VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 12th day of February, 2016.

Arleatha M. Simms, Appellant,

against Record No. 150191
Circuit Court No. CL12-86

John T. Van Son, et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of Brunswick County.

Arleatha M. Simms appeals from the circuit court's dismissal of her personal injury action against John T. Van Son and his employer, American General Life and Accident Insurance Company.[1] After Simms presented her evidence to a jury, the circuit court granted the defendants' motion to strike, "ruling [Simms] was contributorily negligent as a matter of law and [her] negligence was a proximate cause of the accident." J.A. at 335. We disagree and reverse.

I.

Simms drove to the U.S. Post Office in Emporia, Virginia, on November 4, 2010. A horseshoe-shaped, one-way driveway wraps around the post office, and two entrances provide public access to the building. The front entrance faces west onto South Main Street and has steps leading down to a sidewalk that runs parallel to the road. The side entrance consists of a long wheelchair ramp running east-to-west along the north side of the building. Six customer parking spaces face the side entrance.

When Simms arrived at the post office, all six parking spaces were full. She pulled her car past the parking spaces and parked lawfully along the curb at the northwestern corner of the horseshoe driveway. Prior to exiting her vehicle, she looked in her rear view mirrors to make

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[1] The parties stipulated at trial that Van Son "was an employee of defendant American General Life and Accident Insurance Company and was acting in the scope of said employment at the time of the accident sued upon." J.A. at 174.

sure no cars were coming. She then exited her vehicle and proceeded to walk diagonally up the middle of the driveway toward the side entrance of the post office.[2] Simms was familiar with the parking lot and knew that vehicles might back out from the parking spaces.[3]

As she approached the parked cars, she looked and saw no cars with their lights on or their engines running. She did, however, notice Van Son sitting in his vehicle with his head facing downward. She testified Van Son's vehicle engine "was not on" and that his vehicle displayed no "brake lights" or "reverse lights." Id. at 268. She was "being careful and cautious to see whether or not cars were coming toward [her] and whether or not someone was backing out. [She] did not see anyone backing up." Id. at 238. After she had walked approximately three or four cars past Van Son's parking space, Simms was struck from behind by his car. She suffered injuries to her leg and her back, and an ambulance transported her from the accident scene to the hospital. She incurred various medical expenses and lost wages.

After Simms finished presenting her evidence to the jury, the defendants moved to strike on the grounds that Simms was contributorily negligent as a matter of law and that her negligence was a proximate cause of the accident. The defendants argued that the post office driveway constituted a "highway" under the language of Code § 46.2-100 because it was a "place used for purposes of vehicular travel . . . owned, leased, or controlled by the United States government."[4] Therefore, the defendants claimed that Simms was negligent and in violation of

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[2] At trial, there was conflicting evidence as to whether Simms was closer to the front entrance or the side entrance. If Simms had crossed the driveway at a 90-degree angle, she would have approached a sidewalk that led to the front entrance. The trial judge found that Simms was duty bound by statute to use the sidewalk leading to the front entrance because her parking space was "closer to the sidewalk than it [was] to the handicap ramp entrance." Id. at 313.

[3] Given the angle of the customer parking spaces on the north side of the horseshoe-shaped drive, vehicles must pull in front first and must exit by backing out.

[4] Code § 46.2-100 defines "highway" in part as

> the entire width between the boundary lines of every way or place open to the use of the public for purposes of vehicular travel in the Commonwealth, including the streets and alleys, and, *for law-enforcement purposes*, . . . (ii) the entire width between the boundary lines of every way or place used for purposes of vehicular travel on any property owned, leased, or controlled by the United States government and located in the Commonwealth.

Code §§ 46.2-923 and 46.2-928 when she walked in the middle of the "roadway."[5] The defendants argued that the statutory scheme required Simms to either use the sidewalk and the front entrance or walk to the extreme left of the driveway.

