Rel: February 4, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1190976

Yulanda Haddan

v.

Norfolk Southern Railway Company and Norfolk Southern Corporation

Appeal from Lee Circuit Court
(CV-18-900253)

STEWART, Justice.[1]

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[1]This case was originally assigned to another Justice on this Court; it was reassigned to Justice Stewart.

Yulanda Haddan appeals from a summary judgment entered by the Lee Circuit Court in favor of Norfolk Southern Railway Company and Norfolk Southern Corporation (collectively referred to as "Norfolk Southern"). She also seeks review of an order of the circuit court striking certain deposition testimony. Haddan was injured when a pickup truck in which she was riding collided with a Norfolk Southern train at a railroad crossing. In its summary judgment, the circuit court concluded that Haddan could not recover against Norfolk Southern because, it determined, the driver of the truck failed to stop, look, and listen before entering the crossing and that failure was the sole proximate cause of Haddan's injury. For the reasons set forth herein, we affirm the circuit court's order striking the testimony, but we reverse the summary judgment and remand the matter to the circuit court.

I. Facts

On December 1, 2016, shortly after 9:00 p.m., Scott Lindsey Cox was driving a Ford Ranger pickup truck on Lee County Road 430 ("CR 430") in Smiths Station. Haddan was riding in the passenger seat. The portion of CR 430 on which they were traveling runs parallel to Norfolk

Southern's railroad line ("the track"). Lee County Road 243 ("CR 243") runs parallel to the track on the other side. Lee County Road 927 ("CR 927"), also known as "Jones Rd.," crosses CR 430, the track, and CR 243. At the time of the collision, the intersection of CR 927 and the track ("the crossing") was marked with "STOP" signs and crossbucks, which are X-shaped white signs that display the words "RAILROAD CROSSING" in black letters. The crossing was not marked with lights or gates, but signs on both CR 430 and CR 243 warned that the crossing had "NO LIGHTS OR GATES."

Cox turned from CR 430 onto CR 927 toward the crossing. At the time, Cox and Haddan had been discussing whether to bring Haddan's dog, which was in the back of the truck, into the cab. Cox stopped at the "STOP" sign, approximately 22 feet from the track. From that position, Cox had a clear view of the track. As the truck approached the crossing, Cox finally agreed to open his door and to let the dog into the cab of the truck.

Meanwhile, a Norfolk Southern train operated by engineer Troy Rogers approached the crossing. Although the speed limit for trains was

60 miles per hour at the location at issue, the train was traveling only 36 miles per hour. The train's headlights were on bright, its ditch lights -- additional lights below the headlights on both sides of the front of the train -- were flashing, and the train's bell was ringing. Just as the train was about to enter the crossing, Cox drove the truck in front of the train. The train struck the truck on the front passenger side, flipping it into a ditch. Haddan was severely injured.

Haddan sued Cox, Rogers, and Norfolk Southern. She asserted a wantonness claim against Cox, but the circuit court concluded that Cox had never been properly served and had never appeared in the action. The circuit court, thus, ruled that Cox had never become a party to the action. Haddan asserted negligence and wantonness claims against Norfolk Southern and Rogers, alleging that Norfolk Southern had failed to install lights and gates at the crossing and that Rogers had failed to blow the train's horn while approaching the crossing.

Norfolk Southern and Rogers filed motions for a summary judgment, asserting that Cox's negligence was the sole proximate cause of Haddan's injuries. Norfolk Southern and Rogers submitted depositions, affidavits,

photographs of the collision scene, and video footage and data from the train's "RailView" camera showing the collision. In response, Haddan submitted portions of her own deposition and an affidavit of William R. Hughes, a grade-crossing-safety expert. The circuit court granted Norfolk Southern's motion to strike part of Haddan's deposition testimony as hearsay. The circuit court subsequently entered a summary judgment in favor of Norfolk Southern and Rogers. On appeal, Haddan challenges the circuit court's order granting Norfolk Southern's motion to strike and the summary judgment with regard to Norfolk Southern but not with regard to Rogers. See Rule 4(a)(1), Ala. R. App. P. ("On an appeal from a judgment or order a party shall be entitled to a review of any judgment, order, or ruling of the trial court."); Robert S. Grant Constr., Inc. v. Frontier Bank, 80 So. 3d 901, 902 (Ala. 2011) ("It is only in the context of an otherwise final and appealable judgment that an interlocutory order ... merges with the final judgment and becomes reviewable by way of appeal."). Further, Haddan challenges the summary judgment with regard to only her negligence claim, not her wantonness claim. Thus, the

only claim at issue in this appeal is Haddan's negligence claim against Norfolk Southern.

II. Summary-Judgment Standard of Review

> "This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. '[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 Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989)."

Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004).

III. Analysis

A.

Before addressing the merits of the parties' substantive arguments regarding the summary judgment, we address Haddan's argument challenging an order of the circuit court order striking a portion of her deposition testimony as hearsay. "In reviewing a ruling on the admissibility of evidence, ... the standard is whether the trial court exceeded its discretion in excluding the evidence." Woven Treasures, Inc. v. Hudson Cap., L.L.C., 46 So. 3d 905, 911 (Ala. 2009). In the circuit court, Norfolk Southern filed a motion seeking to strike that part of Haddan's deposition testimony in which she recounted statements that Cox purportedly made to her after the collision concerning whether he had heard the train's horn before the collision. Norfolk Southern contended that the testimony constituted inadmissible hearsay. The circuit court agreed and entered an order granting its motion. The circuit court determined that, because Haddan had not established proper service on Cox and because Cox had not appeared in the action, Cox was not a party to the action; thus, the circuit court concluded, the pertinent testimony was not exempt from the hearsay rule as an admission by a party opponent. See Rule 801(d)(2), Ala. R. Evid. ("A statement is not hearsay

if ... [t]he statement is offered against a party and is ... the party's own statement in either an individual or a representative capacity or ... a statement of which the party has manifested an adoption or belief in its truth ....").

On appeal, Haddan argues that that ruling was incorrect because, she contends, Cox was served with the summons and complaint. She cites the return of service on Cox contained in the record. Nothing on the face of the return, however, shows that the summons was left "at [Cox's] dwelling house or usual place of abode with some person of suitable age and discretion then residing therein," Rule 4(c)(1), Ala. R. Civ. P. Haddan fails to demonstrate that the circuit court erred in ruling that she had not established proper service on Cox. Our Court of Civil Appeals has held that an unserved defendant is not a party to the action. Harris v. Preskitt, 911 So. 2d 8, 14 (Ala. Civ. App. 2005). Haddan attempts to differentiate this case from Harris only by insisting that Cox had been served, which, as noted above, is not supported by the record. Haddan, therefore, has not shown that the circuit court exceeded its discretion in concluding that Cox was not a party, in determining that the hearsay exemption under Rule

801(d)(2) was inapplicable, and in excluding the testimony in question as hearsay.

B.

In its summary judgment, the circuit court ruled that Cox's failure to stop, look, and listen was the sole proximate cause of Haddan's injury. Haddan contends that that ruling was erroneous because, she says, the circuit court improperly imputed Cox's contributory negligence to her. She argues that the circuit court should have treated Norfolk Southern and Cox as concurrent tortfeasors.

