MEMORANDUM

TO: **BOB**
FROM: **PHIL**
RE: **OHIO: RES IPSA LOQUITUR**
DATE: **11/1/07**

QUESTIONS PRESENTED

I. DOES OHIO LAW ALLOW A RES IPSA LOQUITUR THEORY OF PREMISES LIABILITY?

YES.

II. IS A RES IPSA LOQUITUR THEORY OF LIABILITY RELEVANT TO ARGUMENTS CONCERNING:

A) landlord notice issues; and

NOT KNOWN, BUT LIKELY.

B) cases where there is no evidence of lead on the subject premises?

NOT KNOWN, BUT NOT LIKELY.

STATEMENT OF FACTS

The impetus for this research memo is the United States Sixth Circuit Court of Appeals' decision in *DeBusscher v. Sam's East Inc.*, ---- F.3d ---- (6th Cir. 2007), on October 11, 2007. In *DeBusscher*, the Sixth Circuit applied Michigan substantive law in diversity to reverse the Federal District Court for the Eastern District of Michigan, that there was a material issue of fact as to whether or not the Defendant had notice of the hazard on the premises of their store, and therefore the Defendant should not prevail on their Federal Rules of Civil Procedure Rule 56(c) motion. *Id*. In ruling on this motion, the

6th Circuit acknowledged *res ipsa loquitur* as a relevant theory of liability in Michigan. *Id*. The *DeBusscher* applied Michigan substantive law, the holding is not directly binding on Ohio courts, which is the subject of this memo. *Id*. Further, this holding is only binding in federal courts sitting in diversity, applying MI substantive law.

ANALYSIS

I. OHIO LAW ALLOWS A RES IPSA LOQUITUR THEORY OF LIABILITY.

Ohio does allow for a *res ipsa loquitur* presumption of negligence for the consideration by the finder of fact, pursuant to the following elements:

> (1) That the instrumentality causing the injury was, at the time of the injury, or at the time of the creation of the condition causing the injury, under the *exclusive management and control of the defendant*; and
> (2) that the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed.[1]

For example, in *McConaughead v. Horaitis*, 2005 WL 121656 (Ohio App. 5 Dist. 2005), the court held that duties vested in the landlord by the Ohio Landlord Tenant Statute mandated exclusive management and control under *res ipsa loquitur* to the Defendant landlord, Mr. Nick Horaitis. *Id*. In *McConaughead*, plaintiff Edward McConaughead was injured when he fell through a carpeted staircase. *Id*. As a result of his fall, Mr. McConaughead suffered injuries including having his right testicle amputated. *Id*. The stairs that Mr. McConaughead fell through were carpeted wood, and he had previously noted to his daughter that there was something wrong with the steps. *Id*. In deposition, Mr. McConaughead admitted that he told his daughter to contact her

[1] *Hake v. George Wiedemann Brewing Co.*, 262 N.E.2d 703, 705 (Ohio 1970) (emphasis added) (Citing *Glowacki v. North Western Ohio Ry. & Power Co.*, 116 Oh. St. 451, 157 (Ohio 1927); *et. al.*).

landlord in regard to the defective step, admitting that his daughter called her landlord and complained "[w]ay before the accident." *Id*. Mr. McConaughead and his wife filed suit against his daughter's landlord for his injuries and loss of consortium in the Stark County Court of Common Pleas. *Id*. Mr. McConaughead's assertion that his daughter complained to Mr. Horaitis, constituting notice was barred as inadmissible hearsay. *Id*. Upon cross-motions for Summary Judgment, the judge ruled in favor of the Defendant, Mr. Horaitis. The trial court granted Mr. Horaitis' Summary Judgment motion, simultaneously denying Mr. McConaughead's cross-motion. *Id*. Four months later, the trial court denied Mr. McConaughead's motion for relief from judgment *Id*. Mr. McConaughead appealed the denial of his Summary Judgment on two assignments of error: whether there was notice of the defect to Mr. Horaitis and the McConaugheads presented evidence of the defect and its role in the accident. *Id*. The Ohio Fifth District Court of Appeals for Stark County, reversed the trial court's grant of Summary Judgment, as there were material issues of fact to Mr. McConaughead's claim. *Id*. The court held that Mr. McConaughead's depositional statements as to notice were admissible, as they did not prove the truth of the matter asserted. *Id*. The court then applied the *res ipsa* presumption to the defective stairs, using the *Glowacki* factors cited above. *Id*. As to the exclusive possession and control element, the court held that "a tenant's possession of the premises is not equivalent to control; nor does [tenant's] possession negate a landlord's 'exclusive' management and control." *Id*. In support of this premise, the court relied upon the Ohio Landlord Tenant Statute (presumably, but not expressly R.C. §§5321.04(A)(1)-(4)), which "imposes the exclusive duty of repair and maintenance upon the landlord," specifying that the landlord, and not the tenants had

