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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2019

2180244

Princess Hawkins

v.

Jimmy Simmons and Worry Free Comfort System, Inc., d/b/a Freedom Heating & Cooling

Appeal from Jefferson Circuit Court
(CV-16-900854)

EDWARDS, Judge.

Princess Hawkins appeals from a judgment as a matter of law ("JML") entered by the Jefferson Circuit Court ("the trial court") against her and in favor of Jimmy Simmons and his

employer, Worry Free Comfort System, Inc., an Alabama corporation doing business as Freedom Heating & Cooling ("FHC").

On March 5, 2016, Hawkins filed a complaint against Simmons and FHC alleging that, on July 29, 2015, Simmons had negligently caused the Chevrolet Silverado pickup truck he was driving for FHC to strike her while she was walking in a tunnel along 5th Avenue North in Birmingham.[1] Hawkins sought damages in the amount of $50,000. Simmons and FHC filed an answer denying Hawkins's allegations and asserting the contributory negligence of Hawkins as an affirmative defense.

Trial of Hawkins's action began on October 22, 2018. On October 23, 2018, Simmons and FHC made an oral motion for a JML at the close of Hawkins's case-in-chief. Simmons and FHC argued (1) that Hawkins's evidence would not support a finding that Simmons had been negligent, (2) that the evidence established that Hawkins had been contributorily negligent as a matter of law, and (3) that, assuming Hawkins had been contributorily negligent, the evidence would not support a

[1]Hawkins's complaint also included other claims against Simmons and FHC. The trial court granted Simmons and FHC's motion for a summary judgment regarding those claims, and Hawkins makes no argument regarding them on appeal.

determination that Simmons had been subsequently negligent. The trial court granted Simmons and FHC's motion for a JML regarding the issue of subsequent negligence by Simmons and denied their motion for a JML regarding Hawkins's purported failure to present substantial evidence that Simmons had been negligent. The trial court deferred its decision regarding whether to grant a JML as to Hawkins's alleged contributory negligence until after Simmons and FHC presented their case.[2]

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[2]Hawkins makes no argument that the trial court erred by granting a JML regarding subsequent negligence. See Zaharavich v. Clingerman ex rel. Clingerman, 529 So. 2d 978, 979 (Ala. 1988) ("Contributory negligence ... is no defense to subsequent negligence. ... The elements of proof of subsequent negligence are: (1) that the plaintiff was in a perilous position; (2) that the defendant had knowledge of that position; (3) that, armed with such knowledge, the defendant failed to use reasonable and ordinary care in avoiding the accident; (4) that the use of reasonable and ordinary care would have avoided the accident; and (5) that plaintiff was injured as a result."). See also Eason v. Comfort, 561 So. 2d 1068, 1071 (Ala. 1990) (noting that the plaintiff must present evidence that the defendant had actual knowledge of the plaintiff's peril in order to be entitled to a jury charge on subsequent negligence and that "the doctrine [of subsequent negligence] is not properly applied where the manifestation of the plaintiff's peril and the accident are virtually instantaneous"). Thus, the issue of subsequent negligence is waived. See, e.g., Waddell & Reed, Inc. v. United Inv'rs Life Ins. Co., 875 So. 2d 1143, 1167 (Ala. 2003) ("Issues not argued in a party's brief are waived.").

After the close of the evidence, Simmons and FHC renewed their motion for a JML, and the trial court granted the motion on the ground that the evidence purportedly established that Hawkins had been contributorily negligent and that her negligence was a proximate cause of the accident, as a matter of law. On October 24, 2018, the trial court entered a judgment in favor of Simmons and FHC and against Hawkins.

Hawkins timely filed a motion for a new trial pursuant to Rule 59, Ala. R. Civ. P., making the same arguments that she had made in response to Simmons and FHC's arguments for a JML at the close of the evidence. Specifically, Hawkins argued that a question of fact existed regarding her alleged contributory negligence and that the trial court had erred by basing its decision that she had been contributorily negligent as a matter of law on the opinion of Birmingham Police Officer Anthony Fields, who had investigated the accident. Hawkins argued:

> "Under Alabama law, opinion evidence is not conclusive on the trier of fact. Stewart v. Busby, 284 So. 2d 269, 272 (Ala. Civ. App. 1973). Specifically, Alabama courts have held that 'an expert opinion, or expert testimony in some other form, is admitted to assist the trier of fact. What weight, if any, is given such testimony is for the trier of fact.' Breland v Rich, 69 So. 3d 803, 812

> (footnote) (Ala. 2011). Further, 'expert opinion testimony may not be binding on a trial court, even if it is uncontradicted. "[A]n expert opinion is not conclusive on the trier of fact even if the testimony was uncontroverted. Furthermore, the weight and credibility to be attributed to an expert witness is for the trier of fact."' Musgrove v. State, 144 So. 3d 410, 432 (Ala. Crim. App. 2012); (quoting Clark Lumber Co. v. Thornton, 360 So. 2d 1019, 1021 (Ala. Civ. App. 1978).
>
> "Because the weight and credibility attributed to Officer Fields's testimony is for the trier of fact, the jury may accept or reject any part of his testimony and accept only the testimony worthy of belief. See [Alabama Pattern Jury Instruction] 15.02. Further, Officer Fields was a lay witness and his testimony carries less weight than expert testimony. Box v. Box, 45 So. 2d 157, 160 (Ala. 1950). ...
>
> "A [JML] is proper only where there is a complete absence of proof on a material issue or where there are no controverted questions of fact on which reasonable people could differ. Baker v. Heims, 527 So. 2d 1241, 1243 (Ala. 1988)."

