FILED
June 25, 2019
Carla Bender
4th District Appellate
Court, IL

2019 IL App (4th) 180469-U

NO. 4-18-0469

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

JACQUELINE D. STARNS,	)	Appeal from the
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Champaign County
BROCK OBENLAND,	)	No. 16L70
Defendant-Appellee.	)	
	)	Honorable
	)	Jason Mathew Bohm,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justice DeArmond specially concurred.
Justice Turner dissented.

ORDER

¶ 1 *Held*: The appellate court reversed and remanded, finding defendant was not entitled to judgment as a matter of law.

¶ 2 In April 2016, plaintiff, Jacqueline D. Starns, filed a complaint against defendant, Brock Obenland, seeking damages for injuries allegedly caused by defendant's negligent operation of a semi-tractor and trailer (semi-truck). In May 2018, defendant filed a motion for summary judgment. Following a June 2018 hearing, the trial court granted defendant's motion. Plaintiff appeals, arguing the court's decision was in error. We agree and reverse and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 A. Complaint

¶ 5 In April 2016, plaintiff filed a complaint alleging defendant, on or about October 15, 2015, negligently reversed a semi-truck into a parking lot located west of 1862 Valley Road, Champaign, and struck plaintiff, causing injuries. Plaintiff sought an amount in excess of $50,000 for the injuries sustained.

¶ 6 B. Answer

¶ 7 In May 2016, defendant filed an answer to defendant's complaint. Defendant admitted he reversed a semi-truck into a parking lot located at or near 1862 Valley Road but denied the other allegations against him.

¶ 8 C. Affirmative Defense

¶ 9 In April 2018, defendant filed an affirmative defense of contributory negligence. Defendant alleged, in the alternative to his denials set forth in his answer, plaintiff's negligent conduct was a direct and proximate cause of her alleged injuries. Defendant asserted plaintiff was barred from recovering damages as her contributory fault was in excess of 50% of the proximate cause of the alleged injuries or, in the alternative, the total amount of damages should be reduced in proportion to plaintiff's contributory negligence.

¶ 10 D. Defendant's Motion for Summary Judgment

¶ 11 On May 4, 2018, defendant filed a motion for summary judgment. Defendant attached to his motion a personal affidavit and portions of discovery depositions, including certain exhibits used during those depositions, of plaintiff, plaintiff's treating physician, and plaintiff's treating nurse. Based on the information from the affidavit and depositions, defendant argued he was entitled to judgment because plaintiff could not prove, as a matter of law, he was

negligent as plaintiff's "description of the alleged accident is inherently improbable and fanciful, to the extent that the alleged accident could not have happened and is made up." Alternatively, defendant argued he was entitled to judgment because plaintiff's "alleged injuries were the direct and proximate result of her contributory negligence, which was well in excess of 50% of the total negligence, as a matter of law."

¶ 12 1. *Defendant's Affidavit*

¶ 13 In his affidavit, defendant swore, in part, to the following. On October 15, 2015, defendant reversed a semi-truck from a parking lot east of Valley Road into a parking lot west of Valley Road at a speed of three to four miles-per-hour. The semi-truck was a total length of approximately 63 to 68 feet and a total weight of approximately 31,000 to 38,000 pounds.

¶ 14 2. *Plaintiff's Discovery Deposition*

¶ 15 In her discovery deposition, plaintiff testified, in part, to the following. On October 15, 2015, plaintiff took a bus to Kirby Avenue, which ran east and west. After getting off the bus, plaintiff crossed Kirby Avenue and began walking south along the west side of Valley Road, which ran north and south. Plaintiff was headed towards an apartment complex where she performed daycare services for Sandra Ellingwood. Because no sidewalk existed on the west side of Valley Road, plaintiff walked in the grass.

