2013 IL App (1st) 110754-U

FOURTH DIVISION
February 14, 2013

No. 1-11-0754

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KEITH JUZWICKI, Plaintiff-Appellant, v. BOARD OF MANAGERS, 1910-1912 HALSTED CONDOMINIUM ASSOCIATION, Defendant-Appellee.	)))))))))))	Appeal from the Circuit Court of Cook County. No. 10L94 The Honorable Jeffrey J. Lawrence, Judge Presiding,

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concur in the judgment.

ORDER

¶ 1 *Held*: Summary judgment affirmed where trial court properly ruled plaintiff exceeded the scope of his status as an invitee when he ventured out over a continuous railing onto an unimproved portion of rooftop and engaged in horseplay such that, at the time of injury, he was a trespasser; and trial court properly ruled there was no willful and wanton conduct on the part of the Association.

¶ 2 On September 9, 2000, plaintiff Keith Juzwicki fell down an air shaft located on the roof of a building at 1910-1912 North Halsted Street, Chicago, Illinois, and sustained serious personal injuries. Subsequently, plaintiff filed a complaint alleging negligence against various defendants. Over time, many of the defendants were dismissed from the case. Plaintiff now appeals the grant of summary judgment in favor of the remaining defendant, Board of Managers, 1910-1912 Halsted Condominium Association (Association) and against plaintiff. On appeal, plaintiff contends that the trial court erred in finding: (1) at the time of injury, plaintiff was a trespasser as a matter of law; and (2) there was no willful and wanton conduct on the part of the Association. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 In 1998, John Lawrence purchased a third-floor unit, known as 3-North, in a condominium building located at 1910-1912 Halsted Street in Chicago, Illinois. The building has six condominium units in it and has a flat blacktop roof surrounded by a short tile-topped wall around its edges. Two rooftop decks have been built, occupying approximately 40% of the roof. The roof-top decks were constructed without obtaining City of Chicago building permits and without obtaining permission from the Association. Lawrence's daughter, Cristina Lawrence, has occupied unit 3-North since 1999. The building's other third-floor unit, 3-South, is owned and occupied by Ginger Kroll. Cristina's deck occupies the northwest corner of the rooftop and Kroll's deck occupies the southwest corner of the roof. The two roof-top decks are on the west side of the roof; the east side of the roof is unimproved without any decks. The surface of the decks are raised approximately two feet above the unimproved portion of the roof.

¶ 5 Cristina's roof-top deck adjoins Kroll's roof-top deck. To obtain access to either deck, one must climb up a back stairway and step up onto a landing. After stepping up onto the landing, one may then turn left and walk onto Cristina's deck, or turn right and walk onto Kroll's deck. Except for the common landing, the two roof-top decks are separated by a three-foot railing. The decks are surrounded by a continuous three-and-one-half foot tall railing.

¶ 6 The unimproved portion of the roof has an air shaft which is approximately five feet across and runs vertically from the roof of the building to the ground. It is surrounded by a one-foot high parapet wall. At the time of the injury, the air shaft was covered by a screen. The surface of the screen was approximately one foot above the surrounding unimproved roof and close enough to the roof-top decks that a person could step off the deck directly onto the edge of the air shaft. There was no artificial lighting on either deck, nor any lighting illuminating the air shaft. No signs were posted on either deck warning of the air shaft or otherwise warning persons to stay off the unimproved roof.

¶ 7 On September 9, 2000, plaintiff, a thirty year-old man, attended a party hosted by Cristina at her condominium. There were several other attendees, as well. While at the party, plaintiff and other guests moved between the condominium and the rooftop deck. At approximately midnight, Kroll noticed several people on her roof-top deck. Kroll informed Cristina that the individuals were on her deck. Cristina apologized and asked the guests to leave Kroll's deck.

¶ 8 Meanwhile, plaintiff climbed over the deck railing and went onto the unimproved roof. Another party guest, Jeff Laroshelle, testified that he (Laroshelle) then attempted to cross over the railing so as to go onto the unimproved roof to urinate. Plaintiff playfully put up his hands in

order to block Laroshelle from coming onto the roof. Laroshelle then moved to his left and began crossing the railing. Unaware of the air shaft, Laroshelle was straddling the railing with one foot on the edge of the air shaft and the other foot on the rooftop deck. Plaintiff approached Laroshelle, stepped up onto the air shaft, fell through it, and was injured.

