
IN THE
Supreme Court of Virginia

RECORD NO. 090193

WILLIAM P. RASCHER,

Appellant,

v.

CATHLEEN FRIEND,

Appellee.

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
ASSIGNMENTS OF ERROR.....	2
I. The trial court erred by granting Friend’s motion to strike Rascher’s case on the ground of contributory negligence because the evidence did not establish that he was negligent as a matter of law	2
II. The trial court erred by granting Friend’s motion to strike Rascher’s case on the ground of contributory negligence because, even if he was negligent, the evidence did not establish that his negligence proximately caused the accident.....	2
STATEMENT OF THE CASE	2
QUESTIONS PRESENTED.....	5
I. Did the trial court err by granting Friend’s motion to strike Rascher’s case on the ground of contributory negligence because the evidence did not establish that he had breached his duty to keep a proper lookout as a matter of law? (Assignment of Error I.).....	5
II. Did the trial court err by granting Friend’s motion to strike Rascher’s case on the ground of contributory negligence because, even if he had breached his duty to keep a proper lookout, the evidence did not establish that this proximately caused his accident as a matter of law? (Assignment of Error II.).....	5
STATEMENT OF FACTS	6
PRINCIPLES OF LAW, ARGUMENTS, AND AUTHORITIES	11
I. Standard of Review	11
II. The trial court erred by ruling that Rascher was contributorily negligent as a matter of law.....	13

A.	Rascher had a duty to keep a proper lookout	13
B.	A jury could reasonably conclude that Rascher met his duty to keep a proper lookout, because he saw Friend stopped in the oncoming lane and reacted accordingly.....	14
C.	This Court's opinions illustrate that Rascher's purported negligence presented a question of fact for the jury.....	16
i.	<u>Gammon v. Hyde</u> involved materially identical facts, and this Court ruled that they presented a jury question as to negligence	16
ii.	<u>Phillips v. Stewart</u> further shows that Rascher, who had the right of way, was justified in glancing away from Friend's stopped car.....	18
iii.	<u>Branson v. Wise</u> , upon which the trial court relied, does not justify the result below	20
D.	Granting Friend's motion to strike required the trial court to resolve disputed questions of fact against Rascher, in derogation of the legal standard.....	23
III.	The trial court further erred by ruling as a matter of law that Rascher's glance at his speedometer was the proximate cause of the crash	25
	CONCLUSION.....	29
	RULE 5:26(d) CERTIFICATE	31

TABLE OF AUTHORITIES

Cases

<i>Austin v. Shoney's, Inc.</i> , 254 Va. 134, 486 S.E.2d 285 (1997).....	11
<i>Branson v. Wise</i> , 206 Va. 139, 142 S.E.2d 582 (1965).....	15, 20, 21, 22
<i>Brown v. Koulizakis</i> , 229 Va. 524, 331 S.E.2d 440 (1985).....	12
<i>Burroughs v. Keffer</i> , 272 Va. 162, 630 S.E.2d 297 (2006).....	13
<i>Butler v. Yates</i> , 222 Va. 550, 281 S.E.2d 905 (1981).....	15, 22, 24
<i>Citizen's Rapid Transit Co. v. O'Hara</i> , 203 Va. 979, 128 S.E.2d 270 (1962).....	14
<i>Deskins v. T.H. Nichols Line Contractor, Inc.</i> , 234 Va. 185, 361 S.E.2d 125 (1987).....	24
<i>Estate of Moses v. Southwestern Va. Transit Mgmt. Co.</i> , 273 Va. 672, 643 S.E.2d 156 (2007).....	13, 25, 29
<i>Gammon v. Hyde</i> , 199 Va. 918, 103 S.E.2d 221 (1958).....	16, 17, 18
<i>Green v. Ingram</i> , 269 Va. 281, 608 S.E.2d 917 (2005).....	12
<i>Jenkins v. Pyles</i> , 269 Va. 383, 611 S.E.2d 404 (2005).....	13, 14
<i>Karim v. Grover</i> , 235 Va. 550, 369 S.E.2d 185 (1988).....	passim

Perdieu v. Blackstone Family Practice Ctr., Inc.,
264 Va. 408, 568 S.E.2d 703 (2002)..... 12

Phillips v. Stewart,
207 Va. 214, 148 S.E.2d 784 (1966)..... 18, 19, 20

Sayre v. Shields,
209 Va. 409, 164 S.E.2d 665 (1968)..... 14, 15, 23

Statutes

Va. Code Ann. § 46.2-800 (2009) 13

Va. Code Ann. § 46.2-825 (2009) 20

Va. Code Ann. § 46.2-880 (2009) 25

Rules

Rule 5:26(d)..... 31

IN THE SUPREME COURT OF VIRGINIA

William P. Rascher)
)
 Appellant,)
)
 v.) Record No. 090193
)
 Cathleen Friend,)
)
 Appellee.)