To prevail on a negligence claim, a plaintiff must prove that the defendant owed the plaintiff a legal duty, that the defendant breached that duty, that the plaintiff suffered a loss or injury, that the defendant's breach was an actual cause of the injury, and that the defendant's breach was a proximate cause of the injury. QORE, Inc. v. Bradford Bldg. Co., 25 So. 3d 1116, 1124 (Ala. 2009). The proximate-cause element is not met if another act or event was the sole proximate cause of the injury. General Motors Corp. v. Edwards, 482 So. 2d 1176, 1195 (Ala. 1985), overruled on

other grounds, Schwartz v. Volvo North America Corp., 554 So. 2d 927 (Ala. 1989).

To say that an event occurring after a defendant's negligence was the "sole proximate cause" of the plaintiff's injury is simply another way of saying that the event was an intervening cause that prevents the defendant from being liable for the injury. See Edwards, 482 So. 2d at 1194 (using "sole proximate cause" and "intervening cause" interchangeably); Beloit Corp. v. Harrell, 339 So. 2d 992, 993 (Ala. 1976) (same).[2] This Court has defined an intervening cause to be "one which occurs after an act committed by a tortfeasor and which relieves him of his liability by breaking the chain of causation between his act and the resulting injury." Edwards, 482 So. 2d at 1194 (citing Vines v. Plantation Motor Lodge, 336 So. 2d 1338 (Ala. 1976)). Stated otherwise, a negligent party is accountable only to those injured as a proximate result of such

[2]This Court's liability-limiting usage of the term "intervening cause" is commonly referred to in modern legal parlance as "superseding cause." See, e.g., Black's Law Dictionary 274 (11th ed. 2019); Bryan A. Garner, Garner's Dictionary of Legal Usage 141 (3d ed. 2011); Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 34 & cmts. (Am. L. Inst. 2010).

negligence, and "[w]here some independent agency intervenes and is the immediate cause of the injury, the party guilty of prior negligence is not liable." Hall v. Booth, 423 So. 2d 184, 185 (Ala. 1982).

> "Not every cause which comes into operation after a tortfeasor has acted will relieve him of liability for his wrongful act. More than the proper temporal relationship between the tortfeasor's act and the subsequent cause is required. In order to be an intervening cause, a subsequent cause also must have been unforeseeable and must have been sufficient in and of itself to have been the sole 'cause in fact' of the injury. Vines[v. Plantation Motor Lodge, 336 So. 2d 1338] at 1339 [(Ala. 1976)]. If an intervening cause could have reasonably been foreseen at the time the tortfeasor acted, it does not break the chain of causation between his act and the injury. Vines, supra; Morgan[v. City of Tuscaloosa, 268 Ala. 493, 108 So. 2d 342 (1959)]; Louisville & N.R. Co. v. Courson, 234 Ala. 273, 174 So. 474 (1937). Conversely, if the intervening cause was unforeseeable, the causal chain is broken. Vines, supra. In the same respect, if the intervening cause is not sufficient to be considered the sole 'cause in fact' of the injury, if it is not in and of itself sufficient to stand as the 'efficient cause' of the injury, the causal chain is not broken; but, if the intervening cause was alone sufficient to produce the injury complained of, it is deemed the proximate cause of the injury and the tortfeasor or tortfeasors between whose acts and the injury the cause intervened are relieved of liability. Watt v. Combs, 244 Ala. 31, 12 So. 2d 189 (1943); Goodwyn v. Gibson, 235 Ala. 19, 177 So. 140 (1937)."

Edwards, 482 So. 2d at 1195.

Haddan contends that Cox's negligent conduct in failing to stop, look, and listen does not rise to the level of a superseding, intervening cause as a matter of law (see note 2, supra) and that, rather, there exists a jury question as to whether Cox's actions were those of a concurrent tortfeasor. Haddan contends that Cox's contributory negligence cannot be imputed to her and that Cox's contributory negligence should not bar her right to recover against concurrent tortfeasors. This Court has stated that "an injury may have several concurrent proximate causes, ... including the actions of two or more tortfeasors, neither of whose action was sufficient in and of itself to produce the injury, who act, either together or independently, to produce it." Edwards, 482 So. 2d at 1195 (citing, among other cases, Butler v. Olshan, 280 Ala. 181, 191 So. 2d 7 (1966)). "Alabama law is clear that on such occasions, where the actions of two or more tortfeasors combine, concur, or coalesce to produce an injury, each tortfeasor's act is considered to be the proximate cause of the injury ... and each tortfeasor is jointly and severally liable for the entire injury." Id.(citing, among other cases, United States Fid. & Guar. Co. v. Jones, 356 So. 2d 596 (Ala. 1977), and Butler, supra). In support of her argument,

Haddan analogizes the present case to the Court of Civil Appeals' decision in Barnett v. Norfolk Southern Railway Co., 671 So. 2d 718 (Ala. Civ. App. 1995), and this Court's decision in Western Railway of Alabama v. Still, 352 So. 2d 1092 (Ala. 1977).

In Barnett, the plaintiff was injured when a pickup truck in which he was a passenger collided with a train. The plaintiff and the driver of the pickup truck both sued the railroad company that operated the train and the train engineer, claiming, among other things, that the train engineer's failure to sound the train's whistle properly as the train approached the railroad crossing where the collision occurred constituted a breach of the duty to warn motorists who were approaching the railroad crossing. The trial court entered a summary judgment in favor of the railroad company and the train engineer on all claims asserted by the plaintiff and the driver on the basis that the driver of the pickup truck had been contributorily negligent and that his negligence had been the sole proximate cause of the collision. Only the plaintiff appealed. On appeal, the Court of Civil Appeals noted that the question of contributory negligence is normally one for the jury, stating that, " '[e]ven where the

evidence does not conflict, the question whether a person has exercised due care is still normally a question of fact for the jury to determine.' " Barnett, 671 So. 2d at 720 (quoting Adams v. Coffee Cnty., 596 So. 2d 892, 895 (Ala. 1992)). The court concluded that "[t]he contributory negligence of a driver does not bar a passenger's right to recovery against a third party if the passenger is otherwise entitled to recovery." Id. (citing Alewine v. Southern Ry., 531 So. 2d 315 (Ala. 1988)). The court ultimately determined that the plaintiff had produced substantial evidence to overcome the railroad company and the train engineer's motion for a summary judgment and that a "jury, and not the trial court, must hear the evidence and determine whether [the plaintiff], as a passenger in the pickup truck, is entitled to recover from the defendants." Id.

