2018 IL App (1st) 181317-U

THIRD DIVISION
December 12, 2018

No. 1-18-1317

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

JILL GILLESPIE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 16 L 12714
	)	
MICHAEL PATY,	)	The Honorable
	)	John H. Ehrlich,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Howse and Ellis concurred in the judgment.

ORDER

¶ 1 *Held:* In negligence action by plaintiff motorcycle passenger against defendant operator for injuries sustained in collision with a deer, trial court's granting of summary judgment in favor of defendant was affirmed. No genuine issue of material fact existed as to whether defendant was negligent in choosing a dangerous route over a safer alternative route, in operating motorcycle while intoxicated or impaired, in driving too fast for conditions, or in failing to keep a proper lookout.

¶ 2 This is an action for personal injuries sustained by the plaintiff, Jill Gillespie, when she was a passenger on a motorcycle being operated by the defendant, Michael Paty. The two were on a motorcycle ride on a road through a forested area near the defendant's home when a deer ran in

front of them. They collided into it, and the plaintiff was injured in the collision. The plaintiff alleges in this case that the defendant was negligent in selecting the route for their ride and in his operation of the motorcycle, and his negligence was a proximate cause of the collision in which she was injured. The defendant moved for summary judgment, which the trial court granted. The plaintiff appeals, arguing that genuine issues of material fact exist about whether the defendant was negligent. For the reasons that follow, we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 The facts of this case are largely undisputed. We set forth the facts from the summary judgment record in the light most favorable to the plaintiff, as the nonmoving party. The collision at issue occurred at about 11:00 p.m. on July 17, 2015. Earlier that evening, the plaintiff and the defendant, who were friends, had attended a country music concert together at an outdoor amphitheater in Tinley Park, Illinois. They first came together that day around 4:00 p.m., when the defendant arrived at the plaintiff's house in Joliet. During the time they were there, the defendant consumed three beers. The defendant then drove the plaintiff to his house in Tinley Park. They arrived there about 5:45 p.m. They stayed there for about 45 minutes before leaving for the concert, during which time the defendant consumed an additional beer. They left the defendant's house around 6:30 p.m., and the defendant drove them to the amphitheater several miles away. They were at the amphitheater from about 7:00 p.m. until about 10:00 p.m., and during that time, the defendant consumed three additional beers. The defendant then drove them back to his house, and they arrived there around 10:15 p.m. Once there, they went to the defendant's garage and each had an additional beer. Around this time, the defendant's daughter and two of her friends stated they were going to a fast-food restaurant to get something to eat. They took orders from the plaintiff and the defendant. While the plaintiff and defendant were

waiting for them to return, the defendant asked the plaintiff if she wanted to take a "ride around the block" with him on his motorcycle. The plaintiff agreed to do so.

¶ 5 The defendant's house is at the intersection of 175th Street and Parkside Avenue in Tinley Park. The driveway adjoins Parkside Avenue. When the plaintiff and the defendant left the driveway on the motorcycle, they headed south on Parkside Avenue toward its intersection with 175th Street. If they had headed north on Parkside Avenue instead, they could have, depending on their route, stayed on streets that were relatively residential and well lit by streetlights. However, 175th Street west of Parkside Avenue runs through a large forested area without streetlights for several blocks. At that point, 175th Street runs east and west, with one lane for traffic heading each direction, divided by a yellow line. It is a paved road, and the plaintiff did not notice any holes or potholes in it. It was not raining at the time of the collision, and the plaintiff made no observations about whether the road conditions was wet or dry. A "wildlife crossing" sign was posted on 175th Street near where the collision occurred.

¶ 6 It is undisputed that the collision occurred on the portion of 175th Street that is bounded by forested land on both sides, in the area west of Parkside Avenue and east of Tinley Park High School. The parties gave differing accounts of the route that they took to arrive at the point of the collision. According to the plaintiff, the defendant turned right from Parkside Avenue to travel west on 175th Street. They did not turn from 175th Street or pass any intersections or traffic lights prior to the collision occurring, and it happened "not long" after they began their ride. According to the defendant, he turned left from Parkside Avenue to travel east on 175th Street to Central Avenue. There he turned right and drove south to Flossmoor Road. There, he turned right again and drove west to Ridgeland Avenue. He then turned right a third time and drove north, back to 175th Street. Finally, he turned right a final time to travel eastbound on 175th Street,

where the collision occurred. The route as described by the defendant would be about six miles.