¶ 9 Christopher Egan testified that he was a guest at the party and witnessed plaintiff's fall into the air shaft. Egan testified that plaintiff went onto the unimproved roof. Cristina's boyfriend told plaintiff to get back on the deck. Plaintiff attempted to get back on the deck, but was playfully blocked by Laroshelle. Plaintiff jumped to his left to "fake" Laroshelle, and fell through the air shaft.

¶ 10 Plaintiff filed a four-count amended complaint sounding in negligence against Cristina Lawrence, John Lawrence, the Board of Managers of the 1910-12 Halsted Condominium, and Ginger Kroll. Kroll moved to dismiss the count against her, arguing the unimproved roof and air shaft were common elements over which she did not have ownership and control and, thus, she had no legal duty to plaintiff. The trial court agreed and dismissed the count against Kroll. Plaintiff appealed the dismissal. This court ultimately affirmed, stating in pertinent part:

> "To prevail in an action for negligence, plaintiff must prove the existence of a duty, a breach of that duty, and an injury to plaintiff proximately caused by that breach. [Citation.] If plaintiff fails to establish the existence of a duty, he may not recover against defendant. [Citation.] Whether a duty exists is a question of law. [Citation.]

> Injuries due to the negligent maintenance of real property give rise to a right of recovery against the party in control and possession of the premises. [Citation.] In other words, the duty toward an injured party arises out of possession and control of the property and may be attributed only to the persons who have possession and control. [Citation.] 'Control' is defined as 'power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee.' [Citation.]
>
> [Kroll] owed no duty to plaintiff because [she] did not control the unimproved roof or air shaft into which plaintiff fell. The unimproved roof and air shaft are considered 'common elements' under both the Condominium Property Act and the Halsted Condominium Declaration. See section 2(e) of the Condominium Act, 765 ILCS 605(e) (West 2000) (defining 'common elements' in relevant part as 'all portions of the property except the units'); see also Article III of the Halsted Condominium Declaration (defining common elements as including the 'roof' and 'shafts'.) Both the Condominium Act and the Halsted Condominium Declaration state that the unit owners' association's [B]oard of [M]anagers is responsible for the operation, care, upkeep, maintenance, replacement, and improvement of the

> common elements. See section 18.4 of the Condominium Act, 765 ILCS 605/18.4 (West 2000); see also Article XIV of the Halsted Condominium Declaration.
>
> Thus, it is the unit association's [B]oard of [M]anagers, not [Kroll], who have the control of the unimproved roof and air shaft in which plaintiff fell. Without any control over the roof or the air shaft, [Kroll] owed no duty to plaintiff, who was injured thereon. In the absence of a duty, plaintiff's negligence action was properly dismissed." *Juzwicki v. Cristina Lawrence, John S. Lawrence, 1910-1912 Halsted Condominium Association, and Ginger Kroll*, No. 1-04-2916 (February 17, 2006) (unpublished order under Supreme Court Rule 23).

¶ 11 Plaintiff's case was then remanded to the trial court and renumbered, with removal of Kroll as a party. The remaining defendants filed separate motions for summary judgment. In February 2008, the trial court granted each remaining defendant's motion for summary judgment, holding the appellate court's ruling regarding Kroll applied equally to Cristina and John Lawrence. The trial court also granted the Association's motion for summary judgment, ruling the Association could not foresee a guest of a condominium owner would "jump a fence" in order to go onto the unimproved roof. Plaintiff appealed that ruling.