Hawkins further argued that Simmons had breached his duty of care by failing

> "to anticipate her presence on the road, therefore a jury could have found him negligent. Violation of a statute by the Plaintiff will not in itself prevent recovery on the ground of contributory negligence, if the violation is not a contributing cause of the injury. Allman [v. Beam], [272 Ala. 110, 114,] 130 So. 2d [194,] 197 [(1961)]. Whether [Hawkins's] conduct in violation of a statute contributed to her injuries so as to bar recovery is a question of fact for the jury. Allman[, supra]."

Simmons and FHC responded to Hawkins's Rule 59 motion, making the same arguments that they had made in support of a JML. Regarding Hawkins's alleged contributory negligence, Simmons and FHC argued that Hawkins had violated ordinances from the Birmingham City Code, specifically § 10-3-1, which provides that "[i]t shall be unlawful for any person to do any act forbidden ... in this title," and § 10-3-8, which provides:

> "(b) Where sidewalks are not provided any pedestrian walking along and upon a highway shall when practicable walk only on the left side of the roadway or its shoulder facing traffic which may approach from the opposite direction."

Simmons and FHC also cited Ala. Code 1975, § 32-5A-215(c), which provides that "[w]here neither a sidewalk nor a shoulder is available any pedestrian walking along and upon a highway shall walk as near as practicable to an outside edge of the roadway, and if on a two-way roadway, shall walk only on the left side of the roadway." Simmons and FHC argued:

> "Hawkins conceded that she had training and knowledge of the applicable Rule of the Road and City Code section, and that she was in violation of the statutes. She testified that she was of the class of person that the statutes were designed to protect. ... [T]here was no testimony to contradict in any manner the testimony of Officer Fields, which was received without any objection. He confirmed

> that ... Hawkins [was] part of the class of person the statutes are designed to protect and that taking into account his investigation, training and knowledge, ... Hawkins's actions caused or contributed to cause the accident."

Simmons and FHC argued that Hawkins's violation of the foregoing ordinances and statute governing pedestrians amounted to negligence per se; that even if Hawkins's violations were not negligence per se, she had been contributorily negligent as a matter of law; and that no question of fact existed regarding whether Hawkins's own actions caused or contributed to the accident.

On November 9, 2018, the trial court entered an order denying Hawkins's Rule 59 motion. On November 21, 2018, she filed a notice of appeal to this court.

"[An appellate court] reviews de novo the grant or denial of a motion for a JML, determining whether there was substantial evidence, when viewed in the light most favorable to the nonmoving party, to produce a factual conflict warranting jury consideration." Edwards v. Allied Home Mortg. Capital Corp., 962 So. 2d 194, 206 (Ala. 2007).

> "Regarding questions of fact, the ultimate question is whether the nonmovant has presented sufficient evidence to allow the case to be submitted to the jury for a factual resolution. Carter v. Henderson,

> 598 So. 2d 1350 (Ala. 1992). The nonmovant must have presented substantial evidence in order to withstand a motion for a JML. See § 12-21-12, Ala. Code 1975; West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989)."

Waddell & Reed, Inc. v. United Inv'rs Life Ins. Co., 875 So. 2d 1143, 1152 (Ala. 2003); see also, Ala. Code 1975, § 12-21-12(a); Ex parte McInish, 47 So. 3d 767, 774 (Ala. 2008). "[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989); see also Ala. Code 1975, § 12-21-12(d).[3] In reviewing a ruling on a motion for a JML, an appellate court views the evidence in the light most favorable to the nonmovant and entertains such reasonable inferences as the jury would have been free to draw. Waddell & Reed, Inc., 875 So. 2d at 1152. A JML "is proper on a claim where the facts are such that all reasonable men must draw the same conclusion from them," i.e., "where there are no controverted

[3]Relying on older precedent, Hawkins makes reference to merely needing to present a "glimmer, gleam, or scintilla" of evidence as to her purported lack of contributory negligence. However, the scintilla rule has been abolished in civil actions. See Ala. Code 1975, § 12-21-12(b).

issues of fact upon which reasonable men could differ." Continental Assurance Co. v. Kountz, 461 So. 2d 802, 806 (Ala. 1984). "Regarding a question of law, however, [an appellate court] indulges no presumption of correctness as to the trial court's ruling." Waddell & Reed, Inc., 875 So. 2d at 1152.

Hawkins argues that the trial court erred in granting Simmons and FHC's motion for a JML regarding her purported contributory negligence and whether that negligence was a proximate cause of the accident.[4] We agree.

> "'Contributory negligence is an affirmative and complete defense to a claim based on negligence. In order to establish contributory negligence, the defendant bears the burden of proving that the plaintiff 1) had knowledge of the dangerous

[4]In addition to responding to Hawkins's arguments regarding contributory negligence, Simmons and FHC argue that the JML is due to be affirmed on the ground that Hawkins failed to present substantial evidence that Simmons was negligent. However, at the close of Hawkins's case-in-chief, the trial court denied their motion for a JML regarding that issue. Also, based on the colloquy with the trial court during the arguments on Simmons and FHC's renewed motion for a JML, lack of substantial evidence of Simmons's negligence was not the basis for the trial court's order granting that motion. Viewing the testimony and trial exhibits in the light most favorable to Hawkins, and entertaining such reasonable inferences as the jury would have been free to draw from that evidence, we cannot conclude that the evidence reflects no controverted issues of fact upon which reasonable persons could differ regarding Simmons's alleged negligence.