Opening Brief of Appellant

William Rascher was riding his bicycle down a two-lane road when he saw Cathleen Friend’s minivan stopped in the oncoming lane, waiting to make a left turn across his lane of travel. Rascher stared at Friend. Comfortable that she had seen him and knowing that he had the right of way, Rascher glanced down at his speedometer. He had no legal duty to watch Friend’s car continuously, and he was entitled to assume that she would obey the law and yield the right of way.

When Rascher looked up, Friend had cut in front of him. He swerved left, but there was no time. He smashed into her minivan. Rascher went flying over his handlebars and landed on his back in the street. The crash happened in his lane of travel. Friend was

charged with, and later pleaded guilty to, failing to yield the right of way.

Rascher sued Friend. At the close of all the evidence, the trial court struck Rascher's case on the ground of contributory negligence—based solely on the fact that he had looked at his speedometer. It ruled as a matter of law that Rascher had failed to keep a proper lookout, causing the accident. But on this record, negligence and proximate causation presented questions of fact for the jury. By resolving each as a matter of law, the trial court committed two distinct errors, each of which provides an independent ground for reversal.

Assignments of Error

- I. The trial court erred by granting Friend's motion to strike Rascher's case on the ground of contributory negligence because the evidence did not establish that he was negligent as a matter of law.
- II. The trial court erred by granting Friend's motion to strike Rascher's case on the ground of contributory negligence because, even if he was negligent, the evidence did not establish that his negligence proximately caused the accident.

Statement of the Case

Rascher sued Friend for negligence in the Circuit Court for Prince William County, seeking \$250,000 in damages. (J.A. 2-3.) Friend

answered, denying any liability. (J.A. 5-8.) The parties conducted discovery, and the case was set for trial on September 8-9, 2008.

Before trial, Rascher filed several motions in limine, including a motion to exclude argument or evidence that he was contributorily negligent. (J.A. 11-22.) Friend contested the motion. (J.A. 23-28.) The trial court, the Honorable Mary Grace O'Brien, presiding, heard argument on Rascher's motion and denied it. (J.A. 49-57.)

Rascher brought his case to trial before a different judge, the Honorable Herman A. Whisenant, Jr. At the close of his case, Rascher moved to strike the defense of contributory negligence. (J.A. 141-42.) The court denied his motion. (J.A. 142-43.) Friend then moved to strike Rascher's evidence on the ground of contributory negligence. (J.A. 143-48.) The court took her motion under advisement, and the trial proceeded. (J.A. 149-53.)

At the close of Friend's case, the parties renewed their cross-motions to strike. (J.A. 157-66.) The court took both motions under advisement. It indicated that it would read the pertinent cases overnight and "rule first thing tomorrow morning." (J.A. 166-70.)

When the court reconvened in the morning, it granted Friend's motion to strike. (J.A. 173.) The trial court stated that it had

considered “the plaintiff’s evidence only.” (J.A. 173-74; *see also id.* at 181 (“[A]gain I emphasize it’s the plaintiff’s facts, not the defendant’s—so certainly there’s nothing for a jury to have to come in and weigh....”) But it immediately noted that Rascher had testified that he’d “stare[d] down” the defendant. The trial court expressed confusion as to what that could mean, “because the evidence is—uncontradicted in this case—that the defendant never saw the plaintiff.” (J.A. 174.) In light of this testimony from the defendant, the court took “stare down” to mean that Rascher “simply looked at [Friend] in the van” from about fifty feet away. (J.A. 174.) The court recited the facts as it understood them:

So what we have is the plaintiff—riding by his own testimony doing a hard ride, trying to do 20 miles an hour and by his testimony doing 19 miles an hour with this hard ride, going down the road, when about 50 feet away—by his testimony he sees this mini van—it’s stopped, turning left—assuming it’s turning left—and that’s his testimony.

After he looks down at his speedometer to see what his speed is, he looks up and this mini van is three to five feet in front of him....He swerves in that three-to-five foot span...doing 19 miles an hour on a bicycle and he strikes the right rear quarter panel of the van.

(J.A. 175-76; *see also id.* at 174-75.)

Finding that there was “no question” that Friend was negligent, the trial court nonetheless ruled that Rascher was contributorily negligent for failing to keep a proper lookout, and that had he done so he might have avoided the accident. (J.A. 176-77, 179-81.) The court entered its final order on October 24, 2008. (J.A. 32-35.)

Rascher timely noted his appeal. (J.A. 37-38.) Due to an unexplained technical difficulty, about ten minutes of Friend’s testimony was not transcribed. The parties submitted a Joint Written Statement Pursuant to Rule 5:11(c) covering the missing testimony. (J.A. 40-45.)

Questions Presented

- I. Did the trial court err by granting Friend’s motion to strike Rascher’s case on the ground of contributory negligence because the evidence did not establish that he had breached his duty to keep a proper lookout as a matter of law? (Assignment of Error I.)
- II. Did the trial court err by granting Friend’s motion to strike Rascher’s case on the ground of contributory negligence because, even if he had breached his duty to keep a proper lookout, the evidence did not establish that this proximately caused his accident as a matter of law? (Assignment of Error II.)