exclusive control over *maintenance and repair* of the stairs. *Id*. The court also held that because of the carpeting over the steps, the alleged defect would require the tenant to remove the carpet from the stairs, and that the authority to remove carpet was to be done by the landlord "and would require approval of the landlord." *Id*.

The *McConaughead* case's reliance on Ohio statute to establish possession and control of the repair of premises is applicable to lead paint cases. In *McConaughead*, the court held that exclusive possession and control of repair of the subject premises is dictated by the Ohio Landlord-Tenant Statute, even thought the tenant may be in actual physical possession of the premises.[2] *Id*. Like in *McConaughead*, the landlords of lead-poisoned tenants have the duty to comply with R.C. §§5321.04(A)(1)-(4), including duties of maintenance, and repair to keep premises fit and habitable. Additionally, as the court noted in *McConaughead*, defects that are concealed, such as a defective stair covered with carpet, are particularly the duty of the landlord, and a tenant would have to secure permission of the landlord to make such a repair. 2005 WL, at ----. Similarly, the fact that there is lead paint present on premises is often concealed from tenants, and tenants are usually required to secure the permission of a landlord before painting their premises, further showing the exclusive possession and control will be maintained by Defendant landlords, despite possession of the premises by Plaintiffs.

Ohio law does support a *res ipsa loquitur* presumption of negligence in tort cases.

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[2] *Contra Goodall v. Deters*, 121 Ohio St. 432, 435-436 (Ohio 1929) (Res Ipsa theory non-applicable where transom window fell on plaintiff's head from above her apartment door, causing injury. "That principle is often applied where the instrumentality causing the injury is in the exclusive possession and control of the defendant. . . [in this instance] [t]he premises were in exclusive [possession and] control. . . of the plaintiff."); *See also Glowacki v. North Western Ohio Ry. & Power Co.*, 116 Ohio St. 451, 463-464 (Ohio 1927) (intervening cause precludes use of res ipsa presumption); *Farnia v. First National Bank*, 72 Ohio App. 109, 114-115 (Ohio App. 1943) (if two reasonable inferences, one implying the negligence of the Defendant, and another implying the negligence of another, a res ipsa presumption may not lie).

II. A RES IPSA LOQUITUR THEORY OF LIABILITY IS RELEVANT TO ARGUMENTS CONCERNING:

A. Landlord notice issues:

The application of *res ipsa loquitur* to premises liability notice issues and childhood lead paint poisoning is an issue of first impression in Ohio.

Ohio courts have ruled that *res ipsa loquitur* may be pleaded coextensively with specific allegations of negligence even in premises liability, where issues of notice are concerned. *Pierce v. Gooding Amusement Co.*, 90 N.E.2d 585, 589 (Ohio App. 1949).