¶ 12 This court, then, considered the whether the trial court erred in granting summary judgment to the remaining defendants. *Juzwicki v. Cristina Lawrence, John S. Lawrence, and*

Board of Managers, 1910-1912 Halsted Condominium Association, No. 1-08-0635 (September 24, 2009) (unpublished order under Supreme Court Rule 23). We held that summary judgment was appropriate regarding defendants John and Cristina Lawrence where, just like in the case of defendant Kroll, as a third-floor condominium owner and occupier, they owed no duty to plaintiff because they did not control the unimproved roof or air shaft into which plaintiff fell. *Juzwicki v. Cristina Lawrence, John S. Lawrence, and Board of Managers, 1910-1912 Halsted Condominium Association,* No. 1-08-0635 (September 24, 2009) (unpublished order under Supreme Court Rule 23). However, we determined that summary judgment as to defendant Association was not proper as to the issue of foreseeability, and we remanded the cause to the trial court for consideration of the other issues raised in the motion for summary judgment. *Juzwicki v. Cristina Lawrence, John S. Lawrence, and Board of Managers, 1910-1912 Halsted Condominium Association,* No. 1-08-0635 (September 24, 2009) (unpublished order under Supreme Court Rule 23). Specifically, we noted that the trial court had found the Association did not owe a duty to plaintiff because it could not reasonably foresee that plaintiff would climb the three and one-half foot railing surrounding the deck and then get on the unimproved roof. We determined that, if plaintiff's behavior was foreseeable to a unit owner/occupant, as the trial court found, then it was also foreseeable to the Association:

> "In the present case, at the hearing on the summary judgment motions, the trial court stated:
>
> 'This rooftop deck in which the party was taking place was surrounded by a three and a half foot fence, and

there is no gate. Now, I'm inclined to agree with you that there is a fact issue as to whether it was foreseeable to Cristina that someone would jump the fence. But * * * was it foreseeable to the Condominium Association or its Board [of] Managers that a partygoer would jump this three and a half foot fence?'

The trial court determined plaintiff's jumping of the fence onto the roof was not reasonably foreseeable to the Association, and therefore the court found the Association owed no duty toward the plaintiff.

However, as aptly noted by defense counsel, 'if it's foreseeable to Cristina or John, it's foreseeable to the Condo Association. The Condo Association consists of unit owners.' We agree with defense counsel; an adult party-goer's jumping or crossing over the three and one-half foot fence to go out onto the unimproved roof to engage in some 'horseplay' is not so extreme or bizarre that it can be said to be unforeseeable to the Association's unit owners as a matter of law. The reasonable foreseeability of the occurrence is a factual question that properly should be decided by a jury, not on a motion for summary judgment.

> Although the trial court heard argument on the other factors in the duty analysis (the magnitude of the burden on defendant in guarding against the injury and the consequences of placing that burden on defendant), the court ultimately did not rule on these arguments but instead premised its decision solely on its finding the occurrence was not reasonably foreseeable. The trial court also never ruled on the other arguments raised by the Association on appeal, specifically: plaintiff was a trespasser on the roof for whom the only duty owed to him by the Association was to refrain from injuring him through wilful and wanton conduct; his injuries were caused by an open and obvious condition; and the Association did not engage in willful and wanton conduct.
>
> We remand to the trial court for consideration of these issues." *Juzwicki v. Cristina Lawrence, John S. Lawrence, and Board of Managers, 1910-1912 Halsted Condominium Association,* No. 1-08-0635 (September 24, 2009) (unpublished order under Supreme Court Rule 23).

¶ 13 On remand, the trial court heard oral arguments from the parties as to the remaining issues. It then issued a memorandum order granting the Association's motion for summary

judgment.[1] In that order, the trial court outlined its reasoning in finding that plaintiff was a trespasser as a matter of law at the time of the accident in question, stating:

> "A trespasser is defined as 'a person who goes upon the premises of another without express or implied permission or invitation.' IPI Civil 3d No. 120.01. Plaintiff inferentially admitted that he never was given express permission to climb onto the roof, when he testified at his deposition that no one told him not to. * * * On the contrary, the record strongly suggests that he was twice told to get off. * * * Nothing about the roof implied a recreational purpose or that anyone was supposed to be there except workmen.
>
> Even if Plaintiff believed that Cristina acquiesced in his entry upon the roof, this was an acquiescence which she had no

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[1]The trial court heard oral arguments on this motion on November 5, 2010. At the close of arguments, the court granted the motion for summary judgment and made particular oral findings. Later that same day, however, the trial court entered an order vacating its previous order, withdrawing its oral opinion, and continuing the matter. It then issued its memorandum order, also granting the motion to dismiss, on November 17, 2010. Inasmuch as plaintiff urges this court to rely on the trial court's vacated oral opinion and reasoning of November 5, 2010, we decline to do so, as the trial court vacated that order and subsequently issued a memorandum order in this cause.