Simms opposed the defendants' motion, arguing that the case presented factual questions for the jury to decide. Her counsel argued that this was not a case involving a pedestrian who neglected to walk along the shoulder of a highway. "She's in a parking lot," he stated, "there's only so much area where she can walk. And she used ordinary care when she walked past Mr. Van Son's vehicle." J.A. at 309. Counsel argued that "[t]he question of whether that ordinary care is sufficient or whether [it] makes her guilty of contributory negligence . . . [is] an issue for the jury and it's also an issue of proximate cause." Id. at 309-10.

The trial court rejected the arguments made by Simms and granted the motion to strike, thereby taking the case away from the jury. The trial court ruled that by walking in the middle of the post office driveway, Simms was negligent as a matter of law. The trial court further held that Simms was the proximate cause of her own injuries because she had the same opportunity to avoid the accident as Van Son. Simms objected to the trial court's rulings, and we granted her petition for appeal.

(Emphasis added.) On appeal, Simms does not contest the application of Code § 46.2-100 to the post office parking lot. See Appellant's Br. at 18 ("The parking lot is only a highway by statutory definition."); id. at 13-14; Oral Argument Audio at 5:54 to 6:07, 7:22 to 9:04.

We do not permit litigants "to define Virginia law by their concessions." Daily Press, Inc. v. Commonwealth, 285 Va. 447, 454 n.6, 739 S.E.2d 636, 640 n.6 (2013). This principle must be distinguished, however, from an appellant's concession of law that qualifies either as a waiver for purposes of Rule 5:25, governing arguments not raised below, or as a waiver for purposes of Rules 5:17(c) and 5:27, applicable to arguments not properly raised on appeal. In either scenario, we may accept arguendo the concession — not as a basis for deciding the contested issue of law, but as a basis for not deciding it. Here, we need not decide the applicability of Code § 46.2-100 under the particular facts in this case.

[5] Based on the uncontested assumption that Code § 46.2-100 applies to this case, the defendants argued at trial that, under Code §§ 46.2-923 and 46.2-928, Simms acted negligently in walking up the middle of the driveway. On appeal, Simms does not contest the presumed application of these statutes to this case. See Oral Argument Audio at 4:44 to 6:07. Here again, we need not decide whether these statutes apply to the unique facts in this case. Supra note 4.

II.

On appeal, Simms argues that the trial court erred when it granted the defendants' motion to strike because contributory negligence and proximate cause are ordinarily questions of fact left to the jury, and in this case, reasonable minds could have differed. Simms argues that the record contains sufficient evidence upon which a reasonable jury could conclude that she acted prudently. Even if her conduct constituted negligence, Simms continues, a reasonable jury could have determined that her conduct was not the proximate cause of the accident. We agree with both assertions.

When reviewing a trial court's decision to strike the evidence, we view "the evidence in the light most favorable to the plaintiff, 'giving the plaintiff the benefit of all inferences which a jury might fairly draw from the evidence.'" Brown v. Hoffman, 275 Va. 447, 449, 657 S.E.2d 150, 151 (2008) (brackets omitted) (quoting West v. Critzer, 238 Va. 356, 357, 383 S.E.2d 726, 727 (1989)). "[I]f several inferences may be drawn, though differing in degree and probability, we will adopt those most favorable to the plaintiff unless they are strained and forced or contrary to reason." West, 238 Va. at 357, 383 S.E.2d at 727.

"Contributory negligence is an affirmative defense that must be proved according to an objective standard whether the plaintiff failed to act as a reasonable person would have acted for his own safety under the circumstances. The essential concept of contributory negligence is carelessness." Jenkins v. Pyles, 269 Va. 383, 388, 611 S.E.2d 404, 407 (2005) (citations omitted). Contributory negligence "is ordinarily a question of fact to be decided by the fact finder." Id. at 389, 611 S.E.2d at 407; see also Richmond Greyhound Lines, Inc. v. Brown, 203 Va. 950, 952, 128 S.E.2d 267, 269 (1962) ("Negligence, contributory negligence, and proximate cause are ordinarily questions for the jury."). "[O]nly when reasonable minds could not differ about what conclusion could be drawn from the evidence" do the issues of contributory negligence and proximate cause become questions "of law for the circuit court to decide." Jenkins, 269 Va. at 389, 611 S.E.2d at 407.