¶ 16 As she was walking south along Valley Road, plaintiff observed a semi-truck pass her heading south on Valley Road and then turn left into a parking lot on the east side of Valley Road. Another parking lot exists on the west side of Valley Road, which is directly across from the east parking lot where the semi-truck entered. Ellingwood lived in an apartment complex by the west parking lot.

¶ 17 As she began to cross an entrance to the parking lot on the west side of Valley Road, plaintiff observed the semi-truck turning into the east parking lot. After crossing the entrance, plaintiff stopped at a curb on the south side of the parking lot entrance near a tree. She looked to the east and saw the semi-truck stopped "all the way to the end" of the parking lot on the east side of Valley Road, pointing east.

¶ 18 Plaintiff decided it was safe to continue walking, took one step west toward Ellingwood's apartment, and was then struck from behind by the back of the semi-truck. Plaintiff did not see the semi-truck move from where she saw it in the east parking lot. She also did not know how fast the semi-truck was moving and did not hear it before it hit her.

¶ 19 Plaintiff fell forward to the ground after being struck by the semi-truck. Her hands, chest, and knees hit the ground. Plaintiff then rolled over, hitting her head on the ground while doing so, and saw the bottom of the semi-truck's trailer. Because the semi-truck was still moving, plaintiff grabbed onto a metal part of the trailer. She "was just trying to keep my head from dragging the concrete that my back was dragging." Plaintiff screamed for the semi-truck to stop but it kept moving. Plaintiff was dragged almost to the far side of the west parking lot, where the semi-truck stopped and she released. The semi-truck then drove forward onto Valley Road and stopped.

¶ 20 Plaintiff approached the semi-truck and told the driver what had occurred. Her hands were bleeding and she was a "nervous wreck." The driver expressed skepticism, believing plaintiff would be dead if he hit her and drug her through the parking lot.

¶ 21 Plaintiff returned to the parking lot to get her phone from the ground and then called Ellingwood and the police. Ellingwood, along with her son, went to plaintiff's aid.

¶ 22 The semi-truck driver approached plaintiff, Ellingwood, and her son. The driver maintained his skepticism about plaintiff's account of what had occurred. Plaintiff maintained she was not lying, and then Ellingwood asked the driver to not speak with plaintiff. The driver left.

¶ 23 Plaintiff was transported to the hospital by ambulance. Plaintiff stated her back was "hurting really bad" and she was "in a state of shock, a nervous wreck."

¶ 24 An aerial photograph from Google Maps was used during plaintiff's deposition. The photograph contains a map scale and shows the east and west parking lots. A photograph taken from the west parking lot looking east was also used during plaintiff's deposition. Plaintiff was asked to mark on that photograph where she was standing in the west parking lot and where the semi-truck was located in the east parking lot. A small "x" appears by a curb on the south side of the west parking lot entrance. A large "x" appears covering almost the entirety of the driveway in the east parking lot.

¶ 25 3. *Dr. Glen Swindle's Discovery Deposition*

¶ 26 In his discovery deposition, Dr. Glen Swindle testified, in part, to the following. Dr. Swindle, a physician who treated plaintiff on October 15, 2015, testified he prepared a document that included a history of plaintiff's "present illness" based on information provided by plaintiff. The document, which was attached to the discovery deposition, provides the following comments for plaintiff's history of present illness:

> "47-year-old female with above complaints. She was walking in a parking lot, walked behind [a] semi-[truck], who was not aware that she was behind him, and he backed up, knocking her to the

> ground. There was no crush injury. 'He drug me' but she was able to get up after he stopped, and ambulate slowly. She complains of some diffuse mid abdominal pain, diffuse mid and lower back pain. There was no LOC, she has no headache, no arm or leg pain, some knee abrasions noted the patient, abrasion over the right shoulder blade as well. This happened less than 2 hours ago[.]"