> condition; 2) had an appreciation of the danger under the surrounding circumstances; and 3) failed to exercise reasonable care, by placing himself in the way of danger.'
>
> "Ridgeway v. CSX Transp., Inc., 723 So. 2d 600, 606 (Ala. 1998). The issue of contributory negligence is generally one for a jury to resolve. Id. See also Savage Indus., Inc. v. Duke, 598 So. 2d 856, 859 (Ala. 1992) ('The issue of contributory negligence cannot be determined as a matter of law where different inferences and conclusions may reasonably be drawn from the evidence.')."

Norfolk Southern Ry. v. Johnson, 75 So. 3d 624, 639 (Ala. 2011). "Contributory negligence on the part of a plaintiff which proximately contributes to the plaintiff's injuries will bar recovery." Creel v. Brown, 508 So. 2d 684, 687–88 (Ala. 1987). Also,

> "[t]o establish negligence per se, a plaintiff must prove: (1) that the statute the defendant is charged with violating was enacted to protect a class of persons to which the plaintiff belonged; (2) that the plaintiff's injury was the kind of injury contemplated by the statute; (3) that the defendant violated the statute; and (4) that the defendant's violation of the statute proximately caused the plaintiff's injury."

Dickinson v. Land Developers Constr. Co., 882 So. 2d 291, 302 (Ala. 2003). In Allman v. Beam, 272 Ala. 110, 113-14, 130 So. 2d 194, 196-97 (1961), the supreme court stated that

> "the violation of a statute designed for the protection of a person claiming to have been injured

> by reason of such violation, is negligence per se, or negligence as a matter of law. But we are also clear to the conclusion that such conduct on the part of a pedestrian will not in itself prevent recovery on the ground of contributory negligence if the violation of the statute is not a contributing cause of the injury."

A further discussion of Allman will be helpful before reviewing the evidence regarding Hawkins's purported contributory negligence and its relationship to the accident. In Allman, the supreme court stated:

> "It is undisputed that [Lydia Lee Beam] was going to work on the morning of the 9th day of November, 1956, at about 6:30 a.m., and was proceeding along the highway on the right side in the direction in which she was going, and that [John C. Allman] proceeding in the same direction came up behind her and struck her with his automobile. The evidence is also undisputed that there were no sidewalks on her side of the highway at the point in question, that the weeds and grass had grown up to the paved portion of the roadway, and that there were rocks and stones along both sides.
>
> "Title 36, Sec. 58(19)(b), Code of 1940, provides as follows:
>
> > "'Where sidewalks are not provided any pedestrian walking along and upon a highway shall when practicable walk only on the left side of the roadway or its shoulder facing traffic which may approach from the opposite direction.'
>
> "[Allman] contends that [Beam] was proceeding along the wrong side of the road when she was struck and

> was therefore, guilty of contributory negligence as a matter of law, which bars her recovery.
>
> "We see no need to set out the evidence, indeed there is little conflict in it in its material aspects. It is ample to raise a jury question as to whether or not [Allman] was initially negligent.
>
> "A motorist must exercise due care to anticipate the presence of others on the highway, and not to injure them upon becoming aware of their presence, and is chargeable with the knowledge of what a prudent and vigilant operator would have seen, and is negligent if he fails to discover a traveler or pedestrian whom he could have discovered in time to avoid the injury in the exercise of reasonable care. ... And this is so regardless of which side [of] the highway the pedestrian or traveler is walking, whether facing oncoming traffic or with his back to traffic. ... Regardless of [Beam's] position on the highway, she was no trespasser and [Allman] was under a duty to keep a lookout for those also using the highway, each owing the other the duty to exercise reasonable care. ...
>
> "[Allman] testified, in substance, that the sun blinded him through his windshield just before he struck [Beam]. The roadway where [Beam] was injured runs in an easterly-westerly direction."

272 Ala. at 112–13, 130 So. 2d at 195–96. In addressing the issues of negligence per se and contributory negligence, the supreme court stated:

> "We are clear to the conclusion from our cases, and those better-reasoned cases from other jurisdictions, that the violation of a statute designed for the protection of a person claiming to have been injured by reason of such violation, is negligence per se, or negligence as a matter of law.

> But we are also clear to the conclusion that such conduct on the part of a pedestrian will not in itself prevent recovery on the ground of contributory negligence if the violation of the statute is not a contributing cause of the injury. It is generally agreed that the question as to whether the violation was a proximate contributing cause of the injury is for the jury.
>
> "The general result of the authorities seems to be, that if the plaintiff, or party injured, by the exercise of ordinary care under the circumstances, might have avoided the consequences of the defendant's negligence, but did not, the case is one of mutual fault, and the law will neither cast all the consequences upon the defendant, nor will it attempt any apportionment thereof.
>
> "....
>
> "On the issue of causation, the facts and circumstances of a particular case may be so nicely balanced that reasonable minds might differ, when this is so, the issue is one for the jury."

Allman, 272 Ala. at 113-14, 130 So. 2d 196-97; see also Giles v. Gardner, 287 Ala. 166, 169, 249 So. 2d 824, 826 (1971) ("Generally speaking, proximate cause is a jury question[,] ... and it is only when the facts are such that reasonable men must draw the same conclusion that the question of proximate cause is one of law for the courts."). The supreme court concluded that the trial court had not erred by refusing to give Allman's requested general charges with hypothesis to the jury, Allman, 272 Ala. at 114, 130 So. 2d at 197, i.e., in

determining essentially that a JML in favor of Allman was warranted. See Byars v. Alabama Power Co., 233 Ala. 533, 538, 172 So. 621, 626 (1937).