¶ 7 The defendant testified that he would describe the stretch of 175th Street through the forested area between Parkside Avenue and the high school as "very dark." Both parties agreed that the headlamp of the motorcycle was illuminated during the ride, and the plaintiff testified it appeared to provide sufficient illumination for the nighttime ride. The plaintiff could not recall the distance of illumination provided by the headlamp. The parties agreed that when they first turned onto 175th Street, the defendant had the high-beam headlight on. However, before the collision he had dimmed it to low-beam because a car was approaching from the opposite direction. Both parties testified that "seconds" after the oncoming car was past them, they collided with the deer. It came out of the woods from their left side. The defendant testified that the deer was on the shoulder of the opposite side of the road when he first saw it, and it was running across the road at "full trot." He testified it was about 10 feet away from them when he first saw it. The plaintiff testified that she never actually saw the deer itself, but she "just saw the glowing eyes." She testified that when she first saw the eyes, they were in the same lane of traffic in which the plaintiff and defendant were traveling, and the eyes were moving. The plaintiff testified the defendant did not make any evasive maneuvers to avoid hitting the deer. The defendant testified that all he could do was lock up the brakes of the motorcycle. In the collision, the motorcycle landed on the plaintiff, causing her significant injuries.

¶ 8 The defendant testified he was operating the motorcycle at about 40 miles per hour when he saw the deer, and the speed limit was 45 miles per hour at that point. The plaintiff testified she did not know the posted speed limit at the point where the collision occurred, and she does not know whether the motorcycle was traveling faster or slower than the posted speed limit. She does not know the speed the motorcycle was traveling at the point of impact. The plaintiff

testified that at some point after the collision occurred, the defendant said to her, "[I]f I didn't dim my brights, maybe I would have seen the deer."

¶ 9 During her discovery deposition, the plaintiff was asked a number of questions about whether the defendant appeared to her to be intoxicated or impaired by alcohol at any point during the evening. She testified repeatedly that he did not appear intoxicated, and she believed at each point that he was capable of safely operating a vehicle. With respect to the defendant's intoxication or impairment at the point when she agreed to go on the motorcycle ride with the defendant, the plaintiff testified she did not make any observations about whether the defendant appeared intoxicated before she got onto the motorcycle that evening. She agreed that if she had thought that the defendant could not operate a motorcycle at the time before the collision occurred, she would not have gotten onto the motorcycle with him. Tori Dodson, one of the friends of the defendant's daughter, who was with the defendant before going to the fast food restaurant, was asked whether she thought the defendant should have should have operated the motorcycle that evening based on her observations of his inebriation. She answered, "I don't think he should have just because there was a little bit of drinking involved. I'm not saying he was totally obliterated but just for the pure fact that he had one or two."

¶ 10 The defendant filed a motion for summary judgment. He argued generally that no evidence existed by which the plaintiff could prove he was negligent or proximately caused the collision in which she was injured. The plaintiff field a response, arguing that genuine issues of material fact existed about whether the defendant had been negligent in selecting a dangerous route for their motorcycle ride through dark roads that deer and other wildlife were known to run across, when a safer alternative route existed of well-lit streets in a residential neighborhood. She also argued that genuine issues of fact existed about whether he was negligent in operating the

motorcycle at a speed too fast for conditions, failing to keep a proper lookout, and consuming between five and nine beers before operating a motorcycle. The trial court granted the defendant's motion for summary judgment. This appeal then followed.

¶ 11 ANALYSIS

¶ 12 As this appeal involves the trial court's granting of summary judgment, this court's review is *de novo*. *Thounsavath v. State Farm Mut. Auto. Ins. Co.*, 2018 IL 122558, ¶ 18. Summary judgment is appropriately granted only when the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* at ¶ 15; 735 ILCS 5/2-1005(c) (West 2016). A genuine issue of material fact exists where the material facts are disputed or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts. *Marshal v. City of Chicago*, 2012 IL 112341, ¶ 49.