In Still, supra, this Court addressed the issue of intervening cause in relation to a railroad-crossing accident in which the passengers in a vehicle that crashed at a railroad crossing suffered injuries. The plaintiffs in Still were passengers in a vehicle that crashed as it crossed a railroad track maintained by the defendant railroad company. The driver was allegedly speeding while crossing the track. The plaintiffs sued the driver

and the railroad company, "alleging that their injuries were due to the negligent or wanton operation of the automobile in combination with the negligent or wanton manner in which the crossing was maintained." Still, 352 So. 2d at 1094. The jury rendered a verdict in favor of the plaintiffs in the amount of $43,000, and the trial court entered a judgment on the verdict. On appeal, this Court concluded that the conduct of the driver was not an unforeseeable intervening cause:

> "This court recently addressed the issue of negligent liability and intervening agency in Vines v. Plantation Motor Lodge, 336 So. 2d 1338 (Ala. 1976), where it stated:
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> > " 'Negligence alone does not afford a cause of action. Liability will be imposed only when negligence is the proximate cause of injury; injury must be a natural and probable consequence of the negligent act or omission which an ordinarily prudent person ought reasonably to foresee would result in injury. If, between the alleged negligent act or omission and the injury, there occurs an independent, intervening, unforeseeable event, the causal connection between the alleged negligence and the injury is broken. [Citations omitted.]
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> > " 'The key here is foreseeability. This court has held many times that a person, who by some act or omission sets in motion a series of events, is not responsible for consequences of intervention of another agency, unless at the time of his original

> act or omission, the act of the intervening agency could reasonably be foreseen. If so, the casual chain is not broken. If the injury results from an independent intervening, efficient cause, not reasonably foreseeable, the original negligent act or omission is not the proximate cause of injury.' [Citations omitted.] 336 So. 2d at 1339.
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> "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. Morgan v. City of Tuscaloosa, 268 Ala. 493, 108 So. 2d 342 (1959) and authorities cite[d] therein."

Still, 352 So. 2d at 1095. The Court concluded that the railroad company had the affirmative duty to maintain the railroad crossing and that it was foreseeable that a driver could speed through the crossing. Id. (citing Alabama Great S. R.R. v. Bishop, 265 Ala. 118, 89 So. 2d 738 (1956); Louisville & Nashville R.R. v. Hubbard, 148 Ala. 45, 41 So. 814 (1906)). The Court stated that the railroad company

> "obviously knows that persons will travel in automobiles over the crossing. This necessarily includes the knowledge that in the course of human conduct some people will break the speed limit. In such a case, the jury must decide whose actions are the proximate cause of the injury, or whether both [parties'] actions concurred and combined to proximately cause the injury."

Id.

Relying on this Court's decisions in Ridgeway v. CSX Transportation, Inc., 723 So. 2d 600, 604 (Ala. 1998), and Norfolk Southern Railway Co. v. Johnson, 75 So. 3d 624, 640 (Ala. 2011), Norfolk Southern contends that the circuit court correctly concluded that Cox's conduct was the sole proximate cause of the collision because, it alleges, Cox failed to abide by the duty to "stop, look, and listen," as required by § 32-5A-150(a), Ala. Code 1975, which provides:

> "Whenever any person driving a vehicle approaches a railroad grade crossing [when, among other things, an approaching railroad train is plainly visible and is in hazardous proximity to such crossing], the driver of such vehicle shall stop within 50 feet but not less 15 feet from the nearest rail of such railroad, and shall not proceed until he can do so safely."

Under the "stop, look, and listen" doctrine,

> " 'one who is about to cross a railroad track must stop so near to the track, and his survey by sight and sound must so immediately precede his effort to cross over it, as to preclude the injection of an element of danger from approaching trains into the situation between the time he stopped, looked, and listened and his attempt to proceed across the track.' "

Ridgeway, 723 So. 2d at 604 (quoting Southern Ry. v. Randle, 221 Ala. 435, 438, 128 So. 894, 897 (1930)). This Court has held that a motorist's

failure to stop, look, and listen at a railroad crossing is generally an intervening cause of resulting injuries. "'"The general rule ... is that where a motorist fails to 'Stop, Look, & Listen' before crossing a railroad track, and he thereby runs into or collides with a train on its track at a public crossing, ... his negligence will be treated as the sole proximate cause of his injuries."'" Johnson, 75 So. 3d at 640 (quoting Ridgeway, 723 So. 2d at 605, quoting in turn Lambeth v. Gulf, Mobile & Ohio R.R., 273 Ala. 387, 389, 141 So. 2d 170, 172 (1962)). According to Norfolk Southern, Cox's failure to stop, look, and listen while approaching the crossing constitutes contributory negligence, and it contends that it is entitled to a judgment as a matter of law in its favor because, it says, Cox's negligence was the superseding, intervening cause of Haddan's injuries.

In reviewing, de novo, the summary judgment, this Court must determine whether Norfolk Southern has made a prima facie showing that no genuine issue of material fact exists concerning the proximate cause of Haddan's injuries, thus entitling it to a judgment as a matter of law in its favor, and, if so, whether Haddan produced substantial evidence creating a genuine issue of material fact on the question of proximate causation.

See Dow, 897 So. 2d at 1038-39. As noted above, "[i]t 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." Still, 352 So. 2d at 1095. Moreover, in relation to the question of the foreseeability of Cox's conduct, this Court has stated:

> " 'Ordinarily, it is a jury question whether consequences of an act are reasonably foreseeable, but, in a proper case, it is a legal question.' Sly v. South Cent. Bell Tel. Co., 387 So. 2d 137, 140 (Ala. 1980). 'When ... the facts of the cause are not conflicting, and where there can be no reasonable difference of opinion as to the conclusion to be reached upon them, those questions are for the decision of the court as a matter of law.' Hercules Powder Co. v. DiSabatino, 55 Del. 516, 527, 188 A.2d 529, 535 (1963). ' "[F]oreseeability must be based on the probability that harm will occur, rather than the bare possibility." ' Ex parte Wild Wild West Soc. Club, Inc., 806 So. 2d 1235, 1241 (Ala. 2001) (quoting 65 C.J.S. Negligence § 4(3) (1966)(emphasis added)).
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> " '[T]he line is drawn to terminate the defendant's responsibility' for injuries of the unanticipated sort resulting from 'intervening causes which could not reasonably be foreseen, and which are no normal part of the risk created.' W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 44, at 312, 311 (5th ed. 1984)."

Alabama Power Co. v. Moore, 899 So. 2d 975, 979 (Ala. 2004).

In support of its motion for a summary judgment, Norfolk Southern presented evidence indicating that Cox stopped at the crossing but failed to look and listen for approaching trains. According to the "RailView" video footage, Cox stopped at the "STOP" sign before the crossing. A photograph taken the morning after the collision from the place where Cox stopped showed that he had a clear view of the track in the direction of the train's approach. Haddan admitted that Cox should have been able to see the train from that position. The video also showed that, before and at the moment Cox pulled into the crossing, the train's headlights were on bright, its bell was ringing, and its ditch lights were flashing. In addition, the video showed that Cox could have seen the train for approximately 6.5 seconds before driving forward into the crossing. At the time, Cox and Haddan were involved in a discussion about bringing Haddan's dog into the cab of the truck. Finally, the video showed that Cox drove forward into the crossing just as the train was entering the crossing.