The evidence presented at trial would support the conclusions that, on July 29, 2015, at approximately 11:30 a.m., on a sunny day, Hawkins was walking toward a partially illuminated tunnel where 5th Avenue North travels underneath railroad tracks and an interstate highway. Hawkins was exercising and was on her way home. She testified, however, that, as she returned home, her normal route on 7th Avenue North was blocked by two trains that were not moving. Rather than attempt to cross the trains, Hawkins chose to walk down 28th Street to 5th Avenue North and to return home through the tunnel, which includes two lanes for traffic traveling away from downtown Birmingham and one lane for traffic traveling toward downtown Birmingham, the direction that Hawkins needed to travel. The reasons for Hawkins's decision to proceed with, rather than against, traffic on 5th Avenue North are discussed during her testimony, quoted infra. Although Simmons and FHC's counsel suggested during questioning of Hawkins that she could have walked a longer distance to return

home via 8th Avenue North, his question assumed that the trains were not also blocking that route, and an additional suggestion that Hawkins "could have walked even one more block ... and walked across the train tracks on a bridge that had sidewalks" is not confirmed by the testimony or exhibits offered at trial. Hawkins did not affirm the viability of either route suggested by Simmons and FHC's counsel.

Shortly before the accident, Simmons's truck was stopped at the traffic light at the intersection of 5th Avenue North and 28th Street; the intersection appears to be located a few dozen yards from the entrance to the tunnel, and Simmons stated that his truck was the first vehicle at the traffic light. The parties submitted no evidence regarding the exact distance, although they did submit some photograph exhibits that provide a view allowing a rough estimate. From the intersection where the traffic light is located to the entrance of the tunnel is a downhill slope. According to Simmons, from where his truck was stopped, he could not see the bottom portion of the tunnel because the slope of the road at the intersection obstructed his view. The photographs of the intersection that were admitted as exhibits were taken

several yards before the traffic light; at that point, the road does obstruct the lower portion of the entrance of the tunnel; one is somewhat looking over a rise in the road where 28th Avenue crosses 5th Avenue North. Also, on approach to the tunnel, depending on the ambient lighting and distance from the entrance, the view into the tunnel is more or less limited, at least until a vehicle enters the tunnel and the driver's eyes adjust to the change in lighting.

Simmons affirmed that "[he] didn't see ... Hawkins walking down [5th] Avenue [North] just before she got to the tunnel," that he did not see her walk into the tunnel, and that he did not see her when he was approaching the tunnel. We note that the distance downhill from the traffic light to the entrance of the tunnel is not insignificant, but no testimony was presented regarding how long Simmons was at the traffic light before he proceeded toward the tunnel. Also, we note that concrete retaining walls are located on each side of 5th Avenue North, beginning a few automobile lengths from the entrance to the tunnel, and that the retaining walls become gradually higher toward the entrance.

Simmons testified that, as he approached the tunnel from the traffic light, "my tires were as close to the double yellow line as the lane would allow because I had been through that tunnel two or three times in my lifetime. I knew there was a concrete wall on the right-hand side of me. There's a 6, 5, 6-inch curb there, and there's no sidewalk." Simmons continued: "[I]n my opinion, I took all the precautions that I thought was necessary to drive in a blinded spot and running, you know, 10, 15 miles an hour slower than the speed limit, anticipating something in the tunnel." The following colloquy occurred between Hawkins's counsel and Simmons:

> "Q. So you're telling the jury today you were driving at a very low speed, lights in the tunnel, lights on your [truck], bright outside, and you never saw ... Hawkins?
>
> "A. That's correct.
>
> "Q. Isn't it more plausible ... that you were actually not paying attention?
>
> "A. I was paying attention.
>
> "Have you ever walked outside in a bright sunny day and then walked in the house and you have blind vision?
>
> "Q. Let me ask -- during opening statements, your attorney made it seem like ... Hawkins was in the middle of road. Even if that was the case, you would have seen her with your lights. You would

have seen her in the tunnel, and you would have seen right there just before you entered in. There's enough light in the beginning of the tunnel to see if someone was there, so that couldn't have been the case. You weren't paying attention, were you?

"A. I was paying attention. If I wasn't paying attention, I wouldn't [sic] have been driving the posted speed limit and been in the center of the lane, and it would have been much worse if I had been in the center of the lane.

"Q. But you would agree as a driver -- you drive for a living -- it's your duty to anticipate the presence of others on the road? You would agree with that, right?

"A. I would agree to that, but you can --

"Q. In this particular situation, you did not anticipate the presence of ... Hawkins being on that road, did you?

"A. I didn't see her. So how can I anticipate her being there?

"....

"Q. ... [Y]ou're saying here today that this accident occurred because Ms. Hawkins was walking with her back to the traffic, and you didn't see her, that she shouldn't have been out there; is that correct?

"A. Yes, sir.

"Q. Now, let me ask you this: If ... Hawkins would have been coming from the opposite direction, walking towards you, facing you, you still would not have seen her, and you still would have hit her? This accident didn't happen because her back was

facing the traffic, it happened because you weren't paying attention?

"If she was coming from the opposite direction facing you, according to your testimony, you didn't see her. You still would have hit her; isn't that correct?

"A. In that tunnel, yes.

"Q. Okay. So, basically, her position on the road, whether her back was facing the traffic or whether she was facing you, you were going to hit anybody in that tunnel; isn't that correct?

"A. In that tunnel, yes."

Hawkins's exhibits 3 and 4 are pictures that were taken on a sunny day and reflect the view immediately before the entrance to the tunnel. On redirect examination by her counsel, Hawkins testified as follows about those exhibits:

"Q. ... Now, I'll submit it may not have been taken on July 29th, but is this how the scene looked back on that day, the lighting and everything?