¶ 27 4. *Mary Eident's Discovery Deposition*

¶ 28 In her discovery deposition, Mary Eident testified, in part, to the following. Eident, an emergency room nurse who treated plaintiff on October 15, 2015, testified she wrote notes in plaintiff's records about plaintiff's "chief complaint" based on information provided by plaintiff. A document containing the notes, which was attached to the discovery deposition, provides, in part, the following comments about plaintiff's chief complaint:

> "[Patient] says she was walking behin[d] a semi[-truck] today when he backed up and knocked her into the ground. Abrasions to hands, arms[,] and upper back. No LOC did not hit head."

¶ 29 E. Memorandum in Support of Motion for Summary Judgment

¶ 30 On May 7, 2018, defendant filed a memorandum in support of his motion for summary judgment.

¶ 31 As to his argument suggesting plaintiff could not establish he was negligent—specifically the elements of breach of duty and causation—because her description of the accident was "inherently improbable and fanciful," defendant relied on the portion of plaintiff's testimony where she indicated she observed the semi-truck parked at the far eastern end of the

east parking lot, facing east, while she was standing on a curb near a parking space located inside the west parking lot and then took one step in a southwesterly direction and was immediately hit by the back end of the semi-truck. Defendant asserted this testimony defied the laws of physics and abilities of modern vehicle mechanical capabilities as a semi-truck could not move 150 feet in reverse in less than a second. Defendant noted he reached the 150-feet calculation by applying a map scale from the Google Maps photograph to plaintiff's testimony of where the semi-truck was located and where she was allegedly struck.

¶ 32 As to his alternative argument suggesting the evidence established plaintiff was more than 50% contributorily negligent, defendant relied on plaintiff's testimony indicating she walked away from the semi-truck, Dr. Swindle's testimony indicating plaintiff reported she walked behind a semi-truck and the semi-truck driver was not aware that she was behind him, and Nurse Eident's testimony indicating plaintiff reported she walked behind a semi-truck. Defendant asserted this evidence showed plaintiff failed to exercise due care for her own safety and that negligence was more than 50% of the proximate cause of her alleged injuries.

¶ 33 F. Plaintiff's Reply to Affirmative Defense

¶ 34 On May 17, 2018, plaintiff filed a reply to defendant's affirmative defense. Plaintiff admitted she owed a duty to exercise ordinary care for herself but denied the other allegations against her.

¶ 35 G. Memorandum in Opposition to the Motion for Summary Judgment

¶ 36 On May 18, 2018, plaintiff filed a memorandum in opposition to defendant's motion for summary judgment.

¶ 37 Plaintiff argued she presented sufficient evidence to support a *prima facie* claim

of negligence. Specifically, she asserted the evidence, when viewed in the light most favorable to her, established on October 15, 2015, she was walking across a parking lot on the west side of Valley Road when a semi-truck being reversed by defendant struck her from behind and dragged her through the parking lot, causing injuries. In support, plaintiff pointed to the portion of her deposition testimony attached to defendant's motion for summary judgment as well as a discovery deposition of Sandra Ellingwood that she attached to her memorandum. In Ellingwood's discovery deposition, Ellingwood testified she received a call from plaintiff, who was a caretaker for Ellingwood's child, on October 15, 2015, and plaintiff stated she was " 'hit by a truck' " outside Ellingwood's apartment. Ellingwood went outside and found plaintiff "shaking." Plaintiff's shirt was "kind of ripped up a little bit," which allowed Ellingwood to see plaintiff's back. She described plaintiff's back as appearing as if it was "clawed." Ellingwood also believed plaintiff's shoulder blade was scraped and starting to bleed.

¶ 38 As to defendant's argument suggesting plaintiff could not establish breach of duty and causation because her description of the accident was "inherently improbable and fanciful," plaintiff argued defendant was asking the trial court to make an improper credibility determination and find her testimony that she was struck by defendant should not be believed based on one aspect of her testimony concerning where defendant's semi-truck was positioned. Plaintiff asserted it was possible the jury could find her description of where the semi-truck was positioned was not credible and still find that she was struck by the semi-truck.