Haddan does not dispute that Cox was negligent; indeed, in her complaint, she alleged that his actions were wanton. Haddan, however, produced evidence to show that the conditions of the crossing were

dangerous and that those conditions were allegedly known to Norfolk Southern. In his affidavit, Hughes, a retired Norfolk Southern employee who had worked on grade-crossing-safety issues during that employment, averred that the crossing was "complex and extra hazardous" because, he said, its significant incline "diverts a driver's attention to focus on what is on the other side of the hump, and therefore, contributes to the cause of a collision." Hughes was also critical of the surface of the crossing, the short distance between the intersecting roadways and the crossing, and the presence of vegetation that obstructed the view of the tracks, among other factors. Hughes stated that, "[a]s a result of the unusually dangerous characteristics of the ... Crossing, Norfolk Southern should have installed safety devices, such as lights and gates." He further testified that the crossing had been identified as unsafe "long before this collision" and that Norfolk Southern "knew that lights and gates were needed at the ... Crossing, and [was] advised by other interested parties of the need for additional safety devices at the ... Crossing." Hughes also stated that "[i]t's reasonable to conclude Norfolk Southern could have and should have recognized the foreseeable characteristics and conditions of

the ... Crossing ... that contributed to the crossing collision." Haddan also provided evidence, which is in dispute, indicating that Rogers, the train engineer, failed to blow the train's horn as it approached the crossing.

We conclude that a genuine issue of material fact exists as to the question of the proximate cause of Haddan's injuries. Norfolk Southern presented evidence attributing the cause of the collision to the contributory negligence of Cox, the driver of the pickup truck in which Haddan was a passenger, but negligence cannot be imputed to a passenger like Haddan absent a showing that the passenger "had some authority or control over the car's movement, such as some right to a voice in the management or direction of the automobile." Adams, 596 So. 2d at 895. Although, as we stated in Johnson and Ridgeway, a driver's failure to stop, look, and listen before crossing a railroad track amounts to negligence that, generally, will be treated as a superseding, intervening cause of injuries to a driver resulting from a collision of the driver's vehicle with a train, this Court has not addressed a situation in which a driver's negligence in failing to stop, look, and listen before crossing a railroad track constituted a superseding, intervening cause of injuries to

a passenger resulting from such a collision. Indeed, the plaintiffs in Johnson and Ridgeway were the drivers, not the passengers, of the vehicles involved in the railroad-crossing collisions in those cases. In the present case, there are two possible tortfeasors -- Cox and Norfolk Southern -- which raises at least the possibility of concurrent-tortfeasor liability, a concept that was not at issue in Johnson and Ridgeway. Moreover, unlike the present case, the claims asserted by the plaintiffs in Johnson and Ridgeway did not involve any allegation that the railroad companies in those cases had failed to install lights and a gate at the railroad crossings where the collisions occurred in those cases.

Akin to the circumstances in Barnett and Still, Haddan presented substantial evidence -- e.g., the evidence concerning the characteristics of the crossing and the evidence indicating that Rogers did not sound the train's horn when approaching the crossing -- from which a reasonable person could conclude that Norfolk Southern contributed to cause the collision resulting in Haddan's injuries, calling into question whether Cox's contributory negligence rose to the level of a superseding, intervening cause and creating a jury question as to whether Cox's

conduct was that of a concurrent tortfeasor. The evidence of Norfolk Southern's failure to install lights and a gate at the crossing further raises doubt as to whether Cox's failure to stop, look, and listen was truly unforeseeable. Haddan has raised enough of a factual issue to preclude the entry of a summary judgment in favor of Norfolk Southern. Ultimately, "the jury must decide whose actions are the proximate cause of the injury, or whether both [parties'] actions concurred and combined to proximately cause the injury." Still, 352 So. 2d at1095.

IV. Conclusion

Based on the foregoing, we affirm the circuit court's order granting Norfolk Southern's motion to strike portions of Haddan's deposition testimony. We reverse the summary judgment in favor of Norfolk Southern, however, and the matter is remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Bryan, Mendheim, and Mitchell, JJ., concur.

Shaw and Sellers, JJ., concur in part and dissent in part.

Bolin, J., concurs in the result.

Parker, C.J., dissents.

Wise, J., recuses herself.

SHAW, Justice (concurring in part and dissenting in part).

The plaintiff, Yulanda Haddan, was a passenger in a pickup truck driven by Scott Lindsey Cox. Haddan was injured when Cox drove his truck through a railroad crossing and was hit by an oncoming train.

Haddan alleged in the trial court several different theories of liability against two of the defendants below, Norfolk Southern Railway Company and Norfolk Southern Corporation ("the defendants"). On appeal, it appears to me that Haddan argues that the trial court erred in entering summary judgment as to two theories of liability: (1) whether the defendants were negligent in operating the train and maintaining the railroad crossing so as to prevent Cox from knowing that the train was approaching and (2) whether the defendants were negligent in failing to provide a control gate and warning lights at that crossing.

As far as it is alleged that the defendants operated the train or maintained the crossing in a negligent fashion, I see no substantial evidence indicating that the sole proximate cause of the accident was not Cox's failure to stop, look, and listen. The undisputed evidence shows that Cox and Haddan, immediately before the collision, were arguing about

letting a dog into the cab of the truck when they stopped at the crossing. Cox then inexplicably drove into the path of a clearly visible train that was traveling only 36 miles per hour. Cox lived in the area for years, and his residence, according to the trial court, "practically abutted the tracks." Photographic evidence established that the tracks were straight at this location, that no vegetation obstructed the view down the tracks, and that a train would be clearly visible a substantial distance from the crossing.

A camera aboard the train recorded the collision, which occurred at night. As the train approached the crossing, the train's lights were on bright and its ditch lights were flashing. The crossing is clearly illuminated by the train as it approaches. Cox's truck can be seen approaching the crossing. It is illuminated by the train's lights as it stops for a few seconds less than the truck's length before the tracks. It then proceeds into the crossing right at the moment the train entered it. There was nothing obscuring the view between the train and Cox's truck as it

approached the crossing, stopped, and then proceeded into the path of the train.[3]

I do not believe that a reasonable juror could conclude that, if Cox had exercised his duty to look for the train, he would not have noticed it because of any negligent conduct Haddan alleges on the part of the defendants in this case. There was simply nothing, such as vegetation, a curve in the track, the grade of the road, or the absence of lights on the train, obstructing the view of the train as it approached the crossing. To the extent that Haddan alleges that the collision was the result of the defendants' operation of the train or maintenance of the area around the

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[3]It appears undisputed that the train's bell was ringing at the time of the collision. The recording of the collision includes a display of data from the train, including its speed and what the defendants assert is an indicator for when the train's horn is sounded. This indicator shows that the horn was sounded several times as the train approached the crossing before the collision. Neither the bell nor the horn can be heard in the audio of that recording of the collision. However, a recording from a different camera located on the train and directed at an obscured area is included in the materials before us. In that recording, the train's horn can be heard sounding before the train slows after the collision. The train's engineer also testified that he sounded the horn before the collision. Haddan, who at the time of the collision was admittedly "high" after taking methamphetamine, could not remember all the details of the collision, but she said that she did not hear the train or the horn.

crossing, I see no question of fact indicating that Cox's actions were not the sole cause of the collision: Cox caused the collision by driving into the crossing before looking and listening, and I see no substantial evidence indicating that the defendants contributed to that cause. See Ridgeway v. CSX Transp., Inc., 723 So. 2d 600, 606-07 (Ala. 1998) (holding that a party killed in a collision with a train while crossing a track "was under a statutory and common-law duty to stop, look, and listen before she attempted to cross the track," that "[n]othing in the evidence suggest[ed] she was in any way prevented from doing that," and, thus, that "[t]he undisputed evidence clearly indicate[d] that the accident would not have occurred had [she] looked and listened sufficiently to note the noise and the appearance of the approaching train"). I would affirm the trial court's summary judgment as to this claim.