"A. The light, it was light, yes, sir.

"Q. So that's how it basically was, from what you remember; is that correct?

"A. It was bright, yes, sir.

"Q. Okay. Now, I think you testified that the accident occurred right around this section as you first got in it; is that correct?

"A. I can't -- to my recollection, I just know it was a few feet.

"Q. Okay. Was there light when you walked in? Could you see inside the tunnel?

"A. Yes, sir.

"Q. Now, I think -- and I understand as you approach and walk down -- this is one of the exhibits. As you approach and walk down the tunnel, the lighting inside the tunnel, does it appear to, as you go in, you can see more as you get closer to it?

"A. Yes, sir.

"Q. Is that your experience with any type of tunnel? As you're going through, the closer you get, the more light that you could see as you're going through the tunnel; is that correct?

"A. Yes, sir.

"....

"Q. So you've got the two lanes that were coming in the opposite direction, ... and the one you were walking in; is that right?

"A. Yes, sir.

"Q. And it's your testimony that, as far as you remember, you were as close as you could to the side of the tunnel on the inside?

"A. I know I was, yes, sir."

Hawkins described her attire as follows: "I had like a sweatshirt. It was royal blue. And I had on hot pink, hot, like loud T-shirt, what we call a cami up under it, some black tights with royal blue shoes with hot pink with loud green

shoestrings." According to Hawkins, the hot-pink T-shirt could be seen; she "had it down where it [could] cover [her] bottom." Also, Hawkins's exhibit 10 is a picture of Hawkins's shoes, showing a hot-pink area along the inside and outside of the sole, a small hot-pink stripe along the top above the heel of the shoe, and lime-green shoestrings. Based on Hawkins's attire, a jury might conclude that her silhouette would have presented a significant contrast to the lightly colored concrete walls leading up to the tunnel and the walls of the tunnel. Also, Hawkins's exhibits 3 and 4 would support the conclusion that, on a bright sunny day purportedly like the one at issue, a driver could see several yards into the tunnel from the entrance and would be able to see a pedestrian within that distance. The colloquy between Hawkins's counsel and Simmons regarding Hawkins's exhibits 3 and 4 is as follows:

> "Q. I notice in all the pictures that were shown [by defense counsel] that there was no picture of what it looked like just inside of the tunnel.[5]

[5]We note that the photographic exhibits introduced by Simmons and FHC appear to reflect that the day those pictures were taken was overcast. The entrance to the tunnel in that series of pictures is much darker, and it is almost impossible to see into the tunnel as it is approached. As noted by Hawkins's counsel, however, those pictures do not include a picture oriented like Hawkins's exhibits 3 and 4, which appear to have been taken immediately before the entrance to the tunnel.

"A. As you can see from that photograph, there is light coming from the outside just inside that tunnel; is that correct?

"You can see there's kind of a bright sunny day on the day of the accident. You can see the light from the photo?

"A. I don't know what time these pictures were taken, but that particular time of day, it was 11:00. I think about 11:45. So I don't know where the sunlight would have been in that tunnel.

"Q. But you said it was sunny, right?

"A. It was.

"Q. A sunny day. Do you see sun in that photograph that you're looking at now?

"A. I do.

"Q. Okay. All right. Also, I think you said some of the lights were out. I think you can count the lights -- excuse me. You keep 4.

"You can actually see the light all the way through; is that correct?

"A. The ones on the right-hand side in my lane are out.

"Q. But it's enough that you can actually see the car that's in the tunnel? You can actually see a tag?

"A. Correct.

"Q. So it was enough light in that tunnel to see someone in there?

"A. No.

"Q. Not even looking at this, you can tell me there wasn't enough light to see anyone just from this here? Is that what you're saying?

"A. Once you enter the tunnel, yes, sir. But coming down off the road into that tunnel is total darkness.

"Q. But I think you testified earlier the accident took place just inside the tunnel, right inside; is that correct?

"A. I'm going to say it was in the tunnel. Traveling 20, 25 miles an hour, maybe a second, two seconds, in the tunnel. I don't know the distance traveled inside that tunnel.

"Q. A second or two seconds in the tunnel, are you saying the accident took place somewhere way down here inside the tunnel?

"A. Whatever a second or two seconds at 25 miles an hour, over how many feet that will carry you.

"Q. So, now, you're changing it? Now, instead of saying it happened just inside the tunnel, you're saying --

"A. I don't know what inside the tunnel is. Maybe 40, 50 feet.[6]

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[6]In Wayland Distributing Co. v. Gay, 287 Ala. 446, 451, 252 So. 2d 414, 418 (1971), the supreme court noted that, when evaluating speed in miles per hour, "vehicles ... mov[e] 1.46 feet per second, multiplied by their actual rates of speed." Assuming Simmons's truck was traveling at 25 miles per hour, he would have traveled 36.5 feet in one second and 54.75 feet in one and one-half seconds.

"Q. So, now, you've got -- when I asked you the question, when did the accident happen, you said, 'Just inside the tunnel.'

"But when I asked you in your deposition, I said, 'Did the accident happen just inside the tunnel,' you said, 'Yes.'

"Now, it's 40 to 50 feet. Is that your definition of inside of the tunnel, 40 or 50 feet inside the tunnel?

"A. That would be my definition, just inside the tunnel.

"Q. So are you saying that entering the tunnel that second, the accident took place a second inside the tunnel? I think you testified a second or a second and a half. Is that what you just said?

"A. Correct.