Statement of Facts

Because this case was decided on a motion to strike, the facts are recited in the light most favorable to the plaintiff, Rascher.

September 2, 2006, dawned gray and rainy. (*See, e.g.*, J.A. 66.) When the rain stopped in late morning, Rascher, an avid cyclist, left his house for a training ride. (J.A. 66-67, 77, 90-91.) He planned to do a series of intervals up and down Antietam Road, riding easily down the road for about 1-1.5 miles in one direction, then turning around and pedaling hard back up the other side of the road. (J.A. 92-94.) For the relatively hard portions of his ride, he hoped to maintain a speed of twenty miles per hour, which he described as “challenging” but not “extremely difficult.” (J.A. 93.) Before the accident, Rascher was training for a 100-mile ride, or “century,” with the goal of maintaining that pace for the entire ride. (J.A. 93.)

Rascher wore a red cycling jersey, which was introduced into evidence as Exhibit 1, and a helmet. (J.A. 67-69, 92, 120.) His bicycle was a white “road bike” with a computerized speedometer mounted on the center of its handlebars. (J.A. 69, 77-78, 102, 118-19.)

Although it was no longer raining when Rascher left his house, the roads were still wet, and it may have been misting. (J.A. 77, 82, 91, 117.) The sky was overcast. (J.A. 118.)

Antietam Road has two lanes running in opposite directions. (J.A. 41.) The speed limit on the relevant section of the road was twenty-five miles per hour.¹ (J.A. 93.) Rascher was familiar with his training course, having ridden Antietam Road more than one hundred times without incident. (J.A. 89-90.) He'd also driven through the area frequently, and lived only two miles away. (J.A. 94-95.)

At the time of the crash, Rascher had ridden a few miles through his neighborhood, and had pedaled up and down Antietam Road several times. (J.A. 92-94.) He was heading back up the road for one of his relatively "hard" intervals, approaching Antietam Elementary School on his right. (J.A. 96, 119.) The school's bus loop intersected Rascher's lane of travel. (See J.A. 97, 121.) The portion of Antietam Road that Rascher was traveling had a slight incline. (J.A. 120.)

A few hundred yards before the school, a Ford Mustang pulled out in front of Rascher, "well ahead" of him. (J.A. 96.)

¹ *But see id.* at 83 (investigating police officer's testimony that the speed limit was forty-five miles per hour).

As he approached the school, Rascher saw Friend's minivan about fifty feet away, stopped in the oncoming lane. (J.A. 96-97, 121.) She appeared to be waiting to make a left turn across Rascher's lane and into the school's bus loop. (J.A. 96-97.) Friend testified that she came to a complete stop, and she believes that she activated her left turn signal. (J.A. 42.)

The Mustang passed Friend's minivan without incident. (J.A. 42, 97.) Rascher "stared" at Friend to confirm that she had stopped and seen him. (J.A. 97, 100.) He saw her in the minivan. (J.A. 99.) Nothing stood between Rascher and Friend to obstruct her view of him. (J.A. 99.)

Rascher continued to ride, "very confident" that Friend was stopped and had seen him. (J.A. 97.) He explained, "That's always a big thing. Not so much that you stop, but just to get confirmation that they see me...." (J.A. 97.) At no point did Friend indicate in any way that she would make a left turn in front of Rascher. (J.A. 101.)

Before the collision, Rascher was looking forward, at the Mustang, and at Friend in her minivan. (J.A. 101.) He did not change his speed or direction because he had the right of way, and because Friend's

minivan was stationary. He assumed that she would obey the law and “didn’t think anything of it.” (J.A. 127-28.)

Comfortable that Friend was aware of his presence, Rascher glanced down at his speedometer for “[a]bout a half second to a second” and saw that he was traveling at nineteen miles per hour. (J.A. 97, 102.) This information was important to him for two reasons: first, he was trying to maintain a twenty-mile-per-hour pace for his training ride; and second, he knew that he was capable of exceeding the posted speed limit on his bicycle. (J.A. 103.) The specific reason why he checked his speedometer was to maintain his training pace. (J.A. 103.)

When Rascher looked up from his speedometer, Friend’s minivan was right in front of him. (J.A. 97, 103.) She was less than five feet away, and almost through her turn into the bus loop. (J.A. 103, 122-23.)

Rascher swerved to his left to avoid Friend, but there was no time. He smashed into Friend’s minivan. Rascher flew over his handlebars. He landed on his back in the middle of the street. (J.A. 97, 103-04.)

The crash occurred in Rascher’s lane of travel. (J.A. 104.) Friend testified that, at the time of the collision, she was traveling about five

miles per hour, and that some portion of her minivan was in the bus loop. (J.A. 43.) She continued her turn, pulled into the school, and stopped. (J.A. 104.)