¶ 39 Plaintiff also argued the issue of contributory negligence could not be decided as a matter of law. She asserted a jury should determine whether she failed to keep a proper lookout and, if so, whether her failure to keep a proper lookout was a greater cause of her injuries than

defendant's failure to keep a proper lookout while he was reversing the semi-truck. Similarly, plaintiff asserted a jury should determine whether she knowingly walked into the path of defendant's semi-truck and, if so, whether her doing so was a greater cause of her injuries than defendant's failure to observe plaintiff and stop the semi-truck in time to not hit her.

¶ 40 H. Defendant's Reply to the Memorandum in Opposition to the Motion for Summary Judgment

¶ 41 On May 22, 2016, defendant filed a reply to plaintiff's memorandum in opposition to his motion for summary judgment. Defendant maintained plaintiff's description of the alleged accident indicating she was approximately 150 feet to the west of his semi-truck and then took one step southwest and was immediately struck by the back end of the semi-truck was inherently improbable and fanciful and, therefore, the trial court should reject "the entirety" of plaintiff's testimony on the elements of breach and causation. In the alternative, defendant maintained the testimony from plaintiff and Dr. Swindle showed plaintiff failed to exercise due care for her own safety by intentionally placing herself into the oncoming path of defendant's semi-truck knowing defendant could not see her and that negligent conduct was well in excess of 50% of the total negligence.

¶ 42 I. Trial Court's Ruling on Motion for Summary Judgment

¶ 43 Following a June 2018 hearing, the trial court granted defendant's motion for summary judgment. The court found plaintiff's testimony about how the accident occurred was "inherently improbable" and, therefore, would not be considered. Specifically, the court indicated its finding was based on the impossibility of the semi-truck traveling to the west parking lot after being seen stopped at the far eastern side of the east parking lot and then striking

plaintiff in the time that plaintiff took one step off the curb. Without plaintiff's testimony, the court found defendant was entitled to summary judgment. In reaching its decision, the court acknowledged it was not to engage in credibility determinations at the summary judgment stage but indicated it believed it did not have to accept as true "inherently improbable" testimony. The court also acknowledged it could not find Illinois case law stating a trial court should reject "inherently improbable" testimony when considering a motion for summary judgment.

¶ 44 This appeal followed.

¶ 45 II. ANALYSIS

¶ 46 On appeal, plaintiff argues the trial court erred by granting defendant's motion for summary judgment. Plaintiff asserts the court reached its erroneous decision by making an improper credibility determination that her testimony was "inherently improbable" and thus could be disregarded. Plaintiff contends she presented sufficient evidence to establish a *prima facie* claim of negligence against defendant.

¶ 47 Defendant contends the trial court did not error by granting his motion for summary judgment. Defendant asserts the court's decision was not based on an improper credibility determination but rather a finding that plaintiff's testimony was inherently improbable and thus held no evidentiary value. Defendant maintains the entirety of plaintiff's testimony on the elements of breach and causation should be disregarded, as her description of how the accident occurred is "inherently improbable," "self-contradictory," "fanciful," "delusional," and "physically impossible." Alternatively, defendant asserts the trial court's judgment may be affirmed as the evidence of record shows, as a matter of law, plaintiff is barred from recovering damages as her contributory fault was in excess of 50% of the cause of her alleged injuries.

¶ 48 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016). When considering a motion for summary judgment, the court's role "is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists." *Williams v. Manchester*, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 8 (2008). "[A] court may not weigh evidence or make credibility determinations when deciding a summary-judgment motion." *Perbix v. Verizon North, Inc.*, 396 Ill. App. 3d 652, 657, 919 N.E.2d 1096, 1100 (2009). "In determining the existence of a genuine issue of material fact, courts must consider the pleadings, depositions, admissions, exhibits, and affidavits on file in the case and must construe them strictly against the movant and liberally in favor of the opponent." *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 48, 77 N.E.3d 50. "Summary judgment is a drastic means of disposing of litigation and, therefore, should only be allowed when the right of the moving party is clear and free from doubt." *City of Springfield v. Ameren Illinois Co.*, 2018 IL App (4th) 170755, ¶ 21, __ N.E.3d __. A trial court's decision granting a motion for summary judgment is reviewed *de novo*. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163, 862 N.E.2d 985, 991 (2007).

