VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 29th day of July, 2021.

Present: All the Justices

Donna Lynn Mattejat, Administrator of the Estate of Allen G. Mattejat, Deceased, Appellant,

against Record No. 201021
Circuit Court No. CL18-953

William R. Blosser, Appellee.

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

This appeal arises from the trial court's decision to grant William Blosser's motion to strike the evidence and to dismiss the wrongful death action brought by Donna Lynn Mattejat as administrator of the estate of her deceased husband, Allen Mattejat. On appeal, Ms. Mattejat argues that her evidence presented a prima facie case of negligence, and thus, the trial court erred in granting the motion to strike. Ms. Mattejat also contends that the trial court erred by denying her pretrial motion in limine seeking to exclude Blosser from testifying. Agreeing with her first argument, but offering no opinion on her second, we reverse and remand for a new trial.

I.

Allen Mattejat died from injuries sustained during a collision between his motorcycle and Blosser's pickup truck. Ms. Mattejat filed this wrongful death action, alleging that Blosser's negligent operation of his pickup truck was the direct and proximate cause of Allen Mattejat's injuries and death.

Prior to the jury trial, Ms. Mattejat filed a motion requesting, in relevant part, that the trial court "prevent or strictly limit the anticipated, uncorroborated testimony" of Blosser under the Dead Man's Statute, Code § 8.01-397. *See* R. at 192. Blosser responded with a motion for summary judgment, arguing that Ms. Mattejat could not demonstrate how or why the accident happened and further arguing that Virginia's Dead Man's Statute would not preclude Blosser's testimony because there was corroborating evidence. The trial court reserved its ruling on both

motions and took them under advisement. The trial court explained that it "needs to hear corroborative evidence that is to be presented, if any[,] prior to making a decision," and that "[i]f appropriate, the Court will enter an Order on the Motions in Limine and Motion for Summary Judgment at the conclusion of that evidence." R. at 296.

At trial, Ms. Mattejat presented one witness — Virginia State Police Trooper Chad Zenzen, who had responded to the scene of the accident. Zenzen testified that Blosser was turning left out of his driveway onto the northbound lane of a two-lane highway while Allen Mattejat was driving a motorcycle in the southbound lane when Mattejat's motorcycle collided with Blosser's pickup truck. The accident occurred during the day when the weather was clear.

At the accident scene, Blosser first told Trooper Zenzen that "[h]e didn't see the motorcycle" before he pulled out of the driveway and that "he saw the motorcycle at the last minute." J.A. at 18. Blosser added that "he knew that once he started that turn, it was a commitment and he needed to go through with it." *Id.* In his later written statement, however, Blosser wrote that he was heading to the store and "~~began pulling out~~." *Id.* at 66. Immediately after these crossed-out words, Blosser stated that he "checked and saw [the] motorcycle around [the] corner 2/300 feet" and "had time to pull out" and that after he pulled out, he "saw the motorcycle going fast [and] much closer to [him]." *Id.* In his written statement, Blosser also stated: "The motorcycle swerved into his left lane but I was already committed to pulling out into my right [l]ane" and that "[t]he motorcycle seemed [to] try to swerve slowly back into his own lane" prior to impact. *Id.*

Trooper Zenzen testified that the speed limit on the highway was 55 miles per hour, but he was unable to estimate the motorcycle's speed. There was one "scrape or a gouge" on the road in the northbound lane, *id.* at 41, but there were no other gouge marks, skid marks, or other markings that would have allowed Trooper Zenzen to determine the location of the vehicles upon impact, *id.* at 19-21. Trooper Zenzen testified that although gouge marks typically are "the best way to determine the point of impact," the one he had observed in the northbound lane was not enough to demonstrate it was the point of impact. *Id.* at 49. Additionally, Trooper Zenzen did not do an accident reconstruction because he could not determine whether Allen Mattejat had been on the motorcycle when the crash had occurred.[1] *Id.* at 45-46.

[1] Although it was unclear whether Mr. Mattejat had been on the motorcycle at the exact moment of impact, the parties stipulated that Mr. Mattejat had died as a result of the collision, *see* J.A. at 4.