The collision dented the rear quarter panel on the passenger side of Friend's minivan. (J.A. 70-71, 82-83, 43.) Rascher's bicycle was also damaged, its handlebars wrenched sideways. (J.A. 71.)

Rascher himself was "obviously injured," with cuts on his hands and thighs. (J.A. 70.) He testified that Friend told him at the scene that she hadn't seen him, and that she accepted responsibility for the collision. (J.A. 104-105.) At trial, Friend conceded that she hadn't seen Rascher before the crash. (J.A. 44.)

A police officer, David Bishop, was called to investigate. (J.A. 79-80.) As a result of his investigation, Officer Bishop charged Friend with violating Code § 46.2-825 by failing to yield the right of way. (J.A. 81-82, 154-55; *see also id.* at 2, 57-62.) Friend later pleaded guilty to that charge, and "submitted [her] plea" in the proceedings below. (J.A. 81-82, 154-55.)

The crash left Rascher with injuries to his shoulder, thigh, and wrist. He saw an orthopedist and underwent arthroscopic surgery on his wrist in December of 2006. (J.A. 72-73, 84-85, 106-11, 129-39.)

As a result of the injuries he suffered, Rascher incurred medical expenses of \$15,796. (J.A. 116.) He continues to have soreness in his wrist, and he has a ten percent permanent physical impairment of his right upper extremity. (J.A. 74-76, 112-15, 140.)

Principles of Law, Arguments, and Authorities

I. Standard of Review

When reviewing a motion to strike at the close of the plaintiff's evidence, a trial court must accept as true all evidence favorable to the plaintiff, as well as any reasonable inference that a jury might draw from that evidence. *Austin v. Shoney's, Inc.*, 254 Va. 134, 138, 486 S.E.2d 285, 287 (1997) (5-2 decision). "The trial court is not to judge the weight and credibility of the evidence...." *Id.* (citing various cases). Nor may it reject any inference favorable to the plaintiff unless "it would defy logic and common sense." *Id.* When a motion to strike is renewed at the end of all of the evidence, the trial court may also consider the defendant's evidence—but it must still view the evidence and all its reasonable inferences in the light most favorable to the plaintiff. *Id.* (citations omitted).

This Court has warned trial courts that they should overrule a motion to strike "in every case" when there is any doubt. *Karim v.*

Grover, 235 Va. 550, 553, 369 S.E.2d 185, 187 (1988) (quoting *Brown v. Koulizakis*, 229 Va. 524, 531, 331 S.E.2d 440, 445 (1985)).

The use of a motion to strike should be confined to those cases in which it is “conclusively apparent that the plaintiff has proved no cause of action against the defendant.” *Brown*, 229 Va. at 531, 331 S.E.2d at 445 (quotation omitted).²

On appeal, this Court will review a trial court’s judgment striking the evidence considering the facts in the light most favorable to the plaintiff, and drawing all reasonable inferences in his favor. *Green v. Ingram*, 269 Va. 281, 290, 608 S.E.2d 917, 922 (2005) (4-3 decision) (citing *Perdieu v. Blackstone Family Practice Ctr., Inc.*, 264 Va. 408, 411, 568 S.E.2d 703, 704 (2002)).

² Both fairness and judicial economy favor this rule. If the trial court should overrule a motion to strike and submit the case to the jury and the jury should return a plaintiff’s verdict, the trial court could always set that verdict aside later. If this Court should disagree on appeal, it would be able to enter final judgment in favor of the plaintiff and avoid a retrial, because the record would include the jury’s verdict. *Brown*, 229 Va. at 531, 331 S.E.2d at 445. If, however, the trial court should grant the defendant’s motion to strike instead of submitting the case to the jury, the record would not include the jury’s verdict. In this case, even when a plaintiff should succeed on appeal, he or she would suffer the delay, expense, and risk of a new trial.

II. The trial court erred by ruling that Rascher was contributorily negligent as a matter of law.

A. Rascher had a duty to keep a proper lookout.

Settled principles control the determination of whether Rascher was contributorily negligent, and they show that the trial court erred in granting Friend's motion to strike. "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." *Estate of Moses v. Southwestern Va. Transit Mgmt. Co.*, 273 Va. 672, 678, 643 S.E.2d 156, 159 (2007) (quoting *Jenkins v. Pyles*, 269 Va. 383, 388, 611 S.E.2d 404, 407 (2005).)

As a cyclist, Rascher had the same rights and duties as a motorist. VA. CODE ANN. § 46.2-800 (2009). These included the duty to keep a proper lookout, which is the duty to look with reasonable care, to see what a reasonable person would have seen, and to react as a reasonable person would have reacted under the circumstances. *See Burroughs v. Keffer*, 272 Va. 162, 168, 630 S.E.2d 297, 301 (2006). Whether a plaintiff is guilty of contributory negligence for failing to keep a proper lookout is typically a question of fact for the jury. It becomes a question of law for the circuit court only where

reasonable minds could not differ. *Id.* at 167, 630 S.E.2d at 300-01 (quoting *Jenkins*, 269 Va. at 388-89, 611 S.E.2d at 407).