> authority to give. Furthermore, the law is clear tha[t] permission to enter one part of a property does not mean access to all of it, and that one can be a trespasser as to that portion to which permission is not expressly granted. *Cockrell v. Koppers Industries, Inc.*, 281 Ill. App. 3d 1099 (1996).
>
> Accordingly, the court finds that the Plaintiff was a trespasser as a matter of law."

It then considered the appropriate standard of care required, determining that the Association could only be liable to plaintiff trespasser if it is guilty of willful and wanton conduct. To arrive at that determination, the court first considered that, although the only duty a landowner owes a trespasser is to refrain from willful and wanton conduct, there are some special circumstances in which the duty of ordinary care may be imposed. See *Mt. Zion St. Bank v. Consolidated Communications, Inc.*, 169 Ill. 2d 110 (1996); *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill. 2d 213 (1996); *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432 (1992); *Eshoo v. Chicago Transit Authority,* 309 Ill. App. 3d 831 (1999).

¶ 14 It then discussed *Lee*, in which an intoxicated pedestrian was electrocuted when he stumbled into contact with the electrified grade-level third rail train track. *Lee*, 152 Ill. 2d at 443. Our supreme court in *Lee* held that a plaintiff must prove that his proximity to the dangerous condition was reasonably foreseeable and that the defendant ought to have anticipated that he would not appreciate the risk. *Lee*, 152 Ill. 2d at 451-52. The trial court differentiated *Lee*, finding:

> "The facts in this case, however, do not warrant imposition of the heightened duty of care mandated in *Lee*. In the first place, unlike a third rail or barbed wire, an air shaft protected by a one foot parapet wall is not 'an artificial condition which involves a risk of death or serious harm.' It becomes dangerous only if someone behaves stupidly around it. In the second place, unlike situations contemplated by the Restatement, harm did not result here because the plaintiff merely came into contact with the condition, but because he jumped or stepped on top of it.
>
> Accordingly, the Association can be liable to the plaintiff, a trespasser, only if it is guilty of willful and wanton misconduct."

¶ 15 Finally, then, the court considered whether the Association's conduct was willful and wanton, and determined that it was not. Relying on *Ziarko v. Soo Line R.R. Co.*, 161 Ill. 2d 267, 273 (1994), the court explained that "[w]ilful and wanton conduct involves not only intentional acts, but acts which exhibit a reckless disregard for the safety of others, such as a failure 'after knowledge of impending danger,' to exercise ordinary care." The trial court then determined:

> "There is no evidence in this record of any prior incidents involving the air shaft. Indeed, evidence of knowledge or impending danger on the part of the Association sufficient to create a triable issue of fact is utterly lacking."

Plaintiff appeals.

¶ 16 II. ANALYSIS

¶ 17 Plaintiff contends that the trial court erred in granting summary judgment to the Association. Specifically, plaintiff argues that the court erred in determining that: (1) he was a trespasser as a matter of law; and (2) the Association's conduct was not willful and wanton. We disagree.

¶ 18 Summary judgment is proper when the pleadings, affidavits, depositions and admissions of record, construed strictly against the moving party, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001). This relief is an appropriate tool to employ in the expeditious disposition of a lawsuit in which " 'the right of the moving party is clear and free from doubt.' " *Morris*, 197 Ill. 2d at 35, quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986). We review a trial court's grant of summary judgment *de novo* (*Morris*, 197 Ill. 2d at 35), and we will only disturb the decision of the trial court where we find that a genuine issue of material fact exists (*Addison v. Whittenberg*, 124 Ill. 2d 287, 294 (1988)).