Viewing the evidence in the light most favorable to Simms, a rational jury could have found that her choice to walk across the driveway toward the side entrance of the post office was reasonable under the circumstances and that she lacked the signature carelessness that characterizes contributory negligence. Although Simms admitted that she knew vehicles might

back out of their parking spots, she testified that she was "being careful and cautious" and never saw Van Son's reverse lights or heard his engine. J.A. at 328. Nor did she see his vehicle move at any time before she was struck.

In Lubowiecki v. Donnell, 235 Va. 131, 366 S.E.2d 90 (1988), we held that the trial court erred in granting the defendant's motion to strike instead of permitting jurors to decide questions of contributory negligence and proximate cause. Despite the "greater degree of vigilance" that is required of a pedestrian who crosses a street between intersections, we determined that the jurors in Lubowiecki could have found that the plaintiff "exercised such vigilance as a reasonably prudent person would have exercised under the circumstances." Id. at 134, 366 S.E.2d at 92. Here, as in Lubowiecki, the unique factual circumstances of the case play a dispositive role in determining whether a trial court should grant a motion to strike and pretermit a jury trial.

We acknowledge Van Son's citation to several cases in which pedestrians were barred from recovering against defendant drivers. These cases, however, all involve plaintiffs who were struck while jaywalking between intersections on busy streets. See, e.g., Carson v. LeBlanc, 245 Va. 135, 141-42, 427 S.E.2d 189, 193 (1993) (affirming a trial court's dismissal of a plaintiff's action when eyewitness testimony indicated it was impossible for the plaintiff not to have seen the defendant's car); Brown v. Arthur, 202 Va. 624, 627, 630, 119 S.E.2d 315, 317, 319 (1961) (upholding a defense verdict when the plaintiff saw the defendant's vehicle yet still "'rushed' across the street"); Hodgson v. McCall, 197 Va. 52, 55, 87 S.E.2d 791, 793-94 (1955) (upholding a trial court's decision to strike the evidence when plaintiff crossed a major thoroughfare on a dark, rainy night without looking for oncoming traffic). In contrast, Simms never saw Van Son's car reversing, testified she was "being cautious and careful," J.A. at 238, and crossed a uniquely configured parking lot driveway rather than a typical busy street.

We also conclude that, based on the evidence at trial, a jury could have reasonably found that any negligence on the part of Simms was a remote, rather than a proximate, cause of the accident. Even in the context of claims of negligence per se, "there must be a direct causal connection . . . between the prohibited conduct and the injury; and whether such causal connection does exist is usually a question for the jury." Speer v. Kellam, 204 Va. 893, 897, 134 S.E.2d 300, 304 (1964) (citation omitted).

In this case, Simms testified that she was approximately three to four cars away from Van Son's parking space at the time his vehicle struck her from behind. See J.A. at 238. Van Son estimated that he had backed up "[a]pproximately 15 feet, maybe 20" at the time of impact. Id. at 173. The jurors could reasonably infer from these facts that Simms was limited from seeing Van Son's approaching vehicle by her need to focus her attention ahead as she walked to the side door of the post office — a path that would take her directly into potential oncoming traffic. The same cannot be said of Van Son, whose backward gaze as he operated his vehicle in reverse should have been entirely in the direction of Simms. Under these circumstances, a reasonable jury could find that any negligence on the part of Simms was a mere remote, rather than a proximate, cause of the accident.

III.

For these reasons, the decision of the circuit court is reversed, and this case is remanded for a new trial.

Justice Mims took no part in the consideration of this case.

This order shall be certified to the said circuit court.

A Copy,

Teste: Patricia L Harrington

Clerk