B. A jury could reasonably conclude that Rascher met his duty to keep a proper lookout, because he saw Friend stopped in the oncoming lane and reacted accordingly.

On the evidence presented, a juror could reasonably conclude that Rascher met his duty to keep a proper lookout.

Simply put, Rascher looked. He saw Friend's car in the opposite lane, stopped and preparing to make a turn. (J.A. 96-97.) In fact, he "stared" at her. (J.A. 97.) Further, Rascher had the right of way. While this did not absolve him of the duty to keep a proper lookout, he was fully entitled to assume that Friend would obey the law. *See Sayre v. Shields*, 209 Va. 409, 410-11, 164 S.E.2d 665, 666 (1968) (citations omitted) (stating that having the right of way does not relieve a driver from the duty to keep a lookout and otherwise exercise ordinary care); *Citizen's Rapid Transit Co. v. O'Hara*, 203 Va. 979, 982, 128 S.E.2d 270, 273 (1962) (citations omitted) (finding that the plaintiff "had a right to presume that the [other driver] would obey the law...unless it was, or should have been, reasonably apparent that he was not doing so.").

Rascher had no legal obligation to constantly monitor Friend's stationary minivan. As the Court noted in *Butler v. Yates*, a plaintiff driver privileged with the right of way has "no obligation to continuously watch" oncoming lanes or an intersecting road "for vehicles which might dart across...into his lane of travel." 222 Va. 550, 554, 281 S.E.2d 905, 907 (1981).

Having stared at Friend, Rascher was confident that she had seen him. He knew that he had the right of way, and that she had stopped her minivan in the oncoming lane. Under these circumstances, Rascher glanced down at his speedometer.

The question presented is whether he behaved reasonably in doing so, and it is a question of fact for the jury. This is emphatically *not* a case in which the plaintiff failed to see an object in plain view without excuse, or ignored it because he wasn't paying attention.³ Instead, Rascher saw the danger of the stopped minivan. He

³ *Cf. Sayre*, 209 Va. at 411, 164 S.E.2d at 666 (plaintiff who failed to see defendant's vehicle in plain view without excuse was contributorily negligent); *Branson v. Wise*, 206 Va. 139, 141-42, 142 S.E.2d 582, 583-84 (1965) (plaintiff who saw defendant's moving vehicle but didn't pay "too much attention" to it because he had the right of way and assumed she would stop was contributorily negligent).

assessed it as minimal—as it would have been, had Friend obeyed the law—and reacted accordingly.

It was for the jury to decide whether this constituted a proper lookout, and whether a reasonable person in Rascher’s position would have glanced at his speedometer.

C. This Court’s opinions illustrate that Rascher’s purported negligence presented a question of fact for the jury.

i. Gammon v. Hyde involved materially identical facts, and this Court ruled that they presented a jury question as to negligence.

Two of the Court’s opinions make this point rather conclusively. The first, *Gammon v. Hyde*, 199 Va. 918, 103 S.E.2d 221 (1958), presents a fact pattern that is materially identical to this case.

The facts of the case are these: Gammon was driving west on Highway 297, approaching an intersection with Highway 623, in late morning with Hyde as his passenger. *Id.* at 919-20, 103 S.E.2d at 222-23. It was drizzling and the roads were wet. *Id.* at 920, 103 S.E.2d at 223. The intersection was open and unobstructed. *Id.* at 919, 103 S.E.2d at 223.

At the same time, Gunter was driving north on Highway 623. *Id.* at 919, 103 S.E.2d at 223. Gunter’s lane had a stop sign, and Gammon

had the right of way. *Id.* at 920, 103 S.E.2d at 223. Both proceeded into the intersection, and Gammon's car struck the right rear wheel of Gunter's truck. *Id.* Gunter testified that he'd stopped at the intersection, and then proceeded across it at no more than five miles per hour. *Id.* He further testified that he hadn't seen Gammon's car until the collision. *Id.* at 920-21, 103 S.E.2d at 223.

For his part, Gammon testified that he approached the intersection at forty miles per hour. *Id.* at 921, 103 S.E.2d at 223. He saw Gunter's truck, stopped at the stop sign, about 200 feet away. *Id.* Judging that Gunter would wait for him to pass, Gammon proceeded to the intersection. *Id.* He estimated that Gunter pulled in front of him when he was not more than twenty feet away, and had no chance to avoid the collision. *Id.* at 921, 103 S.E.2d at 223-24. Gammon did not observe Gunter's truck from the time he saw it stopped until the crash was imminent. *Id.* at 921, 103 S.E.2d at 224.