Haddan's other claim, that the defendants were negligent in failing to provide a crossing gate and warning lights at the crossing, appears to be an entirely distinct theory of liability that requires a different analysis. Although not specifically argued by Haddan, a reasonable juror might conclude that, if crossing gates had existed and blocked the crossing, then

Cox would have been prevented from entering the crossing and the collision would have been prevented. Thus, although Cox was the sole cause of the collision, it might be determined that his actions could have been prevented but for the purported negligence of the defendants in failing to erect a crossing gate.

In response to the defendants' motion for a summary judgment, Haddan cited Ridgeway, supra, for the proposition that, although caselaw holds that railroad companies ordinarily do not have a duty to install additional warning devices at a crossing beyond a sign, such as lights and gates, there may be special circumstances that render a crossing unusually dangerous and thus impose that duty.

In Ridgeway, a driver was struck and killed by a train while attempting to drive over a railroad crossing. 723 So. 2d at 606. The Court held that the driver was contributorily negligent as a matter of law because the evidence showed that she did not stop, look, and listen before proceeding into the crossing. Id. at 606-07. It was argued, like in the instant case, that the railroad company was aware of previous accidents that had occurred at the crossing and of other complaints questioning the

safety of the crossing. Id. at 608. The railroad company argued, on the other hand, that because a "crossbuck" sign warned of the crossing, it was in "compliance" with Alabama law. Id.

The Court first noted the requirement of Ala. Code 1975, § 37-2-80, which provides, in pertinent part: "Every railroad company must erect, at all points where its road crosses any public road, ... a sign, with large and distinct letters placed thereon, to give notice of the proximity of the railroad and warn persons of the necessity of looking out for the cars." Further, the Court noted, "there is no duty on the part of a railroad, beyond that set out in § 37-2-80, to ... take special steps to warn approaching motorists of the presence of a railroad crossing, unless the crossing is a hazardous one in the sense that it cannot be traversed safely through the exercise of ordinary care." 723 So. 2d at 608 (emphasis added). In support of this proposition, the Court quoted the following from Lambeth v. Gulf, Mobile & Ohio R.R., 273 Ala. 387, 389-90, 141 So. 2d 170, 172 (1962):

> "The controlling principle of law, many times reaffirmed by this court, is well stated in Southern Railway Co. v.

> Lambert, 230 Ala. 162, [164,] 160 So. 262, [263 (1935),] as follows:
>
> > " 'This court, in line with the great weight of authority, has declared the rule that, in the absence of statute, or special conditions of hazard to motorists, there is no duty on the railway company to provide special warning or safeguards to motorists, either in the day or nighttime, to prevent collisions with cars standing on such crossing. The law requires motorcars to be equipped with adequate headlights, and that they be not run at such speed that an obstruction, such as a freight car, cannot be discovered in time to come to a stop. Others are not required to take precautions against one's negligence. Otherwise stated, one may assume that another will take ordinary care.
> >
> > " 'So it is widely held that the negligence of the driver of the motorcar will be treated as the sole proximate cause of an injury resulting from running into a standing railway car at a crossing, unless something intervenes calling for special precautions on the part of railway employees; some condition of hazard that may lead to a collision, notwithstanding ordinary care on the part of the driver of the motorcar.' "

(Emphasis added.)

Applying that law, the Court in Ridgeway held that there were no circumstances requiring special steps to warn motorists of the crossing at

issue in that case. 723 So. 2d at 609. The railroad company had complied with § 37-2-80 by placing a crossbuck sign, which could be easily seen, and the driver was familiar with the area around the crossing. Further:

> "[T]he undisputed evidence indicated that no special conditions existed at the crossing that could have rendered the crossing unusually dangerous even if [the driver] had exercised reasonable care as she crossed the track. As previously noted, the track on both sides of the crossing is straight and flat and there were no obstructions blocking [the driver's] view. Therefore, this case is not like Norfolk Southern R.R. v. Thompson, [679 So. 2d 689 (Ala. 1996)], where the evidence indicated that, because of a sharp curve in the track near the crossing, a motorist would have limited visibility and, as a result, could find himself in the path of a fast-moving train even though he had exercised reasonable care in attempting to cross the track; and this case is not like Callaway v. Adams, [252 Ala. 136, 40 So. 2d 73 (1949)], where the evidence indicated that the plaintiff did not know the railroad crossing was ahead of him and could not have discovered its presence through the exercise of reasonable care in time to avoid a collision with the train, because of the grading of the road in front of the crossing and the fact that overhanging tree branches had obscured the crossing's signal light from view."

723 So. 2d at 609. As both Ridgeway and Lambeth indicate, for there to be a duty to take special steps to warn approaching motorists of the existence of a railroad crossing beyond what is required by § 37-2-80, there must be a special, hazardous condition to motorists that makes the

crossing unusually dangerous even for a motorist who exercises reasonable care in crossing.

On appeal, Haddan argues that she presented expert affidavit testimony from William R. Hughes establishing that the conditions of the crossing "rendered it unusually dangerous and required the installation of lights and gates." Haddan's brief at 26.[4] Hughes stated that "numerous complexities" of the crossing rendered it "unusually dangerous to motorists using ordinary care." Specifically, Hughes referred to the fact that the track formed a hump or incline that would divert a driver's attention to focus on what is on the other side of the crossing, a rough crossing surface that could distract a driver crossing the tracks, the short length of the approach between the tracks and the adjoining highway intersection, trains regularly operating at high speeds at the crossing, and vehicle and pedestrian traffic owing to a nearby school.[5] None of these,

[4]To the extent that Haddan argues that the crossing was hazardous because the train's horn was not sounded before the collision, such is not relevant to determining whether there is a special, hazardous condition of the crossing and, thus, is not material to this theory of liability.

[5]Hughes also indicated that excessive vegetation obstructed Cox's view of the train; this is flatly contradicted by the photographic and video

however, are hazards so unusually dangerous that a special warning of the presence of the crossing is required, especially when there was nothing preventing one exercising reasonable care from observing the crossing and, in due course, stopping, looking, and listening.[6]

Haddan cites Collier v. Crumbley, 684 So.2d 1332, 1333 (Ala. Civ. App. 1996), in support of her argument. In that case, however, a driver collided with a train stopped at a crossing. Id. at 1332. The court held that a jury could determine that the conditions at the crossing, including that the crossing was in a rural area, that there were no street lights or lighting at the crossing, the train was black with no reflectors, and that it was dark and cloudy at the time of the collision, relieved the driver of the duty to stop. Id. The railroad company placed flares at this intersection when a train was crossing, but, on the evening of the collision,

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evidence. To the extent that Hughes testified that the presence of a stop sign at the crossing could create a distraction for drivers attempting to cross, I find this immaterial: drivers have a duty to stop at crossings, and the presence of a stop sign arguably may be a means to actually help alert drivers to the presence of a crossing.