"Q. So you're saying, traveling a second or a second and a half, you had already made it 40 feet inside the tunnel? Is that what you're saying now?

"A. I don't know how many feet you can travel at 25 or -- 25 miles an hour, how many feet you can travel in a second or a second and a half. Actual footage, how far I was in the tunnel --

"....

"Q. [During your deposition,] ... I said, 'So you may have basically -- the accident took place a good ways inside the tunnel, would you say?' What was your response?

"....

"A. I was just inside of it.

"Q. ... You were just inside the tunnel?

"A. Yes.

"Q. Now, you're saying that you were just inside the tunnel. Now, you're saying it may be 40 feet, which is it? Is it 40 feet or just inside?

"A. I'll leave it at just inside the tunnel.

"Q. Okay.

"A. But there again, I don't know how far I traveled. I wasn't in the tunnel very long.

"Q. So, now, it's not 40 feet. So it's possible the accident could have happened just right there where the light is, and you should have been able to see?

"A. No.

"Q. It wasn't -- it wasn't right there?

"A. No, sir.

"Q. Okay. Was it after the mud, then? I see some mud. Was it after the mud? Is that what you're saying now?

"A. It was in the mud line.[7]

"Q. It was in the mud line. So right here in the mud line, that can be seen on that exhibit right there; wouldn't you agree?

"And, remember, you have your lights on too, right?

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[7]Mud along the curb appears to be a several yards past the entrance to the tunnel.

"A. I have daytime running lights on.

"Q. Does that mean that they're less bright or something? I'm just -- the lights were on? I'm saying the lights were on; is that correct?

"A. They were on. They were a little bit beyond that mud line, but pretty close to it.

"Q. So, now, we have three. One, just inside the tunnel, right? You also said maybe 40 feet; is that correct?

"A. Correct.

"Q. Now, you're saying it may be just beyond the mud; is that correct?

"A. Correct.

"Q. So we've got three locations that you think you may have hit this person, but you don't know because you never saw them, right?

"A. Never saw her.

"Q. Okay. So you never saw her. You never saw her. All you heard was a scream, but you're able to give at least three, maybe four, locations inside of this tunnel? Is that ... what you're telling the jury today?

"A. I'm going to stick to what I said. At 25 miles an hour at a second to a second and a half, I don't know how many, exactly how many, feet I traveled inside that tunnel. I was just inside the tunnel. That's all I can tell you.

"Q. And my thing is that it was bright and sunny out; is that right?

"A. It was.

"Q. Headlights were on?

"A. Yes.

"Q. There was plenty enough light to see someone; wouldn't you agree?

"A. No, not in that tunnel.

"....

"Q. Even in this photo, you can still see people in this tunnel. You can still see objects. You can still see. Is that correct?

"A. That's correct.

"Q. Okay.

"A. But you're already inside the tunnel, too.

"Q. So -- so you're saying that further in the tunnel, the better you can see people?

"A. Oh, yeah, definitely.

"Q. But at the entrance of the tunnel, you have light from outside shining in. You have the lights from the lamps, and you have your headlights on.

"You're saying you couldn't see anything; is that your testimony, then?

"A. That's correct.

"Q. And also you testified for sure that you did not anticipate the presence of ... Hawkins at any time in this tunnel; isn't that can correct?

"A. That's correct.

> "Q. And wouldn't you agree it is your duty as a safe driver to anticipate the presence of pedestrians on the road?
>
> "A. That's correct.
>
> "Q. And you did not do that, did you?
>
> "A. I didn't anticipate her being in that tunnel.
>
> "Q. But you agree that being a safe driver you are supposed to anticipate the presence of pedestrians on the road?
>
> "A. Yes."

Hawkins testified that the day of the accident was the first time she had walked in the tunnel, although, she said, she had previously driven through it. Regarding Hawkins's actions leading up to the accident, she testified on direct examination as follows:

> "Q. Now, you said you've been on Fifth Avenue [North] before; is that correct?
>
> "A. Yes, sir.
>
> "Q. And what is it like, the lighting in the tunnel there?
>
> "A. I mean, once you're going in, you can see as you're walking down. You can see as you get into the tunnel because I've seen people walking in and out of the tunnel myself.

"Q. Okay. Now, you had two choices that day from looking -- you could have -- now, when you normally walk, do you follow the rules of the road?

"A. Yes, sir.

"Q. And when you're walking on Seventh Avenue [North], did you walk on the left side of the road?

"A. Yes, sir.

"Q. And when you came down and were walking on -- did you follow the rules of the road --

"A. Yes, sir.

"Q. -- from Seventh Avenue [North] to Fifth Avenue [North]?

"A. Uh-huh.

"Q. So when you get here, you have to make a decision?

"A. Yes, sir.

"Q. Okay. Now, you said you've traveled Fifth Avenue [North] before?

"A. Yes, sir.

"Q. Okay. Tell the jury what would happen if you choose to use the left side of the road if you walk under that tunnel.

"A. Okay. The reason I chose the right side, because if I would have came out on that left side [at the end of the tunnel], I would have been dead in the center of traffic. There was no way for me to avoid the cars because they're coming into the tunnel [in the two lanes of 5th Avenue North leaving downtown], and they're going to the freeway [via an

exit lane from 5th Avenue North that is separated from those two lanes by the concrete retaining wall at that end of the 5th Avenue North tunnel]. So I would have been in the dead center in the middle of traffic where cars are going into the tunnel and to the expressway.

"So I chose what was the safest route for me to stay on the right side so that I can be closest to the wall. And when I come up out of the tunnel, I'm automatically placed onto the sidewalk.

"Q. So would you think a reasonable person would have chosen that route?