¶ 49 When addressing defendant's motion for summary judgment, the trial court determined plaintiff's testimony about how the accident occurred was "inherently improbable" and, therefore, would not be considered. The parties dispute whether that determination was an improper credibility determination. Defendant suggests a court can properly disregard testimony that is "inherently improbable," "self-contradictory," "fanciful," "delusional," or "physically

impossible" when ruling on a motion for summary judgment. Defendant acknowledges—as did the trial court—the absence of any Illinois case law where a trial court disregarded such testimony when ruling on a motion for summary judgment.

¶ 50 Even assuming, *arguendo*, a court may disregard testimony that is "inherently improbable," "self-contradictory," "fanciful," "delusional," or "physically impossible" when ruling on a motion for summary judgment, plaintiff's testimony cannot be described by any of these terms. See *Hollenbeck v. City of Tuscola*, 2017 IL App (4th) 160266, ¶ 34, 72 N.E.3d 880 (noting *de novo* review of a grant of a motion for summary judgment requires a reviewing court to examine the pleadings, depositions, admissions, exhibits, and affidavits on file anew to determine whether a material question of fact exists). Plaintiff testified she was struck from behind by the back of a semi-truck, causing her to fall forward to the ground. She then rolled over and saw the bottom of the semi-truck's trailer. Because the semi-truck was still moving, she grabbed on to a metal part of the trailer and was then dragged across the west parking lot. This testimony is neither "inherently improbable," "self-contradictory," "fanciful," "delusional," nor "physically impossible."

¶ 51 Our finding is not affected by the portion of plaintiff's testimony where she describes where she believed the semi-truck was located prior to the moment she was struck. Plaintiff testified the semi-truck was stopped "all the way to the end" of the parking lot on the east side of Valley Road, pointing east. However, she also identified the semi-truck's location on the photograph from the west parking lot looking east. That photograph shows a large "x" covering almost the entirety of the driveway in the east parking lot, which raises factual questions concerning plaintiff's ability to perceive the actual location where the semi-truck was

stopped. Moreover, a jury could, particularly given the other evidence of record, give weight to plaintiff's testimony indicating she was struck while also declining to give weight to her testimony about where she perceived the semi-truck was stopped. In our *de novo* review, we find plaintiff presented sufficient evidence to show defendant breached his duty of care to plaintiff and that breach caused plaintiff's injuries—the only disputed elements with plaintiff's claim of negligence.

¶ 52 We also find defendant's alternative argument suggesting we can affirm the trial court's judgment on contributory negligence grounds to be unpersuasive. See *Chicago Title Insurance Co. v. Bass*, 2015 IL App (1st) 140948, ¶ 13, 31 N.E.3d 444 (noting a reviewing court may affirm a trial court's judgment granting a motion for summary judgment on any basis supported by the record regardless of whether the trial court relied on that basis); 735 ILCS 5/2-1116(c) (West 2016) ("The plaintiff shall be barred from recovering damages if the trier of fact finds that the contributory fault on the part of the plaintiff is more than 50% of the proximate cause of the injury or damage for which recovery is sought."). Defendant contends this case is similar to *Hardy v. Smith*, 61 Ill. App. 3d 441, 445, 378 N.E.2d 604, 607 (1978), which found a plaintiff contributorily negligent as a matter of law where the evidence showed the plaintiff failed to look before crossing an alley where the defendant was driving and no surrounding circumstances existed to excuse his failure to look. Unlike *Hardy*, however, plaintiff testified she walked in a direction away from the semi-truck after observing it parked in the east parking lot. Construing the pleadings, depositions, exhibits, and affidavit on file against defendant, we find the question of whether plaintiff negligently acted or failed to act and whether such negligent conduct was more than 50% of the cause of the injuries for which plaintiff seeks recovery cannot

be decided as a matter of law.