¶ 13 The plaintiff's first argument on appeal is that summary judgment in the defendant's favor was not warranted, because the defendant breached his duty of care to the plaintiff by choosing a dangerous route for their motorcycle ride. At the very least, the plaintiff argues, a genuine issue of material fact exists about whether the defendant engaged in negligent conduct by taking the plaintiff for a motorcycle ride by means of a dangerous route, one that was "dark where deer and other wildlife were known to run across the road," instead of choosing an available alternative route "through the neighborhood that was safe and well-lit." Specifically, the plaintiff points to the defendant's testimony that well-lit, residential streets exited around the area of his house which he could have used to take the plaintiff on a motorcycle ride. Instead, he chose to ride on 175th Street, which was dark and surrounded by forested area on both sides west of Parkland

Avenue. The plaintiff points to the defendant's testimony that he was aware there could be deer in that area and that deer would occasionally run across 175th Street. The plaintiff argues that the law of Illinois "has long recognized that, if a choice of routes is available, and one chooses a hazardous route rather than a safe route, it is a breach of one's duty to exercise ordinary care and, at the very least, creates a question for the fact finder." In support of this argument, the plaintiff cites the cases of *Blacconeri v. Aguayo*, 132 Ill. App. 3d 984 (1985), *Geraghty v. Burr Oak Lanes, Inc.*, 5 Ill. 2d 153 (1955), and *Reuter v. Kocan*, 113 Ill. App. 3d 903 (1983).

¶ 14 In *Blacconeri*, 132 Ill. App. 3d at 988-90, this court addressed the "safer-alternative doctrine" and analyzed whether it had been correctly applied in that case. The plaintiff was a pedestrian who was hit by a car and injured while attempting to cross a major thoroughfare at an intersection that had neither a painted crosswalk nor a traffic-control signal. *Id.* at 986-87. At the trial, the defendant presented evidence that the plaintiff could have chosen a safer alternative route to cross the street, by walking one block north where a controlled crossing existed. *Id.* at 988. The defendant argued that the plaintiff was contributorily negligent by failing to do so. *Id.* The jury reached a verdict for the plaintiff but found her 99 percent contributorily negligent. *Id.* The plaintiff appealed from the denial of her motion for a new trial, arguing that it was error for the defendant to introduce evidence of a safer alternative. *Id.* This court held that the safer alternative doctrine was correctly used in the case and the evidence was properly admitted. *Id.*

¶ 15 The safer-alternative doctrine is normally a principle of contributory or comparative negligence. It stems from the policy that a person may not knowingly expose herself to danger and then recover damages for an injury she might have avoided by the exercise of some act or precaution. *Id.* at 989. Under that doctrine, "[i]f a person has available to him two different ways of proceeding, one dangerous or hazardous and the other safe, and he consciously chooses the

former and is injured as a consequence of his choice, he is contributorily negligent." *Id.* (citing *Atchley v. Berlen*, 87 Ill. App. 3d 61, 63 (1980)). Thus, "evidence of the existence of a safer alternative, known to but not chosen by the plaintiff, is properly admissible to show contributory negligence." *Id.* (citing *Geraghty*, 5 Ill. 2d at 161-62; *Cuthbert v. Stempin*, 78 Ill. App. 3d 562, 567 (1979); *Newton v. Meissner*, 76 Ill. App. 3d 479, 490-91 (1979); *Klimovich v. Crutcher*, 57 Ill. App. 2d 444, 451 (1965)). Whether a plaintiff had a choice of routes and, if so, whether she chose a safe or dangerous one are questions of fact. *Id.* at 989-90. In determining whether a plaintiff was contributorily negligent, the fact finder may consider not only the plaintiff's course of conduct but also whether safer alternatives were available. *Id.* at 990.