"A. Yes, sir.

"Q. So you had to choose between hopping over the train; is that correct?

"A. Yes, sir.

"Q. Or walking in the middle of traffic on Fifth Avenue [North]?

"A. Yes, sir.

"Q. Or hugging the road and walking with your back towards traffic and trying to get through that tunnel?

"A. Yes, sir.

"....

"Q. You had been walking almost an hour?

"A. Yes, sir.

"Q. And do you recall, was it heavy traffic out there?

"A. When I came down to the -- when I came down 28th, I stopped, and I looked back at the traffic. And I saw cars sitting at that light.

"Q. And had some cars already passed you before?

"A. When I got in that tunnel, yes, sir.

"Q. Did any of them hit you?

"A. No, sir.

"....

"Q. Was this a work day, on a Wednesday?

"A. Yes, sir.

"Q. So it may have been -- safe to say it may have been some traffic out there on your left, right? And right here, there would have been cars coming that way; is that correct?

"A. Yes, sir.

"Q. So if you came through this tunnel, you would have had to cross two lanes to get over; is that right?

"A. Yes, sir.

"Q. Or you would have to dodge traffic to the right to find the sidewalk?

"A. Yes, sir.

"Q. So your intention was to come out through the tunnel and hug the side of the road like on that picture?

"A. Yes, sir.

"Q. And go to your home?

"A. Yes, sir.

"....

"Q. ... And did this accident take place right inside the tunnel?

"A. Yes, sir.

"Q. Okay. And did it take place sort of like before the mud or after the mud, based on that?

"A. I'm going to honest. I wasn't concerned about no mud. I'm exercising.

"Q. It wasn't that --

"A. It ain't a cute thing. I didn't care -- I mean, I was looking at that wall just as close I can get to it. I didn't recognize there was no mud. I'm just exercising.

"Q. I understand. But it's your testimony this accident took place somewhere close inside that tunnel?

"A. Yes, sir.

"Q. Did you see ... Simmons come up behind you anywhere?

"A. No, sir.

"Q. Did he blow his horn to let you know he was coming?

"A. No, sir.

"Q. Did he flash any lights to let you know he was coming?

"A. No, sir.

"Q. Did you dart out in traffic? Were you startled in any kind of way?

"A. No.

"Q. And is it your testimony today you wanted to be as close as you could to that wall.

"A. I was close.

"Q. -- because you know there may be cars coming?

"A. Yes, sir.

"Q. And had any other cars passed you as you walked on that side?

"A. Two vehicles.

"Q. Two vehicles?

"A. I remember two vehicles.

"Q. Did they come anywhere close to you?

"A. No, sir.

"....

"Q. It was right here towards the entrance or the --

"A. Yes, sir.

"Q. Entrance of the tunnel that you were hit?

"A. Yes, sir.

"....

"Q. ... Did you think it was dangerous to walk [in that] area?

"A. No.

"Q. Was that because the way you were walking?

"A. The way I was walking because I've seen walkers and runners in there before.

"Q. Have you driven there before?

"A. Many times, yes, sir.

"Q. Have you seen walkers in there before?

"A. Yes, sir.

"Q. Have you seen cars drive by there without any type of event?

"A. Yes, sir."

On cross-examination, Hawkins further testified as follows:

"Q. So what you're saying is, in one second, ... Simmons was supposed to be able to see you and notice that you're standing in the street outside of the mud and then do something to cross over into the other lanes of traffic? Is that what you're saying?

"A. I can't speak for Simmons --

"Q. Because --

"A. What I can say is I wasn't in the street. I don't care about the mud. I don't exercise to get clean. So, I mean, me walking by safety, if it took me walking through a pile of mud, that's what I would have had to do to stay as close as I could to that wall."

Based on the medical records Hawkins submitted into evidence and her testimony, she suffered multiple contusions and a laceration on her left hand as a result of the accident. The accident also cracked the right headlight and tore off the right mirror on Simmons's truck.

Officer Fields, who had responded when the accident was reported and who had discussed the accident with Hawkins and Simmons, also testified at trial. Simmons and FHC's counsel presented Officer Fields with a copy of ordinances from the Birmingham City Code, including § 10-3-1 and § 10-3-8. The following colloquy then occurred:

> "Q. ... Would you look at that and identify that information for the ladies and gentlemen of the jury?
>
> "A. Looks like the code, like a state code or city code that says that anybody walking should be walking on the left side of oncoming traffic.
>
> "Q. Did the fact that she was walking on the right side with traffic that day, in your opinion, based on your investigation, contribute to cause the accident that day?
>
> "A. Yes."

Simmons and FHC's counsel then asked Officer Fields about Ala. Code 1975, § 32-5A-215(c):

> "Q. ... [D]oes that apply in this case?

"A. Yes, sir.

"Q. And the fact that Ms. Hawkins on that day was walking on the right-hand side means that she was in violation of 32-5A-215(c)?

"A. Yes, sir.

"Q. And this is a statute that's designed to protect a pedestrian like ... Hawkins by having them walk on the left side of the road, correct?

"A. Yes, sir.

"Q. And based on what you saw there that day in the investigation that you completed that day, the fact that ... Hawkins was walking on the right-hand side with traffic caused or contributed to cause the accident that day?

"A. Well, I didn't look at it that day like that. The reason why I put the driver at fault is because by her walking on the right-hand side, I thought he was able to see her to be able to go around her, because he hit a pedestrian. And that's the only reason I had questioned it.