Gammon's passenger, Hyde, sued both Gammon and Gunter, and the jury found in her favor. *Id.* at 919, 103 S.E.2d at 222. Gammon appealed. He argued that he was not guilty of any negligence that proximately caused the accident. *Id.* This Court disagreed, holding that Gammon's liability presented a jury question:

[T]he pivotal questions here are whether by the exercise of ordinary care Gammon should have seen that the driver of the truck was not going to yield the right of way but would attempt to cross ahead of him, and if so, whether by the exercise of ordinary care he (Gammon) could have avoided the collision. *These were questions for the jury.*

Id. at 922, 103 S.E.2d at 224 (emphasis added).

The same is true here. Rascher, like Gammon, had the right of way and saw another driver, stopped and waiting to cross his lane of travel. Neither Rascher nor Gammon kept a continuous lookout. In each case, the other driver pulled out, caused an accident, and denied having seen the driver with the right of way. Both accidents occurred in the late morning, under wet conditions. If Gammon's negligence presented a question of fact for the jury, then Rascher's must as well.

- ii. ***Phillips v. Stewart* further shows that Rascher, who had the right of way, was justified in glancing away from Friend's stopped car.**

The second case, *Phillips v. Stewart*, 207 Va. 214, 148 S.E.2d 784 (1966), further shows that Rascher was justified in looking away from Friend's stopped car. In *Phillips*, a plaintiff pedestrian was struck in a crosswalk by a driver. The plaintiff saw the defendant's oncoming car, but assumed that it would stop and proceeded across the street.

Id. at 216, 148 S.E.2d at 786. At the close of all the evidence, the trial court struck the plaintiff's case and entered summary judgment in favor of the defendant. *Id.* at 215, 148 S.E.2d at 785.

On appeal, this Court reversed. It explained that "[t]he plaintiff was not required to look continuously at the defendant's" oncoming car as he crossed the street. *Id.* at 218, 148 S.E.2d at 787. By statute, the plaintiff had the right of way. *Id.* at 217, 148 S.E.2d at 787. Because he was crossing in the proper place, he was entitled to assume that the defendant would yield the right of way. *Id.* at 218, 148 S.E.2d at 787. Of course, the plaintiff was still required to exercise reasonable care. *Id.* But the Court noted "one overriding fact which save[d] the plaintiff's case and [made] a jury question of his alleged contributory negligence:" the defendant's car slowed down, as if to stop, while the plaintiff was in the crosswalk. *Id.* at 218-19, 148 S.E.2d at 787-88. Under those circumstances, "it was for the jury to say" whether the plaintiff had exercised due care by crossing in front of the defendant's car. *Id.* at 219, 148 S.E.2d at 788.

The same must be true here as well. To begin with, unlike the defendant in *Phillips*, Friend did not just slow down. Her minivan was, by all accounts, completely stopped. (J.A. 96 (Rascher's testimony

that he “saw the minivan. It was stopped.”); *id.* at 42 (Friend’s testimony that she “completely stopped her vehicle in her lane of travel on Antietam Road....”) Like the plaintiff in *Phillips*, Rascher was privileged with the right of way by statute. See VA. CODE ANN. § 46.2-825 (2009) (requiring driver of vehicle intending to turn left to yield the right of way). He saw Friend’s car, stationary in the oncoming lane, and he was entitled to assume that she would yield the right of way.

The plaintiff in *Phillips* took his eyes off an oncoming car and crossed in front of it, where he was struck. The simple fact that the defendant’s car was slowing down created a jury question as to his negligence. But here, Friend was not just slowing down—she had stopped completely. And unlike the plaintiff in *Phillips*, Rascher did not cross in front of her. He simply proceeded in his lane. Friend turned left and cut in front of him, causing the crash. Under *Phillips*, the question of Rascher’s negligence was one for the jury.

iii. ***Branson v. Wise, upon which the trial court relied, does not justify the result below.***

In granting summary judgment in Friend’s favor, the trial court relied on *Branson v. Wise*, 206 Va. 139, 142 S.E.2d 582 (1965). (J.A.

178-81.) *Branson*'s holding, however, turns on facts readily distinguishable from those before the Court, and it is not even clear that the case remains good law.

Branson involved an automobile collision in an intersection. As the plaintiff approached the intersection from the east, she saw another car approaching from the south, but ignored it because she had the right of way. *Id.* at 140-41, 142 S.E.2d at 583-84. The plaintiff admitted, "I really wasn't paying too much attention to [the other driver], because I never dreamed she wouldn't stop. *I saw she was moving.* I never dreamed—I knew I had the right of way and I didn't dream she was going to come in and hit me." *Id.* at 141, 142 S.E.2d at 583 (emphasis added).

After a trial, the jury found for the plaintiff. *Id.* at 140, 142 S.E.2d at 583. On appeal, this Court reversed. It found the plaintiff guilty of contributory negligence because she "*assumed the other vehicle would stop* and 'really wasn't paying too much attention to it.'" *Id.* at 142, 142 S.E.2d at 584 (emphasis added).

