VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 9th *day of* May, 2014.

K.L., a Minor, by and through his Mother and Next Friend, Elizabeth Lawson, Appellant,

against Record No. 130786
Circuit Court No. CL11-000059-00

Barbara S. Jenkins, Appellee.

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

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

In an amended complaint, K.L., proceeding as a minor by and through his mother and next friend, Elizabeth Lawson, alleged that Barbara S. Jenkins was grossly negligent for failing to protect K.L., who was six years old, from sexual assaults that occurred while he was attending a summer youth program that Jenkins supervised. Jenkins filed a demurrer to the amended complaint, which the circuit court sustained. According to the circuit court, the factual allegations in the amended complaint were not sufficient to demonstrate that it was reasonably foreseeable that the assailant, also an attendee at the youth program, would sexually assault K.L. In addition, the court concluded that the allegations did not support a claim for gross negligence.

"A demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof," and it "does not allow the

court to evaluate and decide the merits of a claim." Assurance Data, Inc. v. Malyevac, 286 Va. 137, 143, 747 S.E.2d 804, 807 (2013) (internal quotation marks omitted). When reviewing a trial court's judgment sustaining a demurrer, this Court "look[s] solely at [the plaintiff's] allegations in his motion for judgment to determine whether he stated a cause of action." Thompson v. Skate America, Inc., 261 Va. 121, 124, 540 S.E.2d 123, 124 (2001) (internal quotation marks omitted). A demurrer "admits the truth of all material facts that are properly pleaded, facts which are impliedly alleged, and facts which may be fairly and justly inferred." Id. at 128, 540 S.E.2d at 126 (internal quotation marks omitted). Because the decision whether to sustain a demurrer involves issues of law, this Court reviews the trial court's judgment de novo. Assurance Data, 286 Va. at 143, 747 S.E.2d at 808.

K.L. first challenges the circuit court's conclusion that the amended complaint failed to state a claim for negligence because the sexual assaults were not "reasonably foreseeable."[1] Among other

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[1] Generally, a person has no duty to protect another from the criminal acts of a third party unless a special relationship exits. See Burdette v. Marks, 244 Va. 309, 311-12, 421 S.E.2d 419, 420 (1992). In his amended complaint, K.L. alleged that the assailant was a "business invitee." "[W]here the special relationship [is] that of a business owner/invitee . . . we have imposed a duty to warn of third party criminal acts only where there was 'an imminent probability of injury' from a third party criminal act." Commonwealth v. Peterson, 286 Va. 349, 357, 749 S.E.2d 307, 312 (2013) (quoting Yuzefovsky v. St. John's Wood Apartments, 261 Va. 97, 109, 540 S.E.2d 134, 141 (2001)). "Certain special relationships such as that of common carrier/passenger, innkeeper/guest, and employer/employee impose a duty to warn when the danger of third party criminal acts is known or reasonably foreseeable." Id. at 357, 749 S.E.2d at 311.

In Jenkins' demurrer, she framed the dispositive question as whether the sexual assaults on K.L. were "reasonably foreseeable." The parties employed that level of foreseeability in their arguments on the demurrer, and the circuit court did likewise in its analysis. Because the demurrer was argued and decided on the

allegations in the amended complaint, K.L. asserted that Jenkins was aware of a prior incident in which the same assailant committed a similar assault against another attendee of the program who was approximately the same age as K.L. when he was allegedly assaulted. According to K.L., Jenkins also knew the assailant had a history of "inappropriate, disruptive, and aggressive behavior." She had written reports documenting incidents when the assailant "yelled at other children, was defiant to counselors, took other children's belongings, [and] got into physical altercations with other children." Jenkins had personally placed the assailant in "timeout" or suspended him during the five years he had attended the summer program and witnessed K.L. and the assailant spending time together, conduct that violated the program's policy due to their approximately 8-year age difference.