[6]In fact, the existence of a "hump" in the road where tracks cross has been described by this Court as actually highlighting the existence of a crossing. Ridgeway, 723 So. 2d at 606.

only one flare had been placed, and it was on the other side of the crossing. Collier does not support the proposition that the crossing in the instant case was so unusually dangerous that special warnings of its existence were required. Haddan further cites Southern Railway Co. v. Carter, 276 Ala. 218, 221, 160 So. 2d 628, 630 (1964), a case in which a driver knew of the presence of a crossing; stopped, looked, and listened; and was hit by an oncoming train. The train's horn was not blown, its bell was not ringing, and the view of the track was obscured. Id. Whether special warning of the presence of the crossing was required was not at issue.

Because I do not believe that Haddan produced substantial evidence demonstrating that any negligence on the part of the defendants caused her injuries, and because she has not established by authority or evidence that the law imposed a duty on the defendants to provide special warning lights or gates at the crossing, I would affirm the trial court's summary judgment. Therefore, although I concur in the main opinion insofar as it affirms the trial court's threshold evidentiary determination striking some of Haddan's deposition testimony as hearsay, I dissent from the main

opinion insofar as it reverses the summary judgment in favor of the defendants.

Sellers, J., concurs.

PARKER, Chief Justice (dissenting).

The main opinion attempts to distinguish this Court's jurisprudence on superseding cause in vehicle-train collisions. But in my view, our precedent cannot logically be distinguished. We have previously held that a driver's failure to "stop, look, and listen" before crossing a railroad track is generally a superseding cause of injuries resulting from the vehicle's collision with a train. Given the doctrinal content of that general rule, I see no rational distinction between injuries to the driver and injuries to a passenger. Further, appellant Yulanda Haddan does not demonstrate that the facts of this case take it outside the general rule. Nor does she ask us to reconsider the rule. Therefore, the summary judgment should be affirmed.

I. Superseding cause and other doctrines

First, it is necessary to clearly distinguish among four tort-law concepts that are easy to conflate in this case: breach of duty, contributory negligence, concurrent tortfeasors, and superseding cause.

The tort of negligence has five elements in Alabama: duty, breach, damages, actual cause, and proximate cause. QORE, Inc. v. Bradford Bldg.

Co., 25 So. 3d 1116, 1124 (Ala. 2009). The breach element requires proof that the defendant's conduct was negligent, i.e., that it fell below the standard of care. See Restatement (Second) of Torts § 328A (Am. L. Inst. 1965) ("In an action for negligence the plaintiff has the burden of proving ... failure of the defendant to conform to the standard of conduct."). And as an element of the tort, breach is ordinarily part of the plaintiff's prima facie case; it does not have to be disproved by the defendant. See Glass v. Birmingham S. R.R., 905 So. 2d 789, 794 (Ala. 2004); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 38, at 239 (5th ed. 1984).

In contrast, contributory negligence is negligent conduct by the plaintiff that contributed to causing his own injury. Cooper v. Bishop Freeman Co., 495 So. 2d 559, 563 (Ala. 1986), overruled on other grounds by Burlington N. Ry. Co. v. Whitt, 575 So. 2d 1011 (Ala. 1990); 1 Michael L. Roberts, Alabama Tort Law § 2.01, at 131 (6th ed. 2015). Contributory negligence is an affirmative defense; it must be proved by the defendant, not disproved by the plaintiff. See Phillips v. Seward, 51 So. 3d 1019, 1025 (Ala. 2010); Knight v. Alabama Power Co., 580 So. 2d 576, 577 (Ala. 1991). And if proved, it bars the plaintiff from recovering against any defendant.

See Brown v. Piggly Wiggly Stores, 454 So. 2d 1370, 1372 (Ala. 1984); Roberts, supra, § 2.02, at 152 ("A plaintiff whose contributory negligence proximately contributed to his injury is completely barred from recovering for negligence of the defendant.").

Next, the concept of concurrent tortfeasors describes a scenario in which the negligent conduct of more than one person (other than the plaintiff) causes the plaintiff's injury. See General Motors Corp. v. Edwards, 482 So. 2d 1176, 1195 (Ala. 1985). The tortfeasors' negligence is "concurrent" in the sense that it combines to cause one injury to the plaintiff. See id. Neither tortfeasor's negligence is a defense to the other's negligence; both are liable. See id.; Keeton et al., supra, § 52, at 347.

Finally, and most importantly in this case, a superseding cause[7] is an intervening act or event that causes the plaintiff's injury in such a way that, for reasons of practical policy, the act or event is deemed to "cut off"

[7]As the main opinion explains, "sole proximate cause," "intervening cause" (at least as it has been used by this Court), and the modern term "superseding cause" are all synonymous. I prefer "superseding cause" as the more accurately descriptive term, best conveying the role and effect of the doctrine within the proximate-cause analysis.

the defendant's liability for his negligence. See generally City of Mobile v. Havard, 289 Ala. 532, 538, 268 So. 2d 805, 810 (1972); Roberts, supra, § 1.03, at 121-22; Keeton et al., supra, § 44; 1 Dan B. Dobbs et al., The Law of Torts § 204 (2d ed. 2011); Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 34 & cmts. (Am. L. Inst. 2010). To qualify, the event "must (1) occur after the defendant's negligent act, (2) be unforeseeable to the defendant at the time he acts, and (3) be sufficient to be the sole cause-in-fact of the plaintiff's injury." Gilmore v. Shell Oil Co., 613 So. 2d 1272, 1275 (Ala. 1993).

When the intervening event is the negligence of a third person other than the defendant or the plaintiff, the doctrine of superseding cause functions as an exception to the doctrine of concurrent tortfeasors. General Motors, 482 So. 2d at 1195; see Roberts, supra, § 1.03, at 126-27. Instead of both tortfeasors being liable to the plaintiff as concurrent tortfeasors, the later-acting tortfeasor's negligence relieves the earlier-acting tortfeasor of liability. See id.

In addition, superseding cause is distinct from the concepts of breach and contributory negligence. Although superseding cause and breach are

both part of the plaintiff's prima facie case, they relate to different elements: Breach is the second element, whereas superseding cause is a potential issue within the fifth element, proximate cause.

Superseding cause is also distinct from contributory negligence because, although both relate to negligence of people other than the defendant, they do so in different ways. As noted above, contributory negligence is an affirmative defense; superseding cause is part of the tort's fifth element, proximate cause. Contributory negligence is the plaintiff's own negligence; superseding cause includes many events other than negligence of the plaintiff. Contributory negligence completely bars the plaintiff's recovery against all tortfeasors who caused the injury; superseding cause bars recovery only against the particular defendant or defendants as to whose negligence the intervening event operates as a superseding cause. That is, the three elements of superseding cause must be met as to a particular defendant for that defendant to be relieved of liability. Last, and most crucially, contributory negligence bars recovery only by a negligent injured person. In contrast, the function of superseding cause is to relieve the earlier-acting tortfeasor from liability based on the

occurrence of an independent intervening event, not based on any failure by the injured person. Thus, a superseding cause bars the injured person from recovering against the earlier-acting tortfeasor regardless of whether the injured person was negligent.

II. Application of superseding cause in train-collision cases

With those doctrinal distinctions in mind, I turn to the elements of superseding cause and how each applies in this case. Once again, these elements are that the intervening event must be (1) subsequent, (2) unforeseeable, and (3) sufficient to be the sole cause in fact. Gilmore, 613 So. 2d at 1275.