¶ 19 To properly state a cause of action for negligence, the plaintiff must show that the defendant owed him a duty, that the defendant breached that duty, and that this breach was the proximate cause of his resulting injuries. See *Heastie v. Roberts*, 226 Ill. 2d 515, 556 (2007); *Bermudez v. Martinez Trucking*, 343 Ill. App. 3d 25, 29 (2003). Thus, duty is an essential element of a negligence claim; unless the plaintiff can demonstrate that a duty is owed, namely, that he and the defendant stood in such a relationship that the law imposes an obligation on the defendant to act reasonably for his protection, there can be no negligence imposed upon the

defendant. See *American National Bank & Trust Co. v. National Advertising Co.*, 149 Ill. 2d 14, 26 (1992); see also *Wood v. Village of Grayslake*, 229 Ill. App. 3d 343, 349 (1992) (court must weigh foreseeability of injury against burden to be placed on the defendant and consequences thereof); *Vega v. Northeast Illinois Regional Commuter Railroad Corporation*, 371 Ill. App. 3d 572, 577 (2007) ("A defendant will not be found negligent unless the plaintiff can demonstrate that a duty was owed."). "Whether a duty of care exists is a question of law, appropriately determined by the trial court on a motion for summary judgment." *Vega*, 371 Ill. App. 3d at 577, quoting *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023, 1027 (2005).

¶ 20 *a. Plaintiff was a Trespasser*

¶ 21 An invitee loses his status as an invitee and becomes a trespasser when, after being invited onto the premises, he goes to another area beyond the scope of the original invitation. *Cockrell v. Koppers Industries, Inc.*, 281 Ill. App. 3d 1099, 1104 (1996) (A possessor of land owes an invitee a duty to exercise reasonable care in maintaining the premises, but this duty extends only so far as the invitation extended to the invitee. "Thus, 'if an invitee deviates from the accustomed way or goes to a place other than that place covered by the invitation, the owner's duty of care to him ceases forthwith.' *Rodriguez v. Norfolk & Western Railway Co.*, 228 Ill. App. 3d 1024, 1044 (1992).").

¶ 22 Here, plaintiff was initially an invitee to unit 3-North and its rooftop deck, but lost his status once he ventured without invitation onto the unimproved roof. See *Cockrell*, 281 Ill. App. 3d at 1104. The record shows that plaintiff climbed over a three and one-half foot continuous railing through which there was no gate available for ingress or egress to the unimproved rooftop.

He then descended two additional feet from the deck level in order to get to an unimproved area of the roof on the other side of the railing. The parties do not contend that plaintiff was invited onto the unimproved roof. At his deposition, plaintiff admitted that the deck railing represented a "definition of the border of the deck." Nevertheless, plaintiff, uninvited, climbed over the railing and descended to the unimproved rooftop where he "shadow boxed" with LaRochelle before falling into the air shaft. Plaintiff testified that, although the deck was surrounded by three and one-half foot railings with no gates for entry onto the unimproved rooftop, he believed he was at liberty to climb the railing and jump down onto the unimproved roof because no one told him not to do so:

> "[DEFENSE COUNSEL] Q: Did you think that it was okay for you, as a person invited to Christina's apartment, to go onto this [unimproved] portion of the roof?
>
> [PLAINTIFF] A: Yes.
>
> Q: And tell me everything that you saw or heard that evening that thinks [*sic*] that you had the right to do that.
>
> A: No one told me I couldn't do it.
>
> * * *
>
> Q: Do you feel that you have the right to climb over any rail if there's not somebody there telling you not to do it?
>
> A: Yeah, yes.
>
> Q: You do?

A: Yes.

Q: What gives you the right to climb over rails when there's not people telling you not to do it?

A: It's a rail. You're allowed to climb over rails.

Q: And that's your belief, correct?

A: Absolutely."

¶ 23 At her deposition, Cristina testified that, prior to the night of plaintiff's injury, she was not aware of anyone but repairmen ever going onto the unimproved portion of the roof:

"[DEFENSE COUNSEL] Q: The Plaintiff indicated to us there were no gate that exited from the roof deck onto the blacktop portion of the roof?

[WITNESS CRISTINA LAWRENCE] A: There are no gates. The railing is continuous.

Q: I believe you have already indicated you have never had anyone who was visiting your home either exit the deck and go onto the blacktop or attempt to do so; is that correct?