In *Pierce*, the plaintiff was injured while riding with a young child on a merry-go-round. *Id*. at 585-586. The plaintiff and the young child purchased tickets, and the plaintiff placed the child upon a horse in the merry-go-round and stood on the inside of the horse. *Id*. The plaintiff alleged that she was supporting herself with the pole that supported the merry-go-round horse as the ride started into motion, and that suddenly, the pole started wiggling. *Id*. at 586. The plaintiff was then thrown off the merry-go-round, suffering injury. *Id*. A witness testified that the horse that the plaintiff and young child were using had been turned around, specifying that "[y]ou can't tell, but the horse came loose, and knocked her off?" *Id*. At the conclusion of the Plaintiff's case, the defendant moved for a directed verdict, which was sustained, as that there was no pleading of actual or constructive notice to the horse on the merry-go-round. *Id*. On appeal, the Ohio Appeals Court for the Second District reversed, holding that

> The plaintiff does not urge in this court that she made proof of specific negligence. . . Assuming that specific negligence is not proven prima

> facie, we are satisfied that upon the facts adduced the plaintiff had the right to go to the jury upon the application of the rule of *res ipsa loquitur*.

Id. at 588. The court further noted that *res ipsa loquitur* may be pleaded coextensively with allegations of specific negligence. *Id*. at 589. The cause was then reversed in favor of the plaintiff/petitioner. *Id*. at 590.

Though the interaction of the *res ipsa* presumption and pleading of notice issues are not directly considered under Ohio case law, numerous other states have discussed the interaction of the two theories of liability. The following state courts have favorably treated the interaction of notice requirements and the *res ipsa* presumption:

- **Florida:** *Burns v. Otis Elevator Co.*, 550 So.2d 21, 22 (Fla. App. 1989) ("*Res ipsa loquitur* permits the trier of fact to draw an inference of negligence when the following criteria are met [stating three elements of *res ipsa*]. If those conditions are established, actual or constructive notice to defendant of any defect in the instrumentality is immaterial.")

- **Illinois:** *DeBello v. Checker Taxi Co. Inc.*, 8 Ill.App.3d 401, 405 (Ill. App. 1972) ("[T]he question of defendant's knowledge, constructive or otherwise, is answered in rather classic form at this stage by application of the *res ipsa* doctrine.")

- **Kentucky:** *Wright & Taylor, Inc. v. Smith*, 315 S.W.2d 624, 628 (Ky. App. 1958) ("When negligence is presumed by application of the *res ipsa loquitur* doctrine, notice is likewise presumed, for without it there would be no negligence. When, however, there is proof of actual notice or constructive notice, the presumption of negligence is materially strengthened.").

- **Missouri:** *McCloskey v. Koplar*, 46 S.W.2d 557, 560 (Mo. 1932) (En Banc) ("the omission in said instruction in said instruction to include notice to defendant of the defective brakes was supplied by such [*res ipsa*] presumption of defendant's negligence which remained and operated throughout the case in plaintiff's favor. . .").

- **Louisiana:** *Cobb v. Delta Exports, Inc.*, 847 So.2d 739, 742 (La.App. 3 Cir. 2003) ("[civil code] states: The owner or custodian of a thing is answerable for damage occaisioned by its ruin, vice, or defect, only upon a showing that he knew or in the exercise of reasonable care, should have know [sic] about the [defect]. . . Nothing in this article shall preclude the application of the doctrine of res ipsa loquitur in the appropriate case[.]").

- **New Jersey:** *Brown v. Racquet Club of Bricktown*, 95 N.J. 280, 291 (NJ 1984) ("A proprietor generally is not liable for injuries caused by defects of which he had no actual or implied knowledge or notice. . . Defendant recognizes that, confronted by a permissible inference of negligence. . . in order to avoid that inference, it had to explain [that it was not negligent].")

- **New Mexico:** *Romero v. Truchas Mut. Domestic Water Consumer and Mut. Sewage Works Ass'n*, 908 P.2d 764, 768 (N.M. 1995) (Subsequently overruled on issue of procedural posture, not res ipsa) ("Defendant's alleged lack of notice of the possibility of water leaks in the vicinity of Plaintiff's house is not fatal to Plaintiff's theory of *res ipsa loquitur*.").

- **New York:** *Garrido v. IBM*, 38 A.D.3d 594, 596 (N.Y.A.D. 2 Dept. 2007) ([O]nce the inference flows from proof of the elements of *res ipsa loquitur*, there is no additional requirement that the plaintiff prove that Otis acquired actual or constructive notice. . .").