"I didn't actually think that he had hit her, but he did say he felt a bump, which that was the bump from the mirror. So if he would have saw her, he would have had enough time to go around her, as opposed to going straight. But he said he didn't see her. So I put him at fault because I felt like he had enough time to go around her as opposed to bumping her.

"Q. But the fact that she was walking on the right --

"A. Yes, sir.

> "Q. -- in violation of that code, did it, in any way contribute to cause the accident?
>
> "A. Yes, sir."

Hawkins's counsel did not object to the foregoing testimony, and he asked no question of Officer Fields.

Based on the foregoing testimony; the exhibits presented at trial; the right of a jury to draw reasonable inferences from the evidence and to evaluate and decide the credibility and weight to be given to the testimony of Hawkins, Simmons, and Officer Fields; and the holding of the supreme court in Allman, we cannot conclude that a JML was proper on the ground that Hawkins had been contributorily negligent or, if so, that her negligence was a proximate cause of the accident, particularly in light of Simmons's testimony that he would have hit a person even if they had been walking against the traffic, Hawkins's testimony regarding her potential choices for a route home, and the fact that other vehicles had passed Hawkins in the tunnel without incident. The evidence presented reasonably could have supported the conclusion that, no matter how careful Hawkins had been in traveling through the tunnel in the direction she chose, the accident would have occurred and that Simmons would not have hit her had he been

exercising reasonable care as he entered and proceeded through the tunnel. See Wayland Distrib. Co. v. Gay, 287 Ala. 446, 450, 252 So. 2d 414, 417 (1971) ("[T]hose using the public streets, must always exercise such reasonable care for their own safety and for the safety of others as the attending circumstances require."). Further, contrary to the arguments presented by Simmons and FHC in support of their motion for a JML, they were not entitled to a JML merely because they presented substantial evidence, or a prima facie case, indicating that Hawkins also had been negligent. The presentation of substantial evidence by the party who has the burden of proof merely means that there is sufficient evidence to support a jury's verdict in favor of that party, not that the jury must render such a verdict. More is required for a JML to be proper. "The question of whether the plaintiff is guilty of contributory negligence is a matter of law, and therefore one for the court to decide, only when the facts are such that all reasonable people must draw the same conclusion, and the question is for the jury when, under all the facts and circumstances, reasonable minds may fairly differ upon the question of negligence vel non." Hatton v. Chem-Haulers,

Inc., 393 So. 2d 950, 954 (Ala. 1980). The same is true regarding the issue whether a plaintiff's negligence was a proximate cause, i.e., contributed to, the accident causing injury, as to which the burden is also on the defendant. See Hatton, 393 So. 2d at 954 ("The burden of proving contributory negligence and that it proximately caused the injury is on the defendant ...."). In other words, Simmons and FHC were entitled to a JML only if, viewing the evidence and the inferences that could be drawn from the evidence in a light most favorable to Hawkins, there was no factual conflict regarding (1) whether Hawkins had been negligent and (2) whether Hawkins's negligence was a proximate cause of the accident. The evidence was in conflict, however.

Also, regarding Officer Fields's testimony, which the trial court emphasized during the arguments at trial, this court stated in Bunn v. Bunn, 628 So. 2d 695, 697 (Ala. Civ. App. 1993):

> "An expert's opinion is not conclusive on the trier of fact, even if the testimony was uncontroverted, because [the finder of fact] must look to the entire evidence and its own observations in deciding factual issues. Williams v. City of Northport, 557 So. 2d 1272 (Ala. Civ. App. 1989), cert. denied, 498 U.S. 822, 111 S. Ct. 71, 112 L. Ed. 2d 45 (1990). The weight and credibility to be attributed to the

> testimony of an expert is for the trier of fact. Clark Lumber Co. v. Thornton, 360 So. 2d 1019 (Ala. Civ. App. 1978)."

See also Huntsville City Bd. of Educ. v. Jacobs, 194 So. 3d 929, 941 (Ala. Civ. App. 2014) ("The fact that one witness is the sole witness to testify to certain facts does not require the fact-finder to believe the testimony of that witness."). The fact that Hawkins's counsel failed to object to Officer Fields's testimony does not mean that the jury would be required to accept that testimony. Also, "'[g]enerally, a witness, whether expert or lay, cannot give an opinion that constitutes a legal conclusion or amounts to the application of a legal definition.'" DISA Indus., Inc. v. Bell, 272 So. 3d 142, 153 (Ala. 2018) (quoting Hannah v. Gregg, Bland & Berry, Inc., 840 So. 2d 839, 852 (Ala. 2002)). Such questions are for the jury to decide. See Leeper Cleaning & Dyeing Co. v. McKinney, 230 Ala. 462, 464, 161 So. 529, 530 (1935) ("It was a question for the jury as to whether or not the improper parking of the defendant's truck was the proximate cause of the plaintiff's injury or whether or not her driver was guilty of proximate contributory negligence in permitting her car to collide with said truck, taking into consideration the frozen

and slippery condition of the highway and all surrounding circumstances."); see also Triplett v. Daniel, 255 Ala. 566, 568, 52 So. 2d 184, 186 (1951) ("If under the undisputed proof in the case there is a violation of § 17, Title 36, Code of 1940, then such violation constitutes negligence on the part of the plaintiff as a matter of law but it would still remain a question for the jury as to whether violation of the statute proximately contributed to her injury.").

Based on the foregoing, we conclude that the trial court erred by granting Simmons and FHC's motion for a JML regarding the issues whether Hawkins had been contributorily negligent and whether any such negligence was a proximate cause of the accident. Accordingly, the JML is reversed and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Thompson, P.J., and Moore, Donaldson, and Hanson, JJ., concur.