Appeals characterized this evidence to be too "bare-bones" to "eliminate sufficiently other causes of the accident," and that they "failed to evince that the bus driver's negligence was the most probable causative factor." *Id.*

Reaching its decision, the Court noted that the plaintiffs failed to call the bus driver as a witness; failed to summons any other bus passengers, emergency responders, or other motorists who witnessed the accident; failed to produce the accident report; and failed to re-construct the accident sequence. *Id.* at 405. Further, the plaintiffs offered no explanation for their failure to present those additional forms of seemingly available evidence. *Id.* Although *res ipsa* is justified sometimes "by a defendant's superior access to identification of the facts surrounding the accident[,]" the Court ruled that "[f]ailing to produce reasonably available and likely probative witnesses, where substantive and direct evidence is otherwise lacking, leads to the inference that the facts surrounding the happening of the accident were equally accessible to the plaintiff and the defendant." *Id.* at 414 (citation omitted). The Court inferred that the plaintiffs "had equal access as the defendants to the facts surrounding the accident[,]" and held that the plaintiffs were not permitted to "rely upon res ipsa loquitur to satisfy their burden to adduce a prima facie case of negligence[.]" *Id.* at 415 (citation omitted).

The Court of Appeals' decision in *Giant Food, Inc. v. Washington Coca-Cola Bottling Co., Inc.*, 273 Md. 592 (1975), provides a nice contrast to *Singleton*, in which plaintiffs presented only a "bare-bones" case. In *Giant*, the plaintiff was injured when three to four bottles in a six-pack of Coca Cola that he picked up in Giant exploded, causing him injury. *Id.* at 594-96. Evidence adduced at trial demonstrated that the soda was displayed "in typical supermarket fashion," showed no defects or liquid was in the area, and the plaintiff's only contact with the carton was his hand through the handles. *Id.* at

595. The bottles were stored in Giant for a maximum of five days at a constant temperature of 72 degrees. *Id.* They may have been rearranged periodically by Giant's employees or picked up and then abandoned by other customers where they would sit until Giant's employees returned the bottles to their case. *Id.* at 595-96. Testimony at trial "show[ed] that Coca Cola customers ordinarily do not change their minds after they have removed a carton from the shelf, but when they do, they 'never' or 'hardly ever' return the carton to the shelf from which it was removed." *Id.* at 596. Further, "uncontradicted evidence revealed that there are three primary causes of the explosion of a Coca Cola bottle: a manufacturing defect, a thermal shock or an impact break resulting from mishandling." *Id.* The evidence also showed that from the manufacturing plant to Giant's display, Coca Cola uses machines to move the bottles up until the point at which its employees remove the bottles from the delivery truck at the retail store and carries them to the aisle where they are sold. *Id.*

The Court "conclude[d] that the testimony eliminate[d] the possibility that the explosion was caused by either thermal shock or by a manufacturing defect." *Id.* at 599. That left human mishandling, and the Court of Appeals agreed with this Court that the evidence supported an inference that Giant mishandled the bottles "because the opportunities for mishandling by the retailer were considerably more extensive than those of the bottler[,]" as well as the customer. *Id.* (citation and quotation marks omitted). Thus, the Court held, "the greater probability of negligence lies with the retailer." *Id.*

This Court's decision in *Norris* is the case on which St. Jean relies most heavily and

that she claims is "materially indistinguishable" from the facts presented here. Norris alleged that she was injured when a glass shelving unit in a Ross store collapsed while she was walking by. 159 Md. App. at 328. She claimed that she did not touch the shelf and had not seen any other customers or employees nearby. *Id.* The Ross store had been open for only six weeks at the time of Norris' accident, and contractors had assembled the shelves for Ross shortly beforehand. *Id.* Before trial, Ross sought summary judgment, arguing that the undisputed facts did not support a finding of negligence because the store was open to the public and customers had access to the shelving unit—therefore, it was not within Ross's exclusive control. *Id.* at 328, 332. Ross did not dispute that Norris's own negligence did not contribute to her injury. *Id.* at 331. The circuit court granted Ross's motion, and we reversed. *Id.* at 331-32, 335.