These factual allegations, if established at trial, are sufficient to create a jury issue on the question whether the assaults on K.L. were reasonably foreseeable. See Delk v. Columbia/HCA Healthcare Corp., 259 Va. 125, 134, 523 S.E.2d 826, 831-32 (2000). K.L. was not required to "descend into statements giving details of proof" with respect to the assailant's prior assault and Jenkins' knowledge. Assurance Data, 286 Va. at 143, 747 S.E.2d at 807-08. See Thompson, 261 Va. at 130, 540 S.E.2d at 128 (holding allegations that the defendant knew a specific patron "to be violent and to have committed assaults on other invitees . . . in the recent past" were sufficient to state a claim that the defendant "was on notice" that the plaintiff was in danger of being assaulted by that patron); Delk, 259 Va. at 131, 523 S.E.2d at 830 (holding allegations that the defendant knew an "unauthorized" individual was

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reasonably foreseeable level of harm and that standard is not challenged on appeal, the Court decides this appeal based on that level of foreseeability.

in the plaintiff's room, knew the individual had a "troubled history, predisposition, [and] disturbing interaction with other patients" were legally sufficient to demonstrate that the assault was reasonably foreseeable). The decision in A.H. v. Rockingham Publishing Co., Inc., 255 Va. 216, 495 S.E.2d 482 (1998), is inapposite because the assailant there was unknown, and the prior assaults had occurred infrequently over a five-year period and were not at or near the location of the plaintiff's assault. Id. at 222-23, 495 S.E.2d at 486-87.

K.L. next challenges the circuit court's conclusion that the facts in his amended complaint fail to state a claim for gross negligence. Gross negligence is "the utter disregard of prudence amounting to complete neglect of the safety of another," Burns v. Gagnon, 283 Va. 657, 678, 727 S.E.2d 634, 647 (2012) (internal quotation marks omitted), and "requires a degree of negligence that would shock fair-minded persons." Cowan v. Hospice Support Care, Inc., 268 Va. 482, 487, 603 S.E.2d 916, 918 (2004). "Several acts of negligence which separately may not amount to gross negligence, when combined may have a cumulative effect showing a form of reckless or total disregard for another's safety." Chapman v. City of Virginia Beach, 252 Va. 186, 190, 475 S.E.2d 798, 801 (1996). Gross negligence is generally a matter to be resolved by the fact-finder and only becomes a matter of law "when reasonable people cannot differ." Koffman v. Garnett, 265 Va. 12, 15, 574 S.E.2d 258, 260 (2003).

The factual allegations regarding Jenkins' knowledge and failure to protect K.L., when considered in totality, are legally sufficient to state a claim for gross negligence. Reasonable minds could differ as to whether Jenkins' failure to act amounted to an "utter disregard of prudence amounting to a complete neglect of the safety" of K.L. given her knowledge of the assailant's history and

his socializing with K.L. See Burns, 283 Va. at 678, 727 S.E.2d at 647; Koffman, 265 Va. at 15-16, 574 S.E.2d at 260 (finding gross negligence was adequately pled). K.L. was not required to allege that Jenkins engaged in deliberate conduct. "Deliberate conduct is important evidence on the question of gross negligence," but this Court has never stated that such is required to establish gross negligence. See City of Lynchburg v. Brown, 270 Va. 166, 170, 613 S.E.2d 407, 410 (2005).

For these reasons, this Court concludes the circuit court erred in sustaining Jenkins' demurrer. We therefore reverse the circuit court's judgment and remand this case for further proceedings.

This order shall be certified to the said circuit court.

JUSTICE McCLANAHAN, dissenting.

In order to impose a legal duty upon Jenkins in this case, K.L. must allege that Jenkins knew a criminal assault was occurring or about to occur on the premises indicating an imminent probability of harm to K.L. This is well-established law in Virginia and we are obligated to apply it upon review of the circuit court's judgment. Because the amended complaint does not contain any such allegations, the circuit court did not err in sustaining the demurrer. Therefore, I dissent from the Court's judgment.

Based on the facts alleged in the amended complaint, K.L. and the assailant were business invitees of the summer youth program under the supervision of Jenkins. Therefore, Jenkins did not owe a duty of care to protect K.L. from the criminal assault unless she "[knew] that criminal assaults against persons [were] occurring, or [were] about to occur, on the premises which indicate[d] an imminent probability of harm to [K.L.]." Wright v. Webb, 234 Va. 527, 533, 362 S.E.2d 919, 922 (1987). See also Commonwealth v. Peterson, 286

Va. 349, 357-58, 749 S.E.2d 307, 311-12 (2013); Dudas v. Glenwood Golf Club, Inc., 261 Va. 133, 139-40, 540 S.E.2d 129, 132-33 (2001); Thompson v. Skate America, 261 Va. 121, 129, 540 S.E.2d 123, 127 (2001); Burns v. Johnson, 250 Va. 41, 44, 458 S.E.2d 448, 450 (1995). As this Court has stated, knowledge of "previous criminal activity" is insufficient. Wright, 234 Va. at 533, 362 S.E.2d at 922. Rather, the facts must allege "notice of a specific danger just prior to the assault." Id. Thus, regardless of whether any "previous criminal activity was sufficient to make the subsequent assault on the plaintiff reasonably foreseeable," the inquiry must be narrowed to whether "'there was an imminent danger of criminal assault' to the plaintiff." Dudas, 261 Va. at 140, 540 S.E.2d at 133 (quoting Wright, 234 Va. at 533, 362 S.E.2d at 922).[2]