Branson bears some superficial similarity to this case. In both cases, the plaintiff was privileged with the right of way, and failed to continuously watch the defendant's vehicle. But one key fact

distinguishes the two cases: in *Branson*, the plaintiff saw a moving car coming toward her, and assumed that it would stop. She assumed that the oncoming driver would change her behavior to comply with the law. Rascher, by contrast, saw Friend's minivan, already stopped and yielding the right of way. He assumed that she would continue to obey the law—as he was entitled to do, until she gave him some reason to believe otherwise.

Rascher's own testimony makes this point. When asked on redirect why he had not changed his speed or direction, Rascher explained:

Because I had the right of way and I believed she was—*she was stopped when I was looking at her* and I thought it was—I didn't think anything of it.

I thought I was just riding my bike down the lane and she was obeying the laws as I was.

(J.A. 128) (emphasis added).

Finally, it is not clear that *Branson* remains good law. Justice Poff indicated in a subsequent case that, to the extent the *Branson* Court's decision rested on a finding of proximate causation as a matter of law, he would have overruled it. *Butler*, 222 Va. at 555-56, 281

S.E.2d at 907-08 (Poff, J., concurring).⁴ Justice Poff’s reasoning is sound. As discussed in Part III, below, proximate causation is a necessary element of contributory negligence, and it is fundamentally a question of fact for the jury.

D. Granting Friend’s motion to strike required the trial court to resolve disputed questions of fact against Rascher, in derogation of the legal standard.

Granting Friend’s motion to strike required the trial court to resolve disputed questions of fact against Rascher, in derogation of the legal standard. Rascher testified that he had “stared” at Friend—or, as counsel and the trial court put it, that he had “stare[d] down the defendant.” (J.A. 97, 99-102.) The court indicated that it was unsure what this meant in light of the “uncontradicted” testimony that Friend had never seen Rascher, so it determined that “stare down” simply meant that Rascher “looked at her.” (J.A. 174.)

But that is not the ordinary meaning of those words. While Rascher could not testify to what Friend saw, he could and did testify to his own actions. A jury could reasonably infer from his testimony that he’d looked at Friend and perhaps even made eye contact with

⁴ Justice Poff also would have overruled *Sayre v. Shields*, 209 Va. 409, 164 S.E.2d 665 (1968), discussed above, on the same grounds. *Id.*

her as she was stopped. It could reasonably find that he'd gotten the sort of tacit acknowledgement that drivers with the right of way routinely receive from oncoming traffic. And it could reasonably conclude that Rascher acted as an ordinarily prudent person would have under the circumstances. None of these determinations defy logic or common sense.⁵

Rather than granting Rascher the benefit of these reasonable inferences, however, the trial court believed Friend's testimony over his and granted her motion to strike. This was error. In weighing Friend's motion to strike, the trial court was bound to grant Rascher the benefit of all reasonable inferences, even if it believed that other inferences were more likely. *See Butler*, 222 Va. at 553-54, 281 S.E.2d at 908.

⁵ Given Rascher's estimates of the distances involved and his testimony as to his speed, it may be questionable how much time he had to "stare" at Friend. But his testimony about distance was approximate, and any such questions only highlight the inherently factual nature of the questions the trial court resolved. Moreover, while Rascher's testimony on points of fact, such as the place of impact, may be binding, his mere estimates are not. *See, e.g., Deskins v. T.H. Nichols Line Contractor, Inc.*, 234 Va. 185, 188, 361 S.E.2d 125, 126 (1987) (6-1 decision) (while the rule in *Massie v. Firmstone* did not apply to mere estimates of fact, such as speed or distance, it did apply to plaintiff's testimony as to the point of impact).

III. The trial court further erred by ruling as a matter of law that Rascher's glance at his speedometer was the proximate cause of the crash.

The trial court committed a second, independent error by striking Rascher's evidence because his actions were not a proximate cause of the crash.

The defense of contributory negligence consists of two independent elements: negligence and causation. *Estate of Moses*, 273 Va. at 678, 643 S.E.2d at 160 (citing *Karim*, 235 Va. at 552, 369 S.E.2d at 186). Even if a plaintiff is negligent, the defendant still must establish that his negligence caused the accident. *Id.* at 678-79, 643 S.E.2d at 160. And proximate causation is inherently a question of fact for the jury. It becomes a question of law only when reasonable minds could not differ. *Id.* at 679, 643 S.E.2d at 160.

It is undisputed that Rascher was traveling at a speed of 19 miles per hour. As a matter of arithmetic, this equates to about 28.87 feet per second. *See also* VA. CODE ANN. § 46.2-880 (2009) (directing courts to take notice that 20 miles per hour equates to 29.3 feet per second).

This left Rascher little time to react when Friend cut in front of him, illegally and without warning. (J.A. 97, 101.) Rascher saw Friend

stopped in the opposite lane at a distance of about fifty feet, or less than two seconds, away. He traveled an unknown distance and glanced down at his speedometer.⁶ When he looked up, Friend's minivan was a few feet in front of him.