The sole issue on appeal was whether the shelving unit was within Ross's exclusive control. *Id.* at 331. Ross argued that Norris had not satisfied this second element of *res ipsa* because it operated a self-service store, meaning that other customers had access to the shelving unit. *Id.* at 333. We rejected as too remote Ross's contention that a customer may have tampered with the shelving unit. *Id.* at 334-35. "In order to find that a third person interfered with Ross's exclusive control and was responsible for the collapse of the unit," we reasoned, "a jury would have to accept that someone other than a Ross employee or agent tampered with or caused damage to the unit and did so without detection by Ross." *Id.* at 335.

Synthesizing the principles embraced in the foregoing decisions, we now apply the

elements of *res ipsa* case in the case before us on appeal. The first element requires the plaintiff to "prove that the accident would not have occurred in the absence of [the defendant's] negligence." *Holzhauer*, 346 Md. at 336. St. Jean insists that griddles do not fall from shelves absent negligence. But her point leads directly to the question: absent the negligence of whom? The second and third elements of *res ipsa* encapsulate the plaintiff's burden of "'[e]liminating other responsible causes'" of her injury. *Hicks*, 25 Md. App. at 531-32 (quoting Restatement (Second) of Torts § 328D, cmt. f (1965)). As the circuit court pointed out, the griddle's fall may have one of three causes: Appellees' negligence, another customer's negligence, or St. Jean's own negligence.

To satisfy *res ipsa*'s latter two elements, St. Jean bore the burden of proving, by a preponderance of the evidence, that the griddle falling was more likely than not a result of the negligence of Appellees—not her own or another customer's. *Hicks*, 25 Md. App. at 533. Although St. Jean was "'not required in [her] proof to exclude remotely possible causes and reduce the question of control to a scientific certainty[,]'" she was required to demonstrate that the combined likelihood that her own negligence or that of a third party caused the griddled to fall was *less* than 50%. *See Norris*, 159 Md. App. at 331-33 (citation omitted) (explaining that the plaintiff must demonstrate that "the incident more probably resulted from the defendant's negligence rather than from some other cause").

Whether St. Jean adduced evidence to demonstrate Appellees' exclusive control of the griddle is, therefore, the focus of our inquiry. The circuit court below found that St. Jean had "failed to present evidence that [the cooking grate falling] was more probable that

not due to the negligence of the [Appellees]." We agree.

There is a meaningful and determinative distinction between this case and *Norris*. As the term *res ipsa* suggests, the inference applies only when "the thing" speaks for itself. *See Benedick*, *supra*, 88 Md. at 55. What "the thing" is, therefore, is central to determining the applicability of the inference. In *Norris*, "the thing" was a shelving unit, *see* 159 Md. App. at 328; here, it was simply an item on a shelf in a self-service store. Although shelving units and griddles alike do not ordinarily fall absent negligence, a shelving unit is the type of thing that we can fairly infer remained in the store owner's exclusive control. A single item of merchandise on the shelf in a self-service store, on the other hand, is not the type of thing we can fairly infer remained in the store owner's exclusive control absent evidence suggesting otherwise. The evidence at trial showed that St. Jean was struck by the griddle around 2:00 p.m., six hours after the store opened on a busy Memorial Day holiday. Her husband testified that Marshalls was having a sale that day, which suggests the store was busy.

The likelihood is strong that a customer picked up the griddle in the self-service store and placed it back down on the shelf. It was St. Jean's burden to prove that it was more likely than not that the griddle remained in Marshalls' exclusive control. Unlike the Coca Cola bottles in *Giant*, there was no evidence that customers who pick up griddles in Marshalls never put them back on the shelf where they found them. And, the hypothetical third-party customers here, unlike those in *Norris*, would not have had to avoid Appellees' detection if they moved the griddle because an item of merchandise—in contrast to the

shelving unit itself (*see id.* at 335)—is the type of thing that customers in self-service retail stores normally touch and move. We discern that the griddle in this case is much more analogous to the emergency stop button on the escalator in *Holzhauer*. Although "[t]he record is silent as whether anyone did, in fact," leave the griddle unstable on the shelf, "this is of little concern." *Holzhauer*, 346 Md. at 336. It was St. Jean's burden to prove that it was more likely than not the negligence of Appellees as opposed to an intervening third party. *See Dover*, *supra*, 334 Md. at 236. St. Jean failed to do so.