In *Geraghty*, 5 Ill. 2d at 161-62, the issue of the existence of a safer alternative route was similarly applied on the context of the plaintiff's contributory negligence. There, the plaintiff fell while walking through the unlit parking lot of a bowling alley. *Id.* at 155-56. His foot became wedged between a railroad tie and a telephone pole which were lying on the surface of the parking lot, covered with weeds and tall grass, which were used as bumpers to keep the parked cars in line. *Id.* at 156. The jury found for the plaintiff, the appellate court reversed the judgment. *Id.* at 157. In doing so, the appellate court determined that the plaintiff was guilty of contributory negligence as a matter of law because he had a choice of routes, and he chose to walk through tall weeds where no pedestrian path existed instead of through an alternative route known by him to be safe. *Id.* at 161. The supreme court reversed the appellate court, concluding that the evidence did not show that the plaintiff in fact had a choice of routes or that he ignored a route known by him to be safe and instead selected a dangerous route. *Id.* It held that whether plaintiff had a choice of routes and, if he had, whether he chose a safe route or unsafe route, were questions of fact for the jury. *Id.* at 162.

¶ 16 The cases of *Blacconeri* and *Geraghty* support the principle that evidence of a plaintiff's conduct in choosing to traverse a dangerous or unsafe route instead of choosing a safer alternative route may be used to demonstrate contributory or comparative negligence on the part of the plaintiff. As demonstrated by the cases cited above, the context in which the safer alternative route doctrine has long been applied is the context of contributory negligence. See also *Bizarro v. Ziegler*, 254 Ill. App. 3d 626, 631-34 (1993); *West v. Boehne*, 229 Ill. App. 3d 1045, 1052-54 (1992); *Allen v. Dhuse*, 104 Ill. App. 3d 806, 809 (1982); 57B Am. Jur. 2d *Negligence* § 835 (2004) ("Under the 'choice-of-paths' or 'unsafe-route' rule, a person who voluntarily chooses a dangerous path over a safe path, and who is injured as a result, is considered to be contributorily negligent"). Here, however, the plaintiff is seeking to use the safer alternative route doctrine as a theory of liability for establishing the negligence of the defendant.

¶ 17 In arguing that the safer alternative route doctrine may serve as a basis for establishing a defendant's negligence, the plaintiff cites *Reuter*, 113 Ill. App. 3d at 908-09. In that case, the plaintiff and defendant went to a private off-road dirt track to ride dirt bikes. *Id.* at 905-06. While the plaintiff was riding a dirt bike around the track, the defendant decided to drive a car onto the track. *Id.* at 906. Initially the defendant drove the car in the same clockwise direction along the track that the plaintiff was riding, but he reached a point at which the track was too narrow and rutted to proceed further. *Id.* The defendant could not maneuver into the track's infield because tires blocked his path, and he was afraid the car would stall if he got out of it to move them. *Id.* Thus, the defendant turned the car around and proceeded to drive in a counterclockwise direction along the track. *Id.* However, a "blind" curve existed along the track, and it was at that blind curve that the plaintiff collided into the defendant's car while they were traveling in opposite directions along the track. *Id.* The plaintiff fell from the dirt bike and was injured. *Id.* At trial, the

jury found in the defendant's favor. *Id.* at 907.

¶ 18 On appeal, the plaintiff first argued that the defendant was negligent as a matter of law when he reversed the direction of the car after determining he could not continue clockwise along the trail. *Id.* at 908. In rejecting this argument, the court cited the rule that the mere fact that a party has not chosen the safest course of conduct, or that the course of conduct chosen entails certain hazards, is not proof of negligence as a matter of law unless the less-safe course of action is unreasonable. *Id.* Thus, the court held that it was for the jury to determine whether it was unreasonable for defendant to turn around rather than to drive off the track, considering the defendant's testimony that tires blocked his return to the infield and the vehicle was in danger of stalling if he moved them. *Id.* The court did, however, accept the plaintiff's argument that the jury's verdict was against the manifest weight of the evidence. *Id.* The court cited uncontroverted evidence that the defendant had reason to know that the plaintiff would be approaching from the opposite direction if he turned the car around and that the plaintiff would be unaware of his presence. *Id.* at 908-09. The court further noted that any argument that the defendant was not negligent in any degree was substantially weakened by evidence showing that after he turned his car around, he continued substantially past the point at which he could reenter the infield of the track. *Id.* at 909.