As the trial court recognized, there is "no question" that Friend was negligent in failing to yield the right of way. (J.A. 179.) Her negligence was the sole proximate cause of this accident. The reasonable inference from Rascher's version of events—which must be accepted at this stage—is that she darted in front of him and cut across his lane in a matter of seconds.

In striking Rascher's case, the trial court nonetheless surmised that, had he kept a continuous lookout, Rascher would have had more time to avoid the accident. (J.A. 176-77.) It reasoned that "had he been further up the road when he saw the car—or back from the vehicle, maybe he could have avoided the accident." (J.A. 180.)

Perhaps, but that does not resolve the factual question of proximate causation as a matter of law. Put slightly differently, *more* time to avoid the crash does not necessarily mean *enough* time to

⁶ It is unclear from the record how much time or distance passed from the point where Rascher first saw Friend about fifty feet away and the point where he glanced at his speedometer.

avoid the crash as a matter of law, particularly given the speeds and distances involved. And “maybe he could have avoided the accident” is not sufficient to take the factual question of proximate cause away from the jury.

Karim v. Grover, 235 Va. 550, 369 S.E.2d 185 (1988), is instructive on this point. Karim, a fourteen-year-old boy, was riding his bicycle at around seven o'clock in the morning. *Id.* at 551, 369 S.E.2d at 186. Like Rascher, he was traveling down a two-lane road at fifteen to twenty miles per hour. *Id.* at 552, 369 S.E.2d at 186. Though it was before sunrise, it was neither light nor dark out. *Id.* Because Karim's bicycle lacked a headlight, however, it was illegal for him to ride it between sunrise and sunset. *Id.*

As he traveled downhill and around a curve, Karim saw an oncoming dump truck approaching an intersection. He first spotted it when he was about 200 feet from the intersection, and he could see it clearly at that distance. *Id.* As he was approaching the intersection, the truck suddenly made a left turn. It collided with Karim, who had no time to react. *Id.*

Karim sued the truck driver. At the close of his case, the trial court struck his evidence. *Id.* at 551-52, 369 S.E.2d at 185-86. This Court

reversed, because even though Karim had been negligent, reasonable minds could differ as to whether his negligence was a proximate cause—a direct, efficient cause—of the accident. *Id.* at 555, 369 S.E.2d at 187-88. Because Karim saw the truck driver from a distance of 200 feet, the jury could have reasonably concluded that the truck driver saw, or should have seen, him from the same distance; if he turned into Karim’s lane of travel under those circumstances, the fact finder could reasonably conclude that his negligence proximately caused the accident. *Id.* at 554, 369 S.E.2d at 187.

The same is true here. Karim and Rascher were traveling at similar rates of speed. They each spotted an oncoming vehicle in circumstances under which the driver of that vehicle should have seen them as well. In each case, the driver of the oncoming vehicle failed to yield the right of way, making a left turn and causing a collision. Even though there is no indication that Karim failed to keep a proper lookout, he nonetheless lacked sufficient time to react to the other driver’s unexpected and illegal turn. Accepting Rascher’s evidence as true, there is no reason to believe that his situation would have been any different had he continuously watched Friend. And

unlike Karim, Rascher obeyed all applicable statutes. Rascher's argument on proximate causation is, if anything, stronger than Karim's. If proximate causation presented a jury question in *Karim*, then it cannot be resolved against Rascher as a matter of law here.

Conclusion

The essence of contributory negligence is carelessness. *Estate of Moses*, 273 Va. at 678, 643 S.E.2d at 159. Simply put, Rascher was not careless. He saw Friend and reacted accordingly. Reasonable people could differ about whether Rascher exercised a proper lookout, and if not, whether that was a proximate cause of his accident.

This Court should reverse the trial court's judgment striking Rascher's evidence and remand the case for further proceedings.

Respectfully submitted,

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Rule 5:26(d) Certificate

I hereby certify as follows:

The appellant in this case is William P. Rascher. He is represented by James J. O'Keeffe, IV, Monica T. Monday, and Anthony M. Russell, GENTRY LOCKE RAKES & MOORE LLP, P. O. Box 40013, Roanoke, Virginia 24022-0013, (540) 983-9459. The appellee is Cathleen Friend. She is represented by Michael E. Thorsen, TRICHILO, BANCROFT, MCGAVIN, HORVATH & JUDKINS, PC, 3920 University Drive, Fairfax, Virginia 22030, (703) 385-1000.

On this 19th day of May 2009, fifteen copies of this Opening Brief of Appellant have been hand-filed with the Supreme Court of Virginia. Three copies have been mailed to counsel for the appellee. An electronic copy (on compact disc) has been filed with the clerk contemporaneous with this brief.

The appellant desires to state orally and in person the reasons why the judgment below should be reversed.



Of Counsel