Our review of the question of whether the demurrer was properly sustained is de novo, Professional Bldg. Maint. Corp. v. School Bd., 283 Va. 747, 751, 725 S.E.2d 543, 546 (2012), and is conducted without deference to the analysis employed by the circuit court and

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[2] When argued below, neither the parties nor the circuit court addressed the particular level of foreseeability required to impose a duty upon Jenkins in this case or distinguished between the heightened degree of foreseeability applicable to business invitees, see, e.g., Wright, 234 Va. at 533, 362 S.E.2d at 922, and the less stringent level of reasonably foreseeable harm applicable to other special relationships, see, e.g., Taboada v. Daly Seven, Inc., 271 Va. 313, 325-26, 626 S.E.2d 428, 434 (2006) (innkeeper/guest); A.H. v. Rockingham Publishing Co., Inc., 255 Va. 216, 221, 495 S.E.2d 482, 486 (1998) (employer/employee); Connell v. Chesapeake & Ohio Ry. Co., 93 Va. 44, 62, 24 S.E. 467, 470 (1896) (common carrier/passenger). The circuit court concluded the pleaded facts were such that it would "not be reasonably foreseeable to expect the sexual assault, as alleged, to have happened." On appeal, however, Jenkins asserts that a duty upon her only arose if she had knowledge of an imminent probability of injury to K.L.

the parties.[3] Indeed, since we are obligated to apply correct legal principles, we are not constrained by concessions of law made by the parties or the legal analysis relied upon by the parties or the circuit court.[4] "Our fidelity to the uniform application of law precludes us from accepting concessions of law made on appeal. Because the law applies to all alike, it cannot be subordinated to the private opinions of litigants." Logan v. Commonwealth, 47 Va. App. 168, 172, 622 S.E.2d 771, 773 (2005) (en banc). See also Daily Press, Inc. v. Commonwealth, 285 Va. 447, 454 n.6, 739 S.E.2d 636, 640 n.6 (2013) ("we do not allow parties to define Virginia law by their concessions") (citing Logan, 47 Va. App. at 172, 622 S.E.2d at 773); Cofield v. Nuckles, 239 Va. 186, 194, 387 S.E.2d 493, 498 (1990) (a party "cannot concede the law").[5] Thus, an appellate

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[3] Without citing any legal authority, the majority states that because the parties and the circuit court framed the issue and analysis based on whether the assaults were "reasonably foreseeable" and "that standard is not challenged on appeal," the Court decides this appeal based on that level of foreseeability.

[4] Certainly, the circuit court's rationale underlying its ruling did not become the law of the case any more than the ruling itself became the law of the case since the issue squarely presented to this Court is whether Jenkins had a duty under the law to protect K.L. from the assault. See Ilg v. United Parcel Service, Inc., 284 Va. 294,, 301, 726 S.E.2d 21, 25 (2012) (law of the case doctrine inapplicable to issues there on appeal); cf. Kondaurov v. Kerdasha, 271 Va. 646, 629 S.E.2d 181 (2006) (under law of the case doctrine, a legal decision not challenged in a subsequent appeal becomes the law of the case) (emphasis added). In her demurrer, Jenkins stated that "Plaintiff has failed to allege facts sufficient to state a gross negligence claim for failure to protect." The circuit court sustained the demurrer on the ground that "Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted." This is the legal decision challenged on appeal.

[5] This principle must be distinguished from an appellant's concession of law that operates as a procedural default. In such circumstances, an appellate court "may accept the concession -- not

court will not reverse the judgment of the circuit court if it is correct under proper application of the law. See, e.g., Blackman v. Commonwealth, 45 Va. App. 633, 634, 613 S.E.2d 460, 461 (2005) ("An appellate court cannot vacate a criminal conviction that violates no recognizable legal principle simply on the ground that the prosecutor (or, for that matter, the trial judge) did not articulate the proper legal basis for it.").[6]

Applying the correct legal analysis to the amended complaint, therefore, Jenkins did not have a legal duty to protect K.L. from the criminal assault. While the amended complaint contains allegations regarding various behavioral problems exhibited by the assailant during his five-year participation in the summer program, the amended complaint clearly contains no allegations that Jenkins "[knew] that criminal assaults against persons [were] occurring, or [were] about to occur, on the premises which indicate[d] an imminent probability of harm to [K.L.]." Wright, 234 Va. at 533, 362 S.E.2d at 922. And, there is no allegation that Jenkins had "notice of a specific danger just prior to the assault." Id.