¶ 19 In this case, the plaintiff argues that *Reuter* stands for the principle that evidence that a defendant chose a dangerous route over a safe route can establish negligence on the part of the defendant, and that whether one is negligent in choosing a particular route is for the fact finder to determine. However, we do not interpret *Reuter* as holding that the defendant's negligence was based on his choice of one route over another. Rather, the defendant's negligence was based on his conduct of driving in a car on a dirt-bike track in the direction opposite of that which the

plaintiff was riding on a dirt bike, and he knew the plaintiff would be riding directly toward him around a blind curve and likely unaware of his presence. Also, the evidence showed the defendant drove farther along the track than was necessary to safely pull the car off the track and onto the infield. Thus, we do not believe that *Reuter* supports the plaintiff's argument that the "safer alternative route" doctrine can be used to establish the defendant's negligence in this case.

¶ 20 Beyond citing *Reuter*, the plaintiff cites no other case expressly holding that the safer alternative route doctrine can be used as a theory of liability to establish a defendant's negligence. The plaintiff cites us to no case holding that a defendant's negligence can be established based solely on the fact that the defendant chose to operate a vehicle upon one public roadway instead of another, where the defendant has a lawful right to travel upon any of the roadways involved. Thus, while the choosing of a dangerous route over a safer alternative route may be a principle for establishing contributory or comparative negligence on the part of a plaintiff, we cannot accept the plaintiff's argument that a jury question on the defendant's negligence exists based solely on the claim that the particular public roadway that the defendant chose to travel upon constituted part of a "dangerous" route and that a safer alternative route existed upon which the defendant could have chosen to travel instead.

¶ 21 Although not cited to us by either party, an issue similar to this was addressed by the court in *West*, 229 Ill. App. 3d at 1053-54. There, the plaintiff's decedent was driving a van across a bridge on a highway at the same time that the defendant was driving a tractor pulling a field cultivator across the bridge from the opposite direction. *Id.* at 1047-48. The cultivator extended somewhat over the center line of the road. *Id.* at 1048. The van and the cultivator collided as they passed each other on the bridge, and the plaintiff's decedent died as a result. *Id.* At trial, the jury issued a verdict in favor of the defendant. *Id.* at 1047. One of the plaintiff's arguments on appeal

was that the trial court had denied the plaintiff a fair trial by granting a motion *in limine* barring him from presenting a theory that the defendant was negligent in failing to travel along an alternative route which would have avoided the transportation of the cultivator over the bridge. *Id.* at 1052. In doing so, the trial court noted that proof of negligence would be related to the size of the vehicle and the particular road in question rather than to the availability of alternative routes, and it expressed concern that allowing such evidence would open the door to arguments asserting liability for failure to engage in a myriad of possible behaviors which could have prevented the collision. *Id.* The plaintiff argued that the presence of a safer mode of alternative conduct was always a relevant consideration on the issue of negligence, and available alternative routes should be taken when they are known to be safe. *Id.* at 1053. The court noted that the cases cited by the plaintiff applying these principles did so in the context of plaintiffs' negligence in failing to exercise due care in the face of perceived danger. *Id.*; see *Siegel, Cooper & Co. v. Becker*, 83 Ill. App. 600 (1899); *Klimovich*, 57 Ill. App. 2d at 451. The court further pointed out that the evidence had not shown that the alternative routes available to the defendant were known to be safe. *West*, 229 Ill. App. 3d at 1053. The court held that, "absent further evidence that Boehne's course of action was one involving obvious *and* unreasonable danger to which he did not respond, the admission of evidence of an alternative course of conduct is not appropriate." (Emphasis in original). *Id.* at 1053-54. It held that the trial court had not abused its discretion in refusing to allow the plaintiff to present evidence of a safer alternative route. *Id.* at 1054.