¶ 53 III. CONCLUSION

¶ 54 We reverse the trial court's judgment and remand for further proceedings.

¶ 55 Reversed and remanded.

¶ 56 JUSTICE DeARMOND, specially concurring:

¶ 57 Defendant candidly admitted at oral argument there appeared to be no Illinois authority for his argument that summary judgment was appropriate if the trial court concluded the only evidence in support of a breach of duty and proximate cause was so "inherently improbable," "fanciful," "fantastic," or "delusional" that it should be disregarded. That is unfortunate because if ever there was a case where such a principle should be recognized, this is it.

¶ 58 According to plaintiff's own version of the incident, when she last looked at the semi-truck, it was approximately 150 feet away from her location. Although she had already passed from the parking lot to a grassy divider and out of the truck's path of travel, plaintiff inexplicably stepped back into the truck's path as it backed up from one parking lot to the other in order to negotiate a turnaround. Somehow, according to plaintiff, a 31,000-to-38,000-pound vehicle traveled backward 150 feet to a point where it struck her in the back after taking one step off the curb—all in the span of one second. Not only that, but apparently, after being struck, plaintiff had the presence of mind to turn over and grab onto the bottom of the semi-truck's trailer, where she was then dragged some distance before the truck stopped. The truck driver said he was backing up at a speed of three to four miles per hour. As defendant noted, in order for the truck to travel the 150 feet attributed by plaintiff in a single second, it would have had to be

moving at 103 miles per hour.

¶ 59 It does not take a medical degree to conclude the nature of the injuries to plaintiff from a semi-truck traveling at that rate of speed would be greater than some "abrasions to her knee and over her right shoulder blade," "back pain without radiation[,] and acute low back pain." Plaintiff was seen and discharged from the emergency room the same day.

¶ 60 These were the facts confronting the trial court. Unfortunately, as improbable as they may be, there are genuine issues of material fact which would, under the current state of the law, preclude summary judgment. Was the truck as far away as she thought? Was the time frame actually one second from the time she looked at the truck, stepped off the curb, and was struck from behind? Did she step in the direction of her destination, as Justice Knecht states, or back into the path of the truck as the physical evidence would tend to show? Was she aware the driver of the truck could not see her as reflected in the statement made to a nurse and examining physician? Was the semi-truck only traveling at three to four miles per hour? I fully recognize the authority cited by Justice Knecht, which precludes the trial court from weighing the evidence at the summary judgment stage. However, where the facts, as here, are so incredible and defy all logic and common sense, there should be some means by which, if for no other reason than judicial economy, a trial court can conclude the facts are so improbable, fanciful, or physically impossible that summary judgment is appropriate.

¶ 61 At trial, a witness's testimony may be so inherently improbable or fanciful as to be disregarded by the trier of fact. *Lasky v. Smith*, 407 Ill. 97, 106, 94 N.E.2d 898, 902 (1950) ("Courts are not required to accept as true testimony which contains such inherent improbability as to impeach itself."). As defendant

noted, in *Mannen v. Norris*, 338 Ill. 322, 327, 170 N.E. 273, 275 (1930), our supreme court noted:

> "If [the witness's] testimony is contradictory of the laws of nature or universal human experience, so as to be incredible and beyond the limits of human belief, or if facts stated by the witness demonstrate the falsity of the testimony, the court is not bound to believe him."

¶ 62 This extends to courts of review as well. In *People v. Coulson*, 13 Ill. 2d 290, 297, 149 N.E.2d 96, 99 (1958), our supreme court, commenting on the highly improbable testimony of the victim in an armed robbery trial, noted it has in other cases found a witness's testimony to be "too improbable and unconvincing to sustain a conviction. Where testimony is contrary to the laws of nature, or universal human experience, this court is not bound to believe the witness."