A: It has never happened.

Q: And you have never actually seen anyone, as you indicated, other than servicemen or repairmen outside the confines of the decks on this roof?

A: Correct."

¶ 24 Once Cristina noticed plaintiff was on the roof, she told her boyfriend, David Balutanski, to tell him to get off the roof. He did so. Balutanski testified that he yelled out that plaintiff and Larochelle should cut it out, with the intent that they get off of the unimproved rooftop "[b]ecause I was looking out for Christina. I mean, I just thought it was bad news. There was horseplay." Just seconds later, plaintiff fell through the air shaft.

¶ 25 Larochelle testified at deposition that he had seen plaintiff and a person he thought might be Egan on the unimproved portion of the roof approximately one hour prior to the accident. Egan, however, denied he had ever gone out to the unimproved roof, and testified that he assumed that area was off-limits:

> "[DEFENSE COUNSEL] Q: When you were on the deck, you yourself, did you feel that you should have stayed on the deck itself and not go onto the blacktop?
>
> [WITNESS JEFF EGAN] A: Yeah.
>
> Q: Did it seem the blacktop was kind of off limits?
>
> A: I don't think anything was stated about it until that warning so I just sort of assumed that I wouldn't go over there.
>
> Q: What was your perception of what area you were and weren't supposed to be on?
>
> A: I got the impression the deck is where we were supposed to be.
>
> Q: Did you leave the deck at any time [for] the blacktop?

A: No."

Egan also recalled Balutanski warning guests not to go over the railing onto the unimproved roof. Later, Balutanski came back up to the rooftop deck, saw plaintiff on the unimproved roof, and again told plaintiff to get off that portion of the roof. Seconds later, plaintiff fell through the air shaft. Cristina denied that anybody besides plaintiff was on the unimproved portion of the roof:

"[DEFENSE ATTORNEY] Q: Now on the day of the accident itself, do you know whether anybody else besides [plaintiff] had ever been on the black portion of the roof?

[WITNESS CRISTINA LAWRENCE] A: No one has ever been on the black portion of the roof except people who are repairmen.

* * *

Q: At your party before the accident occurred was anybody else besides [plaintiff] on the black portion of the roof that you were aware of?

A: No.

Q: Have you learned since then that anybody else was on the black portion of the roof?

A: No."

¶ 26 Plaintiff contends that he should not be considered a trespasser as a matter of law because he was not warned to stay off the roof, other guests had also climbed onto the unimproved roof

before he did, and the Association had no specific rule prohibiting people from climbing onto the roof. The trial court rejected these arguments, and we do, as well. Plaintiff was clearly not invited onto the unimproved portion of the roof. Rather, the structure of the rooftop deck itself created a barrier from his entrance onto the unimproved roof–there was a three and one-half foot tall continuous railing surrounding the deck with no gates allowing ingress or egress to the unimproved roof, and the deck was raised an additional two feet off of the unimproved roof surface. Moreover, the absence of a prohibition is not the same as an invitation. Finally, insofar as one or possibly two other guests may have gone out to the unimproved roof that night to urinate–also without invitation–they, too, would be considered trespassers.

¶ 27 In sum, plaintiff was invited to a party hosted by Cristina, at an apartment which was part of defendant Association's building. The attendees split their time between Cristina's apartment and its attached roof-top deck. The deck was surrounded completely by a three and one-half-foot high railing and was raised above the rooftop an additional two feet. Plaintiff was not invited to go out onto the unimproved roof, and was in fact instructed to get off of the unimproved roof. Plaintiff clearly deviated from the extent of his invitation and ventured into an area other than the area covered by the invitation. See *Cockrell*, 281 Ill. App. 3d at 1104 (a person becomes a trespasser when, after being invited upon the premises, he goes to another area beyond the scope of the original invitation); see also *Rodriguez*, 228 Ill. App. 3d at 1044 ("[I]f an invitee deviates from the accustomed way or goes to a place other than that place covered by the invitation, the owner's duty of care to him as an invitee ceases forthwith."). The trial court, accordingly, did not err in its determination that plaintiff was a trespasser.