¶ 22 Although *West* addressed the issue at a different procedural posture than we are faced with in this case, we believe its holding is nevertheless applicable. Absent some further evidence that the defendant's choice of route amounted to his engaging in a course of action involving some obvious and unreasonable danger, evidence that a safer alternative route existed is not, standing

alone, a basis for establishing the defendant's negligence. In this case, the plaintiff has not presented evidence that the defendant's choice to travel on 175th Street amounted to his engaging in a course of action involving obvious and unreasonable danger. The route he chose was a public street on which he had a lawful right to ride a motorcycle. There is no evidence that the roadway itself was unsafe. All the evidence is that it was a normal road, regular in size and paved for use by vehicular traffic. There is no evidence that some condition or obstruction existed upon it that made it temporarily unsafe. Although for several blocks the road traversed a forested area and was not lit by streetlights, the same could be said of many roadways throughout this state. Likewise, the risk that deer or other wildlife could run across this road does not make travel upon it any more obviously or unreasonably dangerous than travel upon any other road around this forested area of the county. Thus, we find no genuine issue of material fact exists about whether the defendant was negligent in his choice of route.

¶ 23 The plaintiff next argues that the defendant breached his duty of care to the plaintiff by consuming approximately nine beers over the course of the evening before taking the plaintiff on the motorcycle ride. He argues that the defendant acknowledged this by the following testimony:

> "Q. Another way that a reasonably prudent person can exercise caution when riding a motorcycle is to not operate that motorcycle when that person has had any alcohol to drink in the prior 12 hours; would you agree with that?
>
> * * *
>
> A. Yes."

The defendant responds that the plaintiff may not create an issue of fact on negligence simply by citing evidence that the defendant had consumed alcohol before driving, but rather, because evidence of drinking is considered so prejudicial, the plaintiff must provide evidence of the

defendant's actual intoxication with the impairment of his physical or mental capabilities. *Bielaga v. Mozdzeniak*, 328 Ill. App. 3d 291, 296 (2002). Insinuations of intoxication based upon evidence of drinking are impermissible and irrelevant without actual evidence of intoxication. *Id.* The defendant argues that no evidence of intoxication or impairment exists in the summary judgment record.

¶ 24 The plaintiff was questioned extensively during her discovery deposition about her impressions as to the defendant's intoxication and impairment at various points in time. She testified repeatedly that she never believed the defendant was under the influence of alcohol or impaired, and she would not have ridden on the motorcycle with him if she thought he was. In her reply brief, the plaintiff does not direct this court's attention to any further evidence of the defendant's intoxication or impairment. She does argue that it is appropriate for this court to consider the evidence of the defendant's alcohol consumption because the defendant did not file a motion to bar consideration of such evidence in advance of the summary judgment motion. After reviewing all the testimony and evidence in the record on this issue, we find no evidence of intoxication or impairment that would be sufficient to create a genuine issue of material fact.

¶ 25 The plaintiff next argues that a genuine issue of material fact exists about whether the defendant was negligent in failing to keep a proper lookout or in driving too fast for conditions at the time of the incident. She cites the defendant's testimony that he was aware that there were deer in the forested area around 175th Street and that deer would sometimes cross the road at night. She further points out that it was dark on 175th Street that night, and the defendant had dimmed his high-beam headlight several seconds before the collision due to an approaching car. Regarding his seeing the deer, the defendant testified that the deer came out of the woods, and in a "split second it was there." He testified that when he first saw the deer, it was on the shoulder

of the opposite side of the road from them, and it was running "full trot" across the road. For her part, the plaintiff testified she never saw the deer, but only "saw the eyes." She did not see the eyes until they were in the same lane of roadway in which the parties were traveling, and the eyes were moving when she saw them. The defendant testified he was operating the motorcycle at 40 miles per hour at the point of the collision, and the posted speed limit there was 45 miles per hour. The plaintiff did not know what speed they were traveling or whether it was above or below the posted speed limit. The defendant slammed on his brakes but could not avoid colliding with the deer. The plaintiff testified that the defendant did not make any evasive maneuvers to avoid hitting the deer.