Ms. Mattejat and Blosser presented several photographs that depicted the location of the vehicles after the accident, which Trooper Zenzen testified had not been moved prior to his arrival. The pictures showed both vehicles almost entirely in the northbound lane with only "part of the rear tire" of the motorcycle "in the southbound." *Id.* at 37; *see id.* at 67. The debris from the accident was entirely in the northbound lane "as far as under the pickup truck," which usually indicates the direction of travel, *id.* at 49-50, and Trooper Zenzen testified that the debris "had not been disturbed prior to [his] arrival," *id.* at 54.

At the close of Ms. Mattejat's case, Blosser made a motion to strike the evidence, arguing that Ms. Mattejat had not presented any evidence showing how or why the accident happened. Without any evidence to explain how the accident had occurred, Blosser contended there was no evidence that he had not properly yielded the right-of-way. The trial court agreed with Blosser and granted the motion to strike, pointing to Blosser's written statement at the scene, the location of the vehicles in the northbound lane, the gouge mark in the road on the far side of the northbound lane, and the trooper's statement that the vehicles had not been moved since the impact. The trial court stated that "there's no evidence of how the accident occurred that's inconsistent with the location of the vehicles" and concluded that "[t]he burden is on the plaintiff to prove that the defendant was negligent, and the plaintiff just hasn't met that burden." *Id.* at 62. In its final order, the trial court granted the defendant's motion to strike the evidence "for the reasons stated in the record" and dismissed the action with prejudice. *Id.* at 74.

II.

On appeal, Ms. Mattejat argues that the trial court erred in granting Blosser's motion to strike the evidence. She also contends that the trial court erred by denying her pretrial motion in limine seeking to exclude Blosser's testimony at trial. We agree with her first argument but offer no opinion on her second argument because it challenges a ruling the trial court never made.

A.

A trial court should grant a motion to strike "only when it is conclusively apparent that plaintiff has proven no cause of action against defendant, or when it plainly appears that the trial court would be compelled to set aside any verdict found for the plaintiff as being without evidence to support it." *Banks v. Mario Indus. of Va., Inc.*, 274 Va. 438, 454-55 (2007) (citation omitted). In evaluating a motion to strike, "the trial court should resolve any reasonable doubt as to the sufficiency of the evidence in plaintiff's favor." *Id.* (citation omitted). "A motion to strike is in effect a motion for summary judgment which is not to be granted if any material fact is

genuinely in dispute." *Costner v. Lackey*, 223 Va. 377, 381 (1982); *see also AlBritton v. Commonwealth*, 299 Va. 392, 403 (2021); *Parker v. Carilion Clinic*, 296 Va. 319, 333 (2018). "A factual issue is genuinely in dispute when reasonable factfinders could 'draw different conclusions from the evidence,' not only from the facts asserted but also from the reasonable inferences arising from those facts." *AlBritton*, 299 Va. at 403 (citation omitted).

As we have repeatedly said, "[i]ssues of negligence and proximate causation ordinarily are questions of fact for the jury's determination." *Atkinson v. Scheer*, 256 Va. 448, 453-54 (1998) (citation omitted). When reviewing the motion to strike, the trial court does not sit "as the fact finder" but rules "on a matter of law to determine whether the [plaintiff] ha[s] made out a prima facie case." *Costner*, 223 Va. at 382. "The judicial task when deciding such motions is to preserve the salutary purpose of summary judgment while not permitting it to drastically alter our historic respect for the role of juries." *AlBritton*, 299 Va. at 405.

In this case, Allen Mattejat was driving his motorcycle southbound on a two-lane highway when Blosser pulled out of his driveway to turn left into the northbound lane. At some point while Blosser was turning into the northbound lane, the motorcycle struck the side of Blosser's pickup truck. According to Trooper Zenzen, Blosser stated at the scene of the accident that he had not seen the motorcycle until after he had pulled out of the driveway. J.A. at 18. When he saw the motorcycle, it was too late because "he had already started his action to make his left turn," and he had to follow through with the turn. *Id.* In his written statement, however, Blosser said that before he pulled out of the driveway, he "checked and saw [the] motorcycle around [the] corner 2/300 feet" and "had time to pull out." *Id.* at 66. Implicitly suggesting that he may have misjudged the situation, Blosser then wrote that, after initiating his turn on to the two-lane highway, he "saw the motorcycle going fast [and] much closer to [him]." *Id.*

Blosser's initial oral statement to Trooper Zenzen and his later written statement present two different scenarios of what happened that day. Taken together, the statements support dissimilar conclusions on the question of how and why the accident occurred. The jury could have believed that both statements were all or partly true and then concluded that the evidence did not preponderate in favor of either. It is equally possible that the jury could have believed one of the two and wholly disbelieved the other. At the motion-to-strike stage, the question was whether either one of Blosser's statements, standing alone, presented a baseline set of facts and inferences from which a reasonable jury could find that Blosser had negligently failed to yield the right of way to Mattejat. We believe that both statements did so.