Although K.L. principally relies on the allegation of an incident in 2003 "involving [assailant]" that was "similar to the

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as a basis for deciding the contested issue of law, but as a basis for not deciding it." Logan, 47 Va. App. at 172 n.4, 622 S.E.2d at 773 n.4; see also Rule 5:25 (no ruling of the trial court will be considered "as a basis for reversal" unless objection stated).

[6] For this reason, "[w]e do not hesitate, in a proper case, where the correct conclusion has been reached but the wrong reason given, to sustain the result and assign the right ground." Eason v. Eason, 204 Va. 347, 352, 131 S.E.2d 280, 283 (1963). See also Perry v. Commonwealth, 280 Va. 572, 580, 701 S.E.2d 431, 436 (2010) (failure to make the proper argument to the trial court does not preclude application of right result for the wrong reason doctrine). Thus, if the majority is correct that we are bound by an incorrect legal analysis employed by the circuit court, we would have no occasion to apply the right result/wrong reason doctrine.

incidents" alleged in the amended complaint, this allegation is insufficient to establish an imminent probability of harm to K.L. As an initial matter, this allegation does not state that the assailant committed a previous criminal assault on the premises or even that a criminal assault previously occurred on the premises. The allegation of a "similar" incident "involving" assailant is too vague and conclusory to constitute notice of a specific danger to K.L.[7] As this Court has recognized, "we are not bound to accept conclusory allegations in a review of a demurrer." Ogunda v. Prison Health Servs., 274 Va. 55, 66, 645 S.E.2d 520, 527 (2007). Nevertheless, even if we could reasonably infer that a criminal assault was committed by the assailant on the premises of the summer program in 2003, which I do not believe we can, such contention, even if proved at trial, still would not establish that Jenkins "[knew] that criminal assaults against persons [were] occurring, or [were] about to occur, on the premises which indicate[d] an imminent

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[7] Regarding the allegation of a "similar" incident, the circuit court aptly observed:

> "[That paragraph] doesn't single out [Jenkins] and tell us anything specific about what she did or did not know. All it says is, these two people were aware of the prior incident, which was similar to the incidents described in this Complaint. Well, that right there, in my judgment, simply does not consist of pleaded facts. That's really a conclusory statement that something happened before that's similar to what we're claiming happened here and, therefore, it should be given consideration by the Court. The problem with that is, that it really doesn't amount to anything in the way of pleaded facts that satisfy our rules of pleading.

The circuit court further noted that absent any allegations of fact, there was no way for the court to determine whether the prior incident was in fact similar to the acts described in the amended complaint so as to satisfy the foreseeability requirement.

probability of harm to [K.L.]." Wright, 234 Va. at 533, 362 S.E.2d at 922.

Therefore, because the amended complaint does not allege that Jenkins knew a criminal assault was occurring or about to occur which indicated an imminent probability of harm to K.L., K.L. has not established that Jenkins owed a duty to protect him from the criminal assault.[8] Accordingly, I would affirm the circuit court's judgment sustaining the demurrer.[9]

JUSTICE POWELL, dissenting.

As I do not find the factual allegations sufficient to create a jury issue on the question of whether the assaults on K.L. were reasonably foreseeable, I respectfully dissent.

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Teste: Patricia L Harrington

Clerk

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[8] Because Jenkins only owed a duty under the law if she knew a criminal assault was occurring or about to occur indicating an imminent probability of harm to K.L., it is unnecessary for me to address whether Jenkins owed a duty under the inapplicable less stringent foreseeability standard.

[9] I would further hold that the circuit court did not abuse its discretion in failing to grant further leave to amend. As the court noted, even though the case had been pending for nearly two years and plaintiff was permitted to conduct discovery prior to amending the complaint, plaintiff was still unable to plead anything more than conclusory allegations. See Kimble v. Carey, 279 Va. 652, 662, 691 S.E.2d 790 (2010) (decision whether to grant leave to amend rests with sound discretion of trial court).