¶ 63 I find no authority, however, whereby this analysis has been extended to the summary judgment stage and, therefore, feel compelled to reluctantly concur. Although the dissent finds contributory negligence as a basis for upholding the trial court's grant of summary judgment, I, unfortunately, can see no distinction between the weighing of facts necessary to determine plaintiff's level of contributory negligence and those necessary to determine whether summary judgment was appropriate. Even this court in a case cited by the dissent noted, "[i]f reasonable persons may draw different inferences from the undisputed

facts *or if material facts are disputed*, summary judgment is precluded." (Emphasis added.) *Buerkett v. Illinois Power Co.*, 384 Ill. App. 3d 418, 421, 893 N.E.2d 702, 708 (2008). Here, there is clearly a dispute between plaintiff's version of where the semi-truck was when she last looked at it and where it actually was when it hit her. There is equally a dispute about whether plaintiff could have stepped off the curb in the direction of her destination or back into the path of travel of the truck. There is also a question of fact whether plaintiff could not have heard a semi-truck reversing through two parking areas before stepping into its path, even if she did not see it.

¶ 64 To use valuable judicial time and resources, as well as those of the parties on such an "inherently improbable," "self-contradictory," "fanciful," "delusional," or "physically impossible" set of facts should not be required where the summary judgment process would serve as a perfectly appropriate means of disposing of such litigation.

¶ 65 JUSTICE TURNER, dissenting:

¶ 66 I respectfully dissent. In my view, the record in this case shows plaintiff's contributory negligence was the primary cause of her injuries.

¶ 67 As the majority notes, section 2-1116(c) of the Code of Civil Procedure (735 ILCS 5/2-1116(c) (West 2016)) states a "plaintiff shall be barred from recovering damages if the trier of fact finds that the contributory fault on the part of the plaintiff is more than 50% of the proximate cause of the injury or damage for which recovery is sought." *Supra* ¶ 52. However, as this court has

stated, "[w]hile ordinarily the question of contributory negligence is a question of fact for the jury, 'it becomes a question of law when all reasonable minds would agree that the evidence and reasonable inferences ***, viewed in a light most favorable to the nonmoving party, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand.' " *Buerkett v. Illinois Power Co.*, 384 Ill. App. 3d 418, 425, 893 N.E.2d 702, 711 (2008) (quoting *West v. Kirkham*, 207 Ill. App. 3d 954, 958, 566 N.E.2d 523, 525 (1991)).

¶ 68 Here, it is undisputed plaintiff was aware of the semi-truck. She had watched the semi-truck travel south on Valley Road and then turn left into the north side of the parking lot east of Valley Road. According to plaintiff, she walked south across the north entrance of the parking lot west of Valley Road where she stopped "and turned around to find out where the semi was." When she saw the truck parked with its cab "all the way to the end" of the east parking lot, she determined she was "good" to proceed. Then, upon taking one step, she was struck in her back by the rear of the trailer portion of the semi-truck traveling in reverse.

¶ 69 Even construing this evidence in a light most favorable to plaintiff, she either totally ignored her own safety or was grossly negligent in assessing it was safe for her to proceed. Any reasonable person would know, or reasonably should know, the driver of the semi-truck here would have difficulty in detecting the presence of a person directly behind the trailer portion when traveling in reverse. Indeed, plaintiff essentially acknowledged as much when she told the

treating physician she walked behind a semi-truck "who was not aware she was behind him."

¶ 70 When viewing the evidence and all reasonable inferences in a light most favorable to plaintiff, any reasonable juror would find plaintiff's failure to look out for her own safety was more than 50% of the cause of her injuries. Thus, no contrary verdict could ever stand, and I would affirm the trial court's judgment granting defendant's motion for summary judgment.