

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

DYLAN WOLF SWEENEY	:	APPEAL NO. C-110200
		C-110214
and	:	TRIAL NO. A-0900508
AMY W. OYSTER,	:	<i>JUDGMENT ENTRY.</i>
Plaintiff-Appellants/Cross-Appellees,	:	
	:	
vs.	:	
	:	
JOANNE L. HALL, individually and d.b.a JL PROPERTIES and APARTMENT FINDERS,	:	
	:	
Defendants-Appellees/Cross-Appellants.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. See S.Ct.R.Rep.Op. 3(A); App.R. 11.1(E); Loc.R. 11.1.1.

Plaintiff-appellant/cross-appellee Dylan Wolf Sweeney and two friends leased a house from defendants-appellees/cross-appellants Joanne L. Hall, individually, and d.b.a. JL Properties and Apartment Finders (collectively “Hall”), on Ravine Street. There was a concrete patio off the second floor. A set of stone steps led from the concrete patio up to a wooded lot. At the top of the steps was a landing. The landing was three feet below the roofline of the house and two feet from the side of the house. From the landing, Sweeney accessed the roof of the leased house to take some pictures of the Cincinnati skyline. Sweeney placed his tripod near the edge of the roof and knelt down to look through the viewfinder. He then tried to stand up by placing his hand on the chimney, but a brick was

loose and Sweeney lost his balance and fell backwards off the roof. He sustained serious injuries.

Sweeney sued Hall for common law negligence and negligence per se. At the heart of his claims was Sweeney's assertion that Hall had permitted Sweeney and the other tenants to access the roof and use it as a deck. Under the Cincinnati Housing Code, if the roof was being used as a deck, the roof would have been required to have guardrails. Sweeney's mother, plaintiff-appellant/cross-appellee Amy Oyster, also sued Hall for loss of consortium. Hall asserted a counterclaim against Sweeney, alleging that Sweeney had trespassed on the roof. Following the submission of the evidence, the trial court directed a verdict in favor of Sweeney on the trespass claim and the jury returned verdicts in favor of Hall on the negligence claims.

With respect to the claim for negligence per se, the jury answered an interrogatory finding that Hall had not violated the Cincinnati Housing Code or the Ohio Revised Code. With respect to the claim for common law negligence, the jury found that Hall was negligent, but that her negligence was not the proximate cause of Sweeney's injuries.

Sweeney and Oyster (collectively, "Sweeney") now appeal in the case numbered C-110200. Hall also appeals the directed verdict on her trespass claim in the case numbered C-110214.

Sweeney's Appeal

In his first assignment of error, Sweeney asserts that "the trial court abused its discretion with respect to the jury instruction relating to the negligence per se claim." We are unpersuaded.

The jury instruction for the negligence per se claim stated in part that "[t]here are situations where the duty of care is not left to a jury's determination of ordinary care, but the duty is determined by statutes or ordinances. Plaintiffs claim that the

roof at 2230 Ravine Street was used as a deck with the knowledge and permission of [Hall] * * * Accordingly, Plaintiffs assert that certain provisions of the Ohio Revised Code and Cincinnati Housing Code set the standard for maintaining chimneys and for roofs used as decks. [Hall] denies that she permitted the use of the roof as a deck and if you find that she did not, either expressly or by implication, then the duty of care owed to Dylan Wolfe Sweeney is to refrain from willful, wanton or reckless conduct.”

Sweeney claims that the last sentence in the above quoted jury instruction confused the jury because that sentence explained what Hall’s duty of care would have been if Sweeney had been considered a trespasser on Hall’s rental property. Sweeney further argued that this instruction did not make sense given that the trial court had already determined that Sweeney had not trespassed on the rental property.

While that portion of the jury instruction dealing with “willful, wanton or reckless conduct” may not have been necessary and could have possibly been considered confusing, any confusion was cleared up when the jury instruction was read in its entirety. The instruction defined willful, wanton, and reckless conduct and also defined the sections of the Ohio Revised Code and Cincinnati Housing Code that Hall had allegedly violated. Then the instruction stated, “[w]hether or not the Ohio Revised Code or the Cincinnati Housing Code determines the duty depends on your decision on whether or not Defendant knew about and either encouraged or permitted, expressly or by implication, the use of the roof as a deck. If she did, [Hall] was negligent per se. If she did not, she cannot be found to be negligent per se * * * Plaintiff cannot prevail on a negligence per se claim unless her negligence per se was

a proximate cause of the injury, damage or loss sustained. Proximate cause has been previously defined in these instructions.”

The trial court clearly instructed the jury that the negligence per se claim hinged on two things: First, whether Hall had either encouraged or permitted the use of the roof as a deck, and if she had, that meant that Hall had breached her duty of care. Second, if the jury found that Hall had breached her duty of care, the jury then had to determine whether that breach was the proximate cause of Sweeney’s injuries.

Because the jury instruction, when read as a whole, clearly set forth the basis of a negligence per se claim, we cannot say that the trial court abused its discretion by instructing the jury in this manner. See, generally, *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. Further, the jury interrogatories demonstrated that the jury had understood the instruction because the jury had answered the interrogatory in the negative concerning whether Hall had violated the Cincinnati Housing Code and then had left blank the jury interrogatory dealing with proximate cause. They understood that they did not have to reach that issue based on their conclusion that Hall had not violated any municipal or state statutes.

Accordingly, the first assignment of error is overruled.

In his second assignment of error, Sweeney maintains that the jury’s general verdicts in favor of Hall are against the manifest weight of the evidence. We disagree.

Sweeney first argues that there was no evidence in the record to support the jury’s conclusion, under the common law negligence claim, that Hall was negligent but that her negligence was not the proximate cause of Sweeney’s injuries. While the jury may have thought that Hall had been negligent in failing to maintain the

chimney or negligent in failing to block off access to the stone steps, the jury could have reasonably concluded that but for the fact that Sweeney had been on the roof and near the edge, he simply would not have fallen. Finally, there was competent, credible evidence to support the jury's determination that Hall had not encouraged or permitted Sweeney to use the roof as a deck. Hall testified that she would never tell a tenant that they could access the roof, and she denied telling Sweeney that the roof had a good view. Furthermore, although Sweeney testified that Hall had told him and his roommates that they could access the roof and hang out there, neither of his roommates testified to that fact. They merely testified that Hall had told them that the steps led to the roof. Telling a tenant where a set of steps leads is not the same thing as giving them permission to use those steps to access the roof and use it as a deck.

Because there was competent, credible evidence to support the jury's verdict, we overrule the second assignment of error. *Brokamp v. Mercy Hosp.* (1999), 132 Ohio App.3d 850, 874, 726 N.E.2d 5940.

Hall's Appeal

Bringing forth a single assignment of error, Hall contends that the trial court erred by directing a verdict in favor of Sweeney on Hall's trespass claim. Specifically, Hall argues that she was not required to prove damages in a trespass claim. Regardless of whether Hall had to prove damages, we hold that the trial court properly directed a verdict in Sweeney's favor. In order to trespass on property, the trespasser cannot be in possession of the property. See *State v. Herder* (1979), 65 Ohio App.2d 70, 74, 415 N.E.2d 1000 (trespass is an invasion of the possessory interest of property). Here, Sweeney had leased the home from Hall and was in

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lawful possession of the house. Accordingly, the single assignment of error in the case numbered C-110214 is overruled.

The judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

DINKELACKER, P.J., HILDEBRANDT and HENDON, JJ.

To the clerk:

Enter upon the journal of the court on December 23, 2011
per order of the court _____.
Acting Presiding Judge