Instead, St. Jean seems to imply that Appellees were negligent for keeping a long, flat griddle on a flat shelf without a lip to stop it from falling. But this claim melds into St. Jean's original theory of ordinary premises liability negligence. St. Jean's attempt to straddle the line between proving Appellees' negligence and seeking an inference thereof highlights the fatal flaw in her case. She entered trial on a theory of premises liability — only turning to *res ipsa* when she failed to prove her case. As a result, she "sought to prove 'too much and too little.'" *Id.* at 253 (quoting *Nezbed*, *supra*, 202 Md. at 263). In perverse effect, St. Jean's failed attempt to adduce evidence sufficient to prove her premises liability theory actually demonstrated why *res ipsa* was unavailable on the facts of her case. *See Peterson*, *supra*, 258 Md. at 20 (holding that in the case where a plaintiff was injured by a crumbling wall, the plaintiff was precluded from relying on *res ipsa* because she "attempted to establish specific grounds of negligence" (citing *Smith v. Bernfeld*, 226 Md. 400 (1961)). The *res ipsa* inference does not exist for situations where an ordinary negligence plaintiff simply fails to prove her case.

As was the case in *Singleton*, St. Jean simply presented a "bare-bones" case. 425 Md. at 412. Unlike the plaintiff in *Gillespie*, *supra*, who photographed the scene after the lamp fell from the ceiling in Ruby Tuesday, 861 F. Supp. 2d at 639, neither St. Jean nor her husband photographed the shelf or asked Appellees to preserve the security footage of the incident.[1] "[T]he failure of a plaintiff in a negligence action to produce reasonably available and explanatory evidence about the accident to supplement his/her deficient evidence may preclude, in and of itself, plaintiffs from invoking res ipsa loquitur." *Singleton*, 425 Md. at 415 n.7 (citation omitted). *Res ipsa* applies only when "'it is assumed [the defendant] is in the best position to explain how the accident happened.'" *Dover*, 334 Md. at 237 (quoting *Peterson*, 258 Md. at 19) (emphasis from *Dover* omitted). St. Jean has failed to demonstrate that Appellees were in the best position to explain how the griddle fell.

We note that St. Jean's theory of the case—that she is entitled to a *res ipsa* inference after adducing little more evidence than her own testimony that she did not cause the griddle to fall—would relieve premises liability plaintiffs from proving notice and shift the burden on self-service retailers to prove third-party interference. While justice may require the imposition of an inference when certain instrumentalities fall, such as stairs,

[1] We note that St. Jean faced a Catch-22 here, which only reinforces further the reason why *res ipsa* is unavailable. The more she proved that the shelf was messy and unattended to by Marshalls' employees, the more likely it would become that a customer left the griddle in such a vulnerable position. Although this may help her theory of ordinary negligence, it cuts against applying the *res ipsa* inference because it suggests that Appellees lacked exclusive control.

Blankenship, 261 Md. at 47; or light fixtures, *Gillespie*, 861 F. Supp. 2d at 639, 643; or shelving units, *Norris*, 159 Md. App. at 328-30, justice does not require the inference based on the facts presented in this case.

In sum, St. Jean failed to establish that the griddle was in Appellees' exclusive control and, thus, that its fall was more likely than not caused by Appellees' negligence. Accordingly, we hold that she was not entitled to rely on the *res ipsa* inference and affirm the circuit court's decision to grant Appellees' motion for JNOV. Because we affirm the circuit court's grant of JNOV, we need not address St. Jean's argument that the circuit court abused its discretion by granting Appellees a new trial based on its error in giving the *res ipsa* jury instruction.

JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANT.