VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 4th *day of* April, 2014.

Scott M. Turner, Appellant,

against Record No. 131181

Circuit Court No. CL12667

Charles E. Perryman, Jr., Appellee.

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

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is error in the judgment of the circuit court.

Scott M. Turner filed a complaint against Charles E. Perryman, Jr., seeking damages for personal injuries that he sustained as a proximate result of an automobile accident allegedly caused by Perryman's negligence. The circuit court entered final judgment on a jury verdict in favor of Perryman. On appeal, Turner asserts that the circuit court erred by instructing the jury on the doctrine of contributory negligence.

"The principles of contributory negligence are familiar and well settled. '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.'" Rascher v. Friend, 279 Va. 370, 375, 689 S.E.2d 661, 665 (2010) (quoting Jenkins v. Pyles, 269 Va. 383, 388, 611 S.E.2d 404, 407 (2005). "[J]ust as a plaintiff is required to establish a prima facie case of negligence, a defendant who relies upon the defense of contributory negligence must establish a prima facie case of the plaintiff's

contributory negligence." Sawyer v. Comerci, 264 Va. 68, 75, 563 S.E.2d 748, 753 (2002). To do so, a defendant must show that the plaintiff was negligent and that such negligence was a proximate cause of the accident. Rascher, 279 Va. at 375, 689 S.E.2d at 664-65.

Generally, whether a plaintiff is guilty of contributory negligence is a question of fact to be decided by the fact finder. Ponirakis v. Choi, 262 Va. 119, 125, 546 S.E.2d 707, 711 (2001). However, before a contributory negligence instruction may be submitted to a jury, a defendant asserting a contributory negligence defense must adduce "more than a scintilla of evidence to establish each of the elements of contributory negligence." Sawyer, 264 Va. at 75, 563 S.E.2d at 753. If a defendant presents only "a mere scintilla of evidence of the plaintiff's purported contributory negligence," that defendant is not entitled to a jury instruction on contributory negligence. Id. In other words, "[t]he prima facie case is demonstrated when there is more than a scintilla of evidence produced on each of the elements of contributory negligence." Rose v. Jacques, 268 Va. 137, 150, 597 S.E.2d 64, 72 (2004).

Applying these principles, we view the evidence introduced at trial in the light most favorable to Perryman as the proponent of the instructions on contributory negigence. Hancock-Underwood v. Knight, 277 Va. 127, 130, 670 S.E.2d 720, 722 (2009). The evidence established that Perryman was travelling westbound in a sport-utility vehicle (SUV) on Ashland Road in Hanover County, a two-lane state road, approaching its intersection with Greenwood Road.

Turner was riding a motorcycle eastbound on Ashland Road. The weather was clear and sunny.

Intending to turn left onto Greenwood Road, Perryman activated his left turn signal and stopped or "slowed to a crawl." Perryman testified that as he began his turn, he did not see Turner's motorcycle approaching the intersection on Ashland Road. Additional evidence in the record established that a westbound driver on Ashland Road at this intersection would have a limited view of oncoming traffic because the intersection is at the crest of a hill.

Turner was operating his motorcycle at 40 miles per hour and was approximately 50 yards away when he observed Perryman's SUV at the intersection. Turner was approximately 30 yards away when Perryman began his turn across Turner's lane of travel. Turner testified that he determined that he could not avoid a collision by swerving around the SUV. Instead, he applied the brakes of his motorcycle in an effort to avoid a collision or at least to lessen the force of an impact with the SUV. Turner's motorcycle struck the right rear side of Perryman's SUV.

To support his assertion that Turner was guilty of contributory negligence, Perryman had the burden to produce evidence to demonstrate at what point a reasonably prudent person in Turner's circumstances exercising ordinary care should have realized that Perryman was going to continue his turn across Turner's lane of travel and whether at that point Turner could have taken action to avoid the collision with Perryman's SUV. We hold that the evidence fails to provide more than a scintilla of proof

that Turner's alleged negligence was a proximate cause of the collision.

There is no evidence to dispute that a reasonably prudent person under the circumstances of this case would have had only just an instant to react to the presence of a SUV turning across his lane of travel. At that point the only possible options were to attempt to avoid a collision by braking the motorcycle or attempting to swerve out of the path of the turning SUV. There is no evidence from which the jury could have reasonably concluded that had Turner attempted to swerve out of the path of the SUV the collision would have been avoided. Thus, Perryman failed to establish that Turner's decision to apply the brakes of his motorcycle, rather than to swerve, was a proximate cause of the collision, one of the essential elements of a contributory negligence defense.

For these reasons, we conclude that the circuit court erred by instructing the jury on contributory negligence. We therefore reverse the circuit court's judgment and remand this case for a new trial.

This order shall be certified to the said circuit court.

JUSTICE McCLANAHAN, with whom JUSTICE POWELL joins, dissenting.

I disagree that the circuit court erred in instructing the jury on contributory negligence. Relying on Turner's account of the accident and subjective belief that he could not avoid the collision with Perryman's vehicle, the majority fails to view the

facts in the light most favorable to Perryman, see Rose v. Jaques, 268 Va. 137, 150, 597 S.E.2d 64, 71 (2004), and acknowledge conflicts in the evidence bearing on Turner's negligence that required resolution by the jury, see Brown v. Wilson, 211 Va. 35, 36, 175 S.E.2d 412, 413 (1970).

With regard to how the accident occurred, the parties gave contradictory accounts. Turner testified that he first observed Perryman's vehicle travelling west on Ashland Road when Perryman was approximately 50 yards away, and that Perryman turned left in front of Turner when he was only 30 yards away. In contrast, however, Perryman testified that before he made his left turn onto Greenwood Road, there were no vehicles in Turner's eastbound lane, and Perryman expressly denied making his left turn in front of Turner.[1] The jury was free to reject Turner's account of the accident, and in particular that he observed Perryman turn in front of him at 30 yards away. Brown, 211 Va. at 36, 175 S.E.2d at 413 (given conflicting accounts of the accident, "it was for the jury to accept which version of the accident it deemed credible" thereby presenting "a typical problem for resolution by the trier of fact"). Thus, from Perryman's testimony that no other vehicles were approaching in Turner's lane when Perryman began his turn, the

[1] Apparently accepting Turner's testimony that Perryman turned 30 yards in front of him, the majority states that Perryman testified that "he did not see Turner's motorcycle approaching the intersection on Ashland Road" before he began his turn. In fact, Perryman testified there was "nothing in front of [him] or behind [him]." Whether Turner's motorcycle was approaching the intersection only 30 yards away when Perryman began his turn was a factual dispute for resolution by the jury.

jury reasonably could have concluded that Turner failed to keep a proper lookout and see Perryman's turning vehicle once the intersection came into Turner's view.

In addition to the conflicting accounts of the accident, a jury issue was presented as to the reasonableness of Turner's speed given the limited visibility for Turner as he approached the intersection.[2] Although there was no evidence of the posted speed limit, "[t]he posted speed limit does not determine whether a particular speed is reasonable under the circumstances." West v. Critzer, 238 Va. 356, 359, 383 S.E.2d 726, 728 (1989); see also Faison v. Hudson, 243 Va. 397, 407, 417 S.E.2d 305, 311 (1992) (while there was no evidence driver was exceeding posted speed limit, question of whether driver was approaching intersection at a reasonable speed was properly submitted to jury); Goodwin v. Gilman, 208 Va. 422, 431, 157 S.E.2d 912, 919 (1967) (although there was no evidence driver was exceeding posted speed limit, a jury issue was created as to whether speed was reasonable considering view obstructed by hillcrest). Accordingly, given the limited sight distance upon Turner's approach to the intersection, the jury was entitled to conclude that Turner was operating his motorcycle at an unsafe speed.

Moreover, I disagree with the majority that there was no evidence Turner could have avoided the collision by swerving around

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[2] Deputy Parrish, who investigated the accident, testified that visibility is poor at the intersection and the jury was shown photographs of the intersection depicting the sight distance for each driver.

Perryman's vehicle.[3] The undisputed evidence established that Turner hit the right rear corner of Perryman's vehicle at the point when Perryman's vehicle had travelled half the distance of Turner's lane and was situated perpendicular to Turner's motorcycle. Both parties testified that there was no other traffic on Ashland Road prior to the accident, and Perryman testified that he was blocking only half of Turner's lane. Thus, given the testimony from Deputy Parrish that each lane on Ashland Road was wide enough to accommodate a tractor trailer, certainly reasonable minds could differ about whether Turner could have maintained control of his motorcycle and swerved around the corner of Perryman's vehicle to avoid the accident.[4] See, e.g., Jenkins v. Pyles, 269 Va. 383, 389, 611 S.E.2d 404, 407 (2005) (The issue of whether a plaintiff is guilty of contributory negligence becomes one of law "only when reasonable minds could not differ about what conclusion could be drawn from the evidence.").

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[3] Summarily concluding that Turner "would have had only just an instant to react to the presence of a SUV turning across his lane of travel," the majority presents Turner's version of the accident as though the conflicts were resolved in his favor.

[4] Discounting this evidence, the majority relies on Turner's claim that all he thought he could do was "hit the brakes and brace[] for impact." However, whether Turner's subjective belief was reasonable was for the jury to determine. See, e.g., Harrah v. Washington, 252 Va. 285, 292-93, 477 S.E.2d 281, 286 (1996) (it was for the jury to say whether defendant's belief that a truck was blocking passage in the left lane and that bumper-to-bumper traffic in the right lane prevented him from moving into that lane was in fact reasonable).

In sum, there was more than a scintilla of evidence to support any one of Perryman's theories of Turner's negligence, articulated as follows to the jury:

> [H]ow does one using ordinary care, operating a motor vehicle with the same duties to keep a proper lookout, the same duties to keep their vehicle under the control, and the same duties to operate their vehicle at a reasonable speed under the circumstances, how do you pop over the hill with a lane and a half wide open and no traffic there and hit a defendant in the very right rear and right rear bumper and come in here and say that you're not even one percent at fault in causing this accident?

Because resolution of these issues was for the jury, I would hold the trial court did not err in instructing the jury on contributory negligence and would affirm its judgment.

A Copy,

Teste: Patricia L Harrington

Clerk