¶ 28 Moreover, the trial court properly rejected plaintiff's argument that he was directly or indirectly invited to leave the deck and climb onto the unimproved roof. There was no evidence that Cristina, the party host, extended any invitation or permission to plaintiff or any other party guest to leave the rooftop and climb onto the unimproved area. Plaintiff was, in fact, instructed to get off the unimproved roof area. In addition, even if plaintiff believed Cristina acquiesced in his entry upon the unimproved roof, this was an acquiescence which she had no authority to give.

¶ 29 Plaintiff's reliance on *Eshoo* for the proposition that the issue of the status of an invitee or trespasser must always be decided by a jury does not persuade us differently. In *Eshoo*, a minor purchased a ticket to ride on an elevated train. *Eshoo*, 309 Ill. App. 3d at 832. Rather than waiting for the train on the platform with his friends, he left the platform to urinate. *Id.* To do so, he climbed down a set of stairs attached to the platform that led to the train tracks and was then electrocuted by the electrified third rail. *Id*. Although there was a sign warning "Danger. No one permitted on tracks except employees on duty," there was no physical barrier. *Id*. The minor's parents brought a wrongful death claim against the transit authority and prevailed. *Id*. at 831-32. The transit authority appealed to this court, which reversed the ruling of the trial court, holding that the trial court erred in finding as a matter of law that the minor was an invitee. *Id*. at 835-36. Plaintiff in the case at bar relies on the *Eshoo* court's statement that "[w]here, as here, a plaintiff's status at the time of his injury is disputed and different inferences can be drawn from undisputed facts, the plaintiff's status as invitee or trespasser is a question of fact for the jury." *Id.*, at 836.

¶ 30 *Eshoo* is clearly distinguishable from the case at bar. Here, plaintiff was an adult rather than a minor, and there was a physical barrier keeping him from going onto the unimproved roof. He had to jump up and over the three and one-half foot railing and then descend another two feet to reach the unimproved roof. He was therefore alerted to the fact there was a boundary between the deck on which he had been invited and the unimproved roof. Unlike the situation in *Eshoo*, different inferences cannot be drawn from these undisputed facts and, accordingly, the question is not one of fact for the jury.

¶ 31 Plaintiff exceeded the scope of his invitation when he went out onto the unimproved roof. The trial court did not err in finding that plaintiff was a trespasser as a matter of law.

¶ 32 *b. Willful and Wanton Conduct*

¶ 33 Plaintiff next challenges the trial court's determination that the Association was not guilty of willful and conduct. He argues that the trial court erred in finding no willful and wanton conduct where it failed to discover the "obvious danger" posed by the air shaft. We disagree.

¶ 34 "At common law, the general rule is that a landowner is under no duty to maintain the premises for the safety of trespassers, whether they are adults or children." *Choate v. Indiana Harbor Belt Railroad Company*, 2012 IL 112948, ¶ 25. In fact, a landowner does not owe a duty of reasonable care to a trespasser, but must merely refrain from willfully and wantonly injuring them. *Choate*, 2012 IL 112948, ¶ 25, citing *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.,* 169 Ill. 2d 110, 116 (1995). This court has discussed the duty owed by landowners to trespassers:

> "it is well settled that the liability of an owner or occupier of land (landowner) has been set in terms of duty. Those who enter upon land are generally divided into three fixed categories–trespassers, licensees, and invitees–and the landowner has specific duties regarding persons within each category. * * *
>
> The lowest point on the 'legal-duty-owed' scale is the trespasser, defined as a person who enters or remains upon land in the possession of another without a privilege to do so. [Citations.] * * * [T]he general rule, subject to several qualifications, is that a landowner is not liable for injury to a trespasser caused by the landowner's failure to exercise reasonable care to put his land in a safe condition for the trespasser, or to carry on his activities in a manner which does not endanger the trespasser. [Citations.]" *Miller v. General Motors Corp.*, 207 Ill. App. 3d 148, 153-54 (1990).