As the main opinion explains, there is no dispute that Scott Lindsey Cox stopped but failed to look and listen before driving forward onto the tracks. And as to the first element of superseding cause, there is no dispute that Cox's failure occurred subsequent to the alleged failures of Norfolk Southern Railway Company and Norfolk Southern Corporation (collectively "Norfolk Southern") to install lights and gates and (through engineer Troy Rogers) to sound the train's horn.

The second element, unforeseeability, is the issue on which this case hinges. Generally, the negligence of a third person (here, Cox) is unforeseeable to the defendant if the risk that that third person will act negligently is not increased by the defendant's negligence. See Dobbs, supra, § 205; 57A Am. Jur. 2d Negligence § 592 (2004). Another way to express this principle is that, "[w]hen a force of nature or an independent act is also a factual cause of harm, an actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious." Restatement (Third) of Torts § 34. See also Alabama Power Co. v. Moore, 899 So. 2d 975, 979 (Ala. 2004) (describing superseding cause as based on " 'intervening causes ... which are no normal part of the risk created' " (quoting Keeton et al., supra, § 44, at 311)).

In tort cases generally, foreseeability is often a fact-intensive issue requiring a jury trial, as the main opinion explains. But under this Court's jurisprudence, that is not so in train-collision cases involving a motorist's failure to "stop, look, and listen" at a railroad crossing. Rather, this Court has repeatedly held that such a failure is generally deemed a superseding cause of resulting injuries. " ' "The general rule ... is that where a motorist

fails to 'Stop, Look, & Listen' before crossing a railroad track, and he thereby runs into or collides with a train on its track at a public crossing, ... his negligence will be treated as the sole proximate cause [(superseding cause)] of his injuries." ' " Norfolk S. Ry. Co. v. Johnson, 75 So. 3d 624, 640 (Ala. 2011) (quoting Ridgeway v. CSX Transp., Inc., 723 So. 2d 600, 605 (Ala. 1998), quoting in turn Lambeth v. Gulf, Mobile & Ohio R.R., 273 Ala. 387, 389, 141 So. 2d 170, 172 (1962)). This Court's holding that such a failure is generally a superseding cause necessarily means that it meets all three elements of superseding cause, including unforeseeability. That is, in general, a driver's failure to stop, look, and listen is deemed unforeseeable to a railroad company as a matter of law. As explained by the Restatement and pertinent here,

> "[i]n some cases the intervening act may be an omission. Thus, once an actor creates a risk, that risk may be avoided or ameliorated by another who, notified or aware of the danger, can be expected to take steps to do so. When the other person fails to take such action, ... that omission may justify finding the harm beyond the actor's scope of liability ...."

Restatement (Third) of Torts § 34 cmt. e. Therefore, to avoid the application of this general rule in train-collision cases, a plaintiff must show why it should not apply in the plaintiff's case.

Here, Haddan does not even attempt to articulate why this general rule of unforeseeability should not apply. Instead, she focuses on evidence that Norfolk Southern was negligent: that it should have installed lights and gates at the crossing and sounded the train's horn. As explained above, the issue whether a defendant was negligent (breach) is completely separate from the issue whether a third person's negligence was a superseding cause, and specifically whether the third person's negligence was unforeseeable, and most particularly here, whether the case's facts take it out of the general rule that a driver's failure to stop, look, and listen is unforeseeable.

For the same reason, the main opinion's recitation of the evidence supporting a conclusion that Norfolk Southern was negligent is likewise legally irrelevant. That evidence goes to the issue of breach (Norfolk Southern's negligence), not superseding cause (effect of Cox's failure to look and listen). Similarly, the main opinion's statement that the evidence

of Norfolk Southern's negligence "call[s] into question whether Cox's contributory negligence rose to the level of a superseding ... cause," ___ So. 3d ___, is a non sequitur. Whether a defendant was negligent and whether a third person's negligence was a superseding cause are separate issues, as explained above. Evidence of a defendant's breach does not establish the absence of a superseding cause, and evidence of a superseding cause does not establish that the defendant did not commit a breach.[8]

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[8]The circuit court struck Haddan's deposition testimony that Cox had told her he did not hear the train's horn, as discussed in the main opinion. But it seems to me that that ruling is legally irrelevant to the disposition of this appeal. An interlocutory ruling is relevant to the disposition of an appeal of a final judgment only to the extent that the ruling affects the correctness of the judgment. See Rule 45, Ala. R. App. P. Here, Cox's statement was evidence that Norfolk Southern did not sound the horn, but that fact goes only to the issue whether Norfolk Southern was negligent (breach), not the separate issue of superseding cause on which this appeal hinges. Moreover, even if Norfolk Southern's failure to sound the horn were legally relevant, Cox's statement was not the only evidence of it. Haddan testified that she also did not hear the horn. Although she was high on methamphetamine at the time, that fact goes to her credibility, which cannot be considered at the summary-judgment stage, see Nix v. Franklin Cnty. Dep't of Hum. Res., 234 So. 3d 450, 456 (Ala. 2017). So Cox's statement was not necessary to establish, for summary-judgment purposes, that Norfolk Southern did not sound the horn. Accordingly, I express no opinion on the main opinion's analysis of this evidentiary ruling.

Further, the main opinion's attempt to distinguish Johnson and Ridgeway -- because in those cases the plaintiff was the negligent driver rather than a passenger -- has no basis in those cases' rationale or in the doctrine of superseding cause. Our rule that a driver's failure to stop, look, and listen is generally unforeseeable to a railroad company appears to be rooted in a practical consideration: Cars can stop quickly, trains cannot. As we said in a case that was cited by Johnson and Ridgeway:

> "This legal duty [of a driver to stop, look, and listen] grows out of the well-known fact that a train cannot be stopped ... with the same dispatch as a motorcar .... It is a duty to see that the crossing is clear of danger from approaching trains .... This court has often, with great emphasis, declared it is negligence as matter of law to disregard this duty. We think it a rule conservative of human life, and therefore to be steadfastly applied."

Johnston v. Southern Ry. Co., 236 Ala. 184, 186, 181 So. 253, 254 (1938). Apparently, the duty to stop, look, and listen has been viewed as so important, and its observance so crucial to human safety at railroad crossings, that a breach of this duty has been deemed to be outside the risks that could reasonably flow from any prior negligence by a railroad company, i.e., unforeseeable as a matter of law. And nothing in that

rationale suggests that it holds true only when the driver is injured and not when a passenger is injured.

Moreover, nothing in the doctrine of superseding cause renders the main opinion's driver/passenger distinction apposite. To understand why requires an examination of our reasoning in Johnson. The driver there asserted both a negligence and a wantonness claim against the railroad company. We held that the driver's failure to stop, look, and listen constituted contributory negligence that barred him from recovering on his negligence claim. Id. at 645. Because contributory negligence is not a defense to a wantonness claim, however, see Brown v. Turner, 497 So. 2d 1119 (Ala. 1986), that defense could not apply to the wantonness claim. As to that claim, we held that the driver's failure to stop, look, and listen was a superseding cause of his injury, based on this Court's general rule in train-collision cases. Johnson, 75 So. 3d at 646. Thus, our analysis of the superseding-cause issue was not dependent on the fact that the plaintiff's negligence created the superseding cause. Instead, our analysis was based on the general rule that a driver's failure to stop, look, and listen is a superseding cause as to a railroad company's liability for negligence. And

because the focus of that superseding-cause analysis is necessarily on the railroad company's absence of liability, it contains no basis for a distinction between liability to a driver versus to a passenger.