- **Oregon:** *Pooschke v. Union Pac. R. Co.*, 426 P.2d 866, 869 (Or. 1967) ("'It is not questioned here but that plaintiff's proof were, under *res ipsa loquitur*, sufficient to establish that the hose and its nozzle were defective at the time of the plaintiff's injuries. Having gone this far, does the doctrine permit supplying by inference the other essential to defendant's negligence, viz., actual or constructive notice of such defective appliance. We think it does. . .' If application of the doctrine permits an inference of Negligence, such inference must necessarily include all the essential elements of negligence including here an inference that defendant had actual or constructive knowledge of the defective condition. . .").

- **Pennsylvania:** *Neve v. Insalaco*, 771 A.2d 786, 791 (Pa. Super. 2001) ("In addition to implicating constructive notice, the durability of a dangerous condition also implicates *res ipsa loquitur*.").

- **Texas:** *Jackson v. Dallas Railway & Terminal Co.*, 273 S.W.2d 463, 465 (Tex. Civ. App. 1954) (*res ipsa* not expressly used, but the concept was used to create an inference of constructive notice of the presence of a foreign slippery substance on the floor of a bus).

- **Washington:** *Case v. Peterson*, 136 P.2d 192, 195 (Wash. 1943) ("[discussing notice of a dangerous condition] This court has adopted the rule that, even though a plaintiff should base his action upon the doctrine of res ipsa loquitur, he may plead and prove specific acts of negligence in support of his right to recover.").

- **Wisconsin:** *Zino v. Milwaukee Electric Railway & Transport Co.*, 74 N.W.2d 791, 793 (Wis. 1956) ("In Wisconsin [the doctrine that the defendant has more access to the explanation of the accident as a justification for *res ipsa*] is not one of the controlling conditions but it may be an explanation for the reason that proof

of notice of the defect to the defendant is not required as a condition precedent to the invocation of the doctrine.")

The following jurisdictions have declined to acknowledge the premise that the concept of notice or constructive notice is presumed and incorporated into a *res ipsa loquitur* argument:

- **District of Columbia:** *Hackett v. District of Columbia*, 264 A.2d 298, 300 (D.C. App. 1970) ("That the doctrine of res ipsa loquitur is not applicable to the District of Columbia in this type of case is further compelled by the requirement of notice. For when the District must receive notice to be held liable, as it must in cases concerning the general condition and sidewalks, the concept of exclusive control is incompatible.").

- **Alabama:** *Delchamps, Inc. v. Stewart*, 255 So.2d 586, 588 (Ala. Civ. App. 1971) ("'No presumption of negligence arises form the mere fact of injury to a customer. Upon the plaintiff rests [sic] primarily the burden of showing that the injury was proximately caused by the negligence of the storekeeper, or one of its servants or employees. Actual or constructive notice of the presence of the offending instrumentality must be proven before the proprietor can be held responsible for the injury.").

- **Maryland:** *Toy v. Atlantic Gulf & Pacific Co.*, 4 A.2d 757, 764 (Md. 1939) (*res ipsa* is not applicable where there is no evidence of fault of the defendant. The court then used the defendant's lack of knowledge as one of the factors used to negate the establishment of fault in the action).

- **Connecticut:** *Shirlock v. Donald*, 186 A. 562, 563 (Conn. 1936) (where plaintiff sued for injury on a defective bridge, court holds that the highway commissioner does not have the ability to know of all of the bridges are in disrepair, therefore *res ipsa* is inappropriate).

Additionally, New York jurisprudence has used the concept of exclusive control in the context of childhood leadpoisoning. *Guerrero v. Djuko Realty, Inc.*, 300 A.2d 542, 543 (N.Y. Slip Op. 2002). The Appellate Division of the New York Supreme Court, in, while not applying a *res ipsa* inference, did hold that a manager of an apartment building where a child injested lead paint, was in exclusive control of the premises, and was therefore liable. *Id*.