¶ 26 Having considered all of the evidence relied upon by the plaintiff, we find no evidence that would support an inference in the mind of a reasonable juror that the defendant was negligent in failing to keep a proper lookout or in driving too fast for the conditions. With respect to driving too fast, the evidence showed that the defendant was driving slower than the posted speed limit. While compliance with the speed limit is not dispositive on the issue of negligence if a special hazard exists or if weather or highway conditions warrant otherwise (see *Watkins v. Schmitt*, 172 Ill. 2d 193, 209 (1996)), the plaintiff has not identified any hazard or condition from which it could reasonably be concluded that 40 miles per hour was too fast for the defendant to be traveling in this 45 mile per hour zone. We disagree with the plaintiff that the facts of this case are similar to those of *Turner v. Roesner*, 193 Ill. App. 3d 482, 489 (1990), in which the court found an issue of fact to exist on the question of whether the defendant was driving too fast for conditions even though the evidence showed he was driving 10-15 miles per hour below the posted speed limit. In *Turner*, the evidence showed that that the defendant was driving at 40-45 miles per hour on a dark and icy road in dense fog, and his visibility was limited to the distance

covered by his headlights. *Id.* No similar conditions are shown by the evidence to exist in this case. We reject the plaintiff's argument that the darkness of the road or the possibility that a deer could run cross it constitute hazards or conditions from which reasonable jurors could conclude that a reduction in speed of greater than five miles per hour below the posted speed limit was warranted. Outside of cities, such conditions could be said to exist almost every night on many roadways throughout this state.

¶ 27 Finally, with respect to the defendant's lookout, the only evidence in the summary judgment record was that in a "split second," the deer ran out of the woods and directly into the parties' path of travel. The deer was approximately 10 feet away and running toward them when the defendant first saw it. There is no evidence that the deer could have been seen before it was out of the woods or at any time before it was on the shoulder of the roadway. The plaintiff provided no such evidence, as she testified she never even saw the deer itself. She only saw "eyes," and she did not see them until they were in the same lane of the roadway in which the parties were traveling. Thus, we find no evidence sufficient to create a genuine issue of material fact that the defendant was negligent in failing to keep a proper lookout.

¶ 28 We reject the plaintiff's argument that a different conclusion is required by the case of *Santschi v. Gorter*, 63 Ill. App. 3d 394 (1978). There, a driver entered the roadway from a private driveway and stopped in the plaintiff's path of travel. *Id.* at 395. To avoid colliding with that car, the plaintiff turned into the oncoming lane of traffic and collided with the car driven by the defendant, who was proceeding from the opposite direction. *Id.* The plaintiff alleged the defendant was negligent in failing to keep a proper lookout. *Id.* On appeal of the granting of summary judgment in favor of the defendant on that issue, the court noted that neither party had pinpointed the distance between their respective automobiles when each could observe the other

or the other car blocking the plaintiff's lane. *Id.* at 396. The court held that a genuine issue of material fact existed about whether as a result of the defendant to maintain a proper lookout his automobile collided with that of the plaintiff. *Id.*

¶ 29 This case is distinguishable from *Santschi* for the obvious but significant reason that the plaintiff is not alleging the defendant failed to keep a lookout for other vehicles on the roadway in front of him. Rather, the plaintiff is alleging the defendant failed to keep a lookout for a deer running out of the woods and onto the roadway. A driver's duty is to see that which he or she clearly should see or that which is obviously visible. 4 Ill. L. and Prac. *Automobiles and Motor Vehicles* § 53. While it may be assumed from common sense that vehicles ahead on a roadway would be obviously visible to a driver keeping a proper lookout, the same cannot be assumed of wildlife in a forested area adjacent to the roadaway. Thus, while the court in *Santschi* could determine that a reasonable trier of fact could infer that the defendant was negligent in failing to recognize what was occurring with other cars on the roadway in front of him, this principle does not extend to a deer running out of the woods without some evidence that the defendant could have seen the deer prior to its entering the roadway. Here, as discussed above, the plaintiff has not presented evidence that the deer was visible within the woods until moments before the collision. Any determination that the defendant was negligent in failing to keep a proper lookout would require substantial speculation by the jury, which cannot serve as a basis for the existence of a genuine issue of material fact.

¶ 30 CONCLUSION

¶ 31 In conclusion, we affirm the order of the trial court granting summary judgment in favor of the defendant on the plaintiff's complaint at law.

¶ 32 Affirmed.