The main opinion's further attempt to distinguish our prior train-collision cases on the basis that they did not involve multiple tortfeasors, and thus did not address concurrent-tortfeasor liability, is similarly unavailing. As this Court has explained, when multiple tortfeasors are involved, the doctrine of superseding cause is an exception to the doctrine of concurrent tortfeasors:

> "Because of joint and several liability, no concurrent tortfeasor may assert the culpability of any other tortfeasor as a defense to his own liability. In other words, because the actions of each tortfeasor contributed, as a 'cause in fact,' to produce the injury, no tortfeasor may assert that the actions of another tortfeasor, and not his own, caused the injury. The single exception to this rule is ... where the unforeseen act of another tortfeasor, which was sufficient in and of itself to produce the injury, intervened between the time the first tortfeasor acted and the injury. In such cases, the intervening act breaks the chain of causation between the first tortfeasor's act and the injury, the first tortfeasor is relieved of his liability, and the actions of the intervening tortfeasor are considered the sole proximate cause [(superseding cause)] of the injury ...."

General Motors, 482 So. 2d at 1195 (citations omitted). Thus, when we held in Johnson that the driver's failure to stop, look, and listen was a superseding cause, we necessarily determined that concurrent-tortfeasor liability would not have applied if multiple tortfeasors had been involved.

In addition, the main opinion seeks to distinguish the prior train-collision cases because they did not involve allegations of failure to install lights and gates. But those alleged facts do not affect the application of the legal principles at hand. They are merely the particular conduct of the railroad company alleged in this case; they do not change the general rule that a driver's failure to stop, look, and listen is a superseding cause of injuries resulting from a train collision, regardless of how exactly the railroad company is alleged to have been negligent. Similarly, the main opinion suggests that "[t]he evidence of Norfolk Southern's failure to install lights and a gate at the crossing ... raises doubt as to whether Cox's failure to stop, look, and listen was truly unforeseeable." ___ So. 3d at ___. Although it is not completely clear, the main opinion seems to be asserting that Norfolk Southern's failure to install lights and gates was sufficient to take this case out of this Court's general rule of unforeseeability. That

assertion has not been raised by Haddan on appeal, however, so it cannot be a basis for reversal. See Avis Rent A Car Sys., Inc. v. Heilman, 876 So. 2d 1111, 1124 (Ala. 2003). Beyond that, the main opinion does not explain how Norfolk Southern's failure to install lights and gates is sufficient to override the general rule, and I will not speculate on what the connection may be.

The other cases relied on by the main opinion are inapposite. In Barnett v. Norfolk Southern Railway Co., 671 So. 2d 718 (Ala. Civ. App. 1995), although the trial court based its judgment partly on the doctrine of superseding cause, the Court of Civil Appeals did not address this doctrine in its holding. Instead, the court focused on contributory negligence. As explained above, the two doctrines are distinct, and only superseding cause is at issue here.[9] For the same reason, contrary to the

[9]The main opinion imputes a contributory-negligence argument to Norfolk Southern: that "Cox's failure to stop, look, and listen while approaching the crossing constitutes contributory negligence ...." ___ So. 3d at ___. But that is not Norfolk Southern's argument, nor could it be, because, as everyone agrees, contributory negligence of a driver cannot be imputed to a passenger, see Southern Ry. Co. v. Lambert, 230 Ala. 162, 164, 160 So. 262, 263 (1935). Rather, Norfolk Southern's argument is the same as the circuit court's basis for the summary judgment: Cox's

main opinion, there is no issue here whether "the contributory negligence of Cox, the driver ..., ... can[] be imputed to a passenger like Haddan," ___ So. 3d at ___. The issue here is superseding cause, not imputation of contributory negligence. The other case relied on by the main opinion, Western Railway of Alabama v. Still, 352 So. 2d 1092 (Ala. 1977), was based on a vehicle accident resulting from a poorly maintained track, not a train collision, so this Court's rule regarding stop, look, and listen was not at issue there. Thus, Still's generalized discussion of the unforeseeability element of superseding cause is simply inapplicable here; our specific train-collision rule is the law on point.

As for the third element of superseding cause, that the intervening event was sufficient to be the sole cause in fact of the plaintiff's injury, this element was met here as well. This sole-cause-in-fact element asks whether the third person's negligence "was alone sufficient to produce the injury," General Motors, 482 So. 2d at 1195. That is, hypothetically, if the defendant had not been negligent and the third person had committed the

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negligence was a superseding cause.

exact same conduct, would the injury have occurred? Here, if Norfolk Southern had done the things that Haddan alleges it should have done -- installed lights and gates and sounded the horn -- and Cox had still failed to look and listen before driving forward despite the oncoming train, then Haddan's injury would still have occurred.

Importantly, this sole-cause-in-fact element asks only whether the third person's negligence could have independently produced the injury. See id. ("alone sufficient to produce the injury"). Thus, it does not ask whether, if the defendant had not been negligent, the third person's negligence would not have occurred -- i.e., whether the defendant's negligence was a cause in fact of the third person's negligence. Rather, it asks only whether, if the defendant had not been negligent (and the third person had still been negligent), the injury could have occurred -- i.e., whether the third person's negligence was sufficient to be a sole cause in fact of the injury. This means that the third person's negligence must be assumed in the hypothetical, and only the defendant's negligence is deleted from the scenario. Therefore, under this element, we do not ask whether Cox might not have driven forward if Norfolk Southern had

installed lights and gates[10] and sounded the horn. That might be a relevant inquiry under the unforeseeability element, but Haddan does not argue it. Nor does she address this sole-cause-in-fact element in general.

Accordingly, Haddan has not demonstrated that any of the elements of superseding cause was not met. And that is her burden in seeking reversal of the summary judgment because, as discussed above, the evidence before the circuit court constituted a prima facie showing on each of the elements of superseding cause. See Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038 (Ala. 2004) ("Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact."). Because Haddan has not met that burden, the summary judgment should not be reversed.

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[10]I appreciate Justice Shaw's explanation of why the evidence was insufficient to show that Norfolk Southern was negligent in not installing lights and gates. For the reasons explained in this paragraph of the main text, however, I do not believe that the premise of that analysis -- that "it might be determined that [Cox's] actions could have been prevented but for the purported negligence of [Norfolk Southern]," ___ So. 3d at ___ (Shaw, J., concurring in part and dissenting in part) -- is legally relevant to this sole-cause-in-fact element.

Under this Court's precedent, a driver's failure to stop, look, and listen before proceeding into a railroad crossing is generally a superseding cause of a collision with a train and resulting injuries. Because of the way superseding cause works within negligence doctrine, that general rule permits no distinction between injuries to the driver and injuries to a passenger. And Haddan does not demonstrate that the facts of this case are such that that general rule does not apply. Therefore, I would affirm the summary judgment.