From Blosser's oral statement, a jury could reasonably infer that he had failed to keep a proper lookout for southbound traffic when he had initiated his turn. While making the turn, Blosser "saw the motorcycle at the last minute," *id.* at 18, and did not have enough time to avoid the collision. Second, from Blosser's written statement, a jury could reasonably find that Blosser had initiated his left turn after observing the motorcycle heading in his direction and that he simply had misjudged his ability to get into the northbound lane quickly enough to avoid a collision. Blosser's written statement further suggests a reasonable inference that Mr. Mattejat saw the danger and swerved left and then right to avoid the imminent collision. Either of these two alternative scenarios presents a prima facie showing of negligence. A reasonable jury could find either or neither of Blosser's explanations persuasive, leaving a material factual issue genuinely in dispute. Under these circumstances, the trial court erred in granting Blosser's motion to strike.

B.

We will not resolve Ms. Mattejat's second assignment of error, which asserts that the trial court misapplied the Dead Man's Statute and erred in ruling that Blosser would be allowed to testify at trial. *See* Appellant's Br. at 2. Her pretrial motion in limine sought to prevent Blosser from testifying at trial pursuant to the Dead Man's Statute. The trial court took the motion "under advisement," stating that "[t]he [c]ourt needs to hear corroborative evidence that is to be presented, if any[,] prior to making a decision" and that it would enter an order on the motion in limine after hearing that evidence, "[i]f appropriate." R. at 296; *see also* J.A. at 5-6. Blosser was never called to testify, and the trial court thus never ruled on the motion. Under Rule 5:17(c)(1), an appellant must "assign error to [a] specific ruling of the circuit court." *Heinrich Schepers GmbH & Co. v. Whitaker*, 280 Va. 507, 514 (2010). On this issue, the trial court made no such ruling, correct or incorrect, for us to review.

Ms. Mattejat argues on brief that the trial court also erred in admitting Blosser's oral and written statements to Trooper Zenzen. Ms. Mattejat's assignment of error, however, does not specifically assert that these out-of-court statements were inadmissible. We do not address discrete legal issues outside the scope of a well-crafted assignment of error. As we have often said,

> [a]ssignments of error are the *core* of the appeal. With the assignment of error, an appellant should "lay his finger" on the alleged misjudgment of the court below. . . . Like a well-crafted pleading, assignments of error set analytical boundaries for the arguments on appeal, provide a contextual backdrop for our ultimate ruling, and demark the stare decisis border between holdings and dicta.

Henderson v. Cook, 297 Va. 699, 706-07 (2019) (emphasis in original) (citation omitted).[2]

III.

In sum, the trial court erred when it granted Blosser's motion to strike the evidence. We reverse the trial court's judgment and remand this case for further proceedings consistent with this order.

This order shall be certified to the Circuit Court of Augusta County.

A Copy,

Teste:

Acting Clerk

[2] We acknowledge that this assignment of error could be read broadly to include any possible error involving the Dead Man's Statute, including out-of-court statements by Blosser. Given her arguments on appeal, however, we find such an interpretation to be overly broad. In her petition for appeal, except for a single, unsupported sentence in a footnote, she made no argument regarding Blosser's out-of-court statements and asserted only that he should not be allowed "to testify at trial" on remand. *See* Pet. at 26-33. In a footnote in her opening brief, Ms. Mattejat described the written statement as "inadmissible hearsay" and questioned whether "perhaps [she] should have specified that AOE II pertained to both Blosser's testimony and/or his written statement." Appellant's Br. at 33 n.5 (emphasis omitted). We agree she should have, and because we do, it is unnecessary to address Blosser's argument that Ms. Mattejat opened the door to the admission of his written statement by questioning Trooper Zenzen about its contents. *See* Appellee's Br. at 32-35 (citing Va. R. Evid. 2:106(a)).