"[G]enerally, to be guilty of willful and wanton conduct, a defendant ' " 'must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of the surrounding circumstances and existing conditions, that his conduct will *naturally and probably result in injury*' " ' *Leja v. Community Unit School District 300*, 2012 IL App (2nd) 120156, ¶ 11, quoting *Oelze v. Score Sports Venture, LLC*, 401 Ill. App. 3d 110, 122-23 (2010), quoting *Bartolucci v. Falleti*, 382 Ill. 168, 174 (1943). Willful and wanton conduct involves not only

intentional acts, but acts which exhibit a reckless disregard for the safety of others, such as a failure " 'after knowledge of impending danger, to exercise ordinary care to prevent' the danger, or a 'failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care.' " *Ziarko v. Soo Line Railroad Company*, 161 Ill. 2d 267, 273 (1994), quoting *Schneiderman Interstate Transit Lines, Inc.*, 394 Ill. 569, 583 (1946). Illinois courts have "consistently applied the definition of willful and wanton conduct stated in IPI Civil 3d No. 14.01 to all cases." *Murray v. Chicago Youth Center*, 224 Ill. 2d 231, 241 (2007). IPI 14.01 requires a course of action which shows actual or deliberate intention to harm, or utter indifference to, or conscious disregard to the safety of others. Illinois Pattern Jury Instruction 14.01 (Illinois Patter Jury Instruction, Civil, No. 14.01 (4th ed. 2000).

¶ 35 As we have herein determined, plaintiff was a trespasser at the time of his accident. Accordingly, the Association cannot be held liable to him absent a showing that the accident was caused by its willful and wanton conduct. We find the trial court correctly found that the record does not show evidence of willful and wanton conduct on the part of the Association. There is no evidence in the record before us of any prior injury involving the air shaft, and there is no evidence to suggest that the Association knew or should have known that invitees of the third floor unit owners who used the rooftop decks had ever before climbed over the railing, descended the additional two feet, and accessed the unimproved rooftop area.

¶ 36 Cristina testified that she had never before seen anyone else go onto the unimproved roof area. Moreover, plaintiff failed to offer any evidence that he was permitted in any way by the Association or by Cristina to go onto the unimproved portion of the roof. There is, in fact, no

evidence in this record of any prior incidents whatsoever involving the air shaft. We agree with the trial court that "evidence of knowledge of impending danger on the part of the Association sufficient to create a triable issue of fact is utterly lacking." In addition, the Association's failure to discover the danger posed by the air shaft where there is no evidence in the record of any prior incidents involving the air shaft and no evidence that plaintiff was permitted to enter onto the unimproved portion of the roof does not represent a course of action which shows a conscious disregard to the safety of others.

¶ 37 Plaintiff's assertion that whether a personal injury has been inflicted by willful or wanton conduct is always a question of fact to be determined by the jury is unpersuasive. While ordinarily questions of whether misconduct was willful and wanton are questions of fact reserved for the trier of fact, a court may decide the issue when determining whether or not a complaint sufficiently alleges such conduct as to state a cause of action. *Ward v. Community Unit School District No. 220*, 243 Ill. App. 3d 968, 975 (1993); *Oravek v. Community School District 146*, 264 Ill. App. 3d 895, 897 (1994). That is the case here.

¶ 38 In sum, while plaintiff was an invitee for purposes of visiting Unit 3-North and its attendant rooftop deck, he was not an invitee for the unimproved portion of the roof, for which he gained access by climbing over a railing. Rather, when he climbed the railing and descended onto the unimproved portion of the roof, he extended the scope of his invitation, changing his status from that of invitee to trespasser. The Association's duty, therefore, was to refrain from willfully and wantonly injuring him. See *Choate*, 2012 IL 112948, ¶ 25, citing *Mt. Zion State Bank & Trust,* 169 Ill. 2d at 116 (a landowner does not owe a duty of reasonable care to a

trespasser, but must merely refrain from willfully and wantonly injuring them). The Association complied with this duty where there is no evidence that the Association had knowledge of guests such as plaintiff engaging in horseplay on the unimproved common areas of the roof. Accordingly, we find no error in the trial court's determination that there was no willful and wanton misconduct on the part of the Association.

¶ 39 III. CONCLUSION

¶ 40 For all of the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 41 Affirmed.