The *res ipsa loquitur* presumption of negligence should be acceptable to show that a landlord should be liable for a minor plaintiff's lead poisoning, and may be pleaded coextensively with allegations of notice on the part of the landlord.

B. Res Ipsa Loquitur is not likely applicable in cases where there is no evidence of lead on the subject premises.

While there is no application of the doctrine of *res ipsa* to childhood lead poisoning in Ohio, *res ipsa* is intended for the purpose of showing negligence where there is no evidence of negligence. However, issues of cause may obstruct the application of *res ipsa* where there is no evidence of lead on the subject premises.

For example, in *Cleveland Ry. Co. v. Sutherland*, 152 N.E. 726, 727 (Ohio 1926) (Per Curiam), the plaintiff was injured by a piece of falling window glass from a stopping streetcar packed full of commuters. Denying the applicability of the doctrine of *res ipsa loquitur*, the Ohio Supreme Court held that

> [t]he maxim *res ipsa loquitur* relates merely to negligence *prima facie* and is available without excluding all other possibilities, but it does not apply where there is direct evidence as to the cause, or where the facts are such that an inference that the accident was due to a cause other than defendant's negligence could be drawn as reasonably as that it was due to negligence.

Id. The court then held that the facts did not indicate that the window broke as a result of faulty construction, but rather "extraneous physical force," merely because the glass looked as if it had been punched out. *Id*. Additionally, in *Jennings Buick, Inc. v. City of Cincinnati*, 406 N.E.2d 1385, 1389 (Ohio 1980) (Per Curiam), the Ohio Supreme Court held that where the doctrine of *res ipsa loquitur* is pled, the facts must not point to other possible causes being just as likely as the defendant's negligence in causing the injury.

In *Jennings Buick*, the plaintiff suffered $57,890.55 in property damage when a high-pressure water main broke in front of his car dealership. *Id*. at 1386. It was determined that the hole in the pipe was caused by gravel in the fill dirt surrounding the pipe. *Id*. at 1387. The plaintiff filed suit, but was denied a jury instruction as to strict liability. *Id*. The court of appeals then reversed, because the jury should have been instructed as to strict liability. *Id*. The defendant petitioned the Ohio Supreme Court, which reversed and remanded for determination as to whether a *res ipsa loquitur* jury instruction should have been given. *Id*. On remand, the court of appeals affirmed their reversal, on the grounds of a lack of *res ipsa* jury instruction, and the record was subsequently certified back to the Ohio Supreme Court. *Id*. The *Jennings Buick* court, applying the *Hake* test, held that the doctrine of *res ipsa loquitur* was not applicable to the facts at bar as there was evidence that the damage to the plaintiff could have been the proximate cause of a factor other than the defendant's purported negligence. *Id*. at 1387, 1389. The *Hake* court noted that the plaintiff's witness even presented evidence that the break in the water main could have been caused by a myriad of other factors, including temperature changes, traffic vibrations, etc., and as "[t]here was evidence presented. . . from which reasonable men could conclude that it was more probable than not that the injury was the proximate result of a factor other than the negligence of the city." *Id*. at 1389.

Like in *Jennings Buick*, the hypothetical of a lead-poisoned child in a house with no evidence of lead paint, could present an equally likely proximate cause for the injury, in most circumstances. Logically, where the *res ipsa* presumption relies upon no evidence to support the defendant's negligence, any other null presumption would provide for just

as likely a result. For example, where a child resided in an apartment where there was no evidence of lead, and it was pled that there was a presumption that the injury was the result of the premises under exclusive control of the defendant, the defendant could rebut this presumption so long as there was evidence of the plaintiff being in any other building/place where there was no evidence of lead hazards. Once again logically speaking, the only circumstance where a *res ipsa* presumption could be supported where there was no evidence of lead on the subject premises would be where the minor plaintiff had never left the premises, or had only left the premises for *de minimis* periods of time.

It is not likely that courts will allow a presumption of negligence under the doctrine of *res ipsa loquitur* when there is no evidence of lead paint on the subject premises.