RENDERED: SEPTEMBER 10, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000723-MR

CAROL PLISKA — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 08-CI-05433

EQUITY MANAGEMENT GROUP, INC.; STARBUCKS CORPORATION; ASHLAND VENTURES, LLC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; DIXON, JUDGE; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: On October 22, 2007, Carol Pliska slipped and fell while stepping over a parking barrier on her way from a Starbucks coffee shop.

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

She brought suit against Starbucks Corporation and the owners of the property, alleging negligence and failure to warn. The Fayette Circuit Court granted summary judgment in favor of the defendants, and this appeal followed.

Pliska initially named as defendants in her lawsuit Starbucks Corporation, Equity Management Group, Inc. and Caller Properties, LLC. Caller Properties filed a successful motion to dismiss on the ground that it was not the owner of the property where Pliska's fall occurred. Pliska then filed a motion to amend her complaint to add the correct property owner, Ashland Ventures, LLC, as a defendant. The motion was verbally granted by the court, but no written order was ever entered to reflect that ruling. Pliska never filed an amended complaint, nor was Ashland Ventures ever served with a copy of the complaint. Ashland contends that under Kentucky Rules of Civil Procedure (CR) 15.01, there is an implicit requirement that the party sought to be brought into the action by the amendment of the complaint must be served with a copy of the amended complaint. Ashland argues that consequently it was never properly joined as a party, and that the present appeal against it is improper.

We have reviewed the record of the hearing at which the circuit court decided to grant summary judgment to the defendants. There was some discussion in the courtroom about the fact that a written order had not yet been entered substituting Ashland Ventures for Caller Properties. Counsel for Pliska stated that the order granting summary judgment should reflect the substitution. After

pointing out that the plaintiff had filed a motion to amend her complaint, rather than a motion to substitute a defendant, counsel for the appellees readily acquiesced to Pliska's request. The order granting summary judgment contains the following language: "The Court had previously granted Plaintiff's Motion to Amend her Complaint to add Ashland Ventures, LLC, as a Defendant to this action. This Order applies equally to any and all claims that have been or may be asserted by the plaintiff against Ashland Ventures, LLC." There is nothing in the record to indicate that Ashland objected to being named in that order, nor did it ever move this Court to be dismissed as a party to this appeal. It is well-settled that parties cannot argue one thing before the trial court and another to the appellate court. See *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth,* 312 S.W.3d 321 (Ky. 2010). There is nothing improper, therefore, in Ashland being named as an appellee in this appeal.

In reviewing a grant of summary judgment, our inquiry focuses on "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); Kentucky Rules of Civil Procedure (CR) 56.03. "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky.1991).

We review the facts of the case in the light most favorable to Pliska. Pliska and her husband were returning to their car after having a cup of coffee at Starbucks. The couple was not in a hurry. It was approximately 6:15 p.m. and raining lightly. The pavement was slippery. According to Pliska, the exit from Starbucks is "quite unusual to navigate" and she had to step over a planter, into some mulch, down a rounded-down curb, onto the pavement and then over a parking barrier in order to get to the parking lot. She stated that this was the only obvious route to her vehicle. Pliska safely made her way over the planter, mulch and curb, but as she stepped over the parking barrier, her right foot slipped straight out in front of her. She tried to prevent herself from falling by putting her weight on her left foot, but her left foot was still in the process of stepping over the barrier. Her left foot slid out and she fell, twisting and injuring her left knee. She claims that, had it not been for the parking barrier, her left foot would have been on the ground and she could have prevented herself from slipping.

Pliska does not dispute the general rule of premises liability that "[i]f the hazard is 'known or obvious to' the invitee, the owner has no duty to warn or protect the invitee against it." *Horne v. Precision Cars of Lexington*, 170 S.W.3d 364, 368 (Ky. 2005). The question on appeal is whether the circuit court properly held as a matter of law that the parking barrier was so obvious to Pliska that the appellees owned no duty to warn or protect her against it. *Id*. at 366.

Pliska has acknowledged that the parking barrier was in plain view, but argues that her case falls within one of the exceptions to the general rule that

there is no liability for open and obvious hazards, which is if an area is improperly constructed and inherently dangerous. "[T]he general "no duty" rule finds an exception where there is evidence of the owner/occupier's creation of an inherent danger." *Wallingford v. Kroger Co*., 761 S.W.2d 621, 625 (Ky. App. 1988). Although Pliska acknowledges that the light rain did not in itself create liability, she argues that the slickness of the wet pavement coupled with the difficulty of stepping over the barrier created a severe danger that should have been anticipated by the appellees. In *Wallingford*, this Court observed that "the existence of obvious, outdoor, natural hazards generally creates no duty upon the owner/occupier of the land, on the theory that the hazard is as obvious to both the owner and the invitee." *Id.* at 624. It nonetheless reversed a directed verdict in favor of a grocery store which failed to clear a steep ramp of ice and snow. The plaintiff, a delivery man, asked the store employees to clear the ramp. They refused, and would not allow him to make his delivery to another entrance. He tried to clear the ramp himself, and was then injured when he slipped and fell while pulling his delivery cart weighing several hundred pounds up the ramp.

In Pliska's case, there was nothing inherently dangerous about the presence of the parking barrier or wet pavement. The fact that there was no other route by which to access the parking lot does not in and of itself make the placement of the barrier inherently dangerous. In our view this case is factually distinguishable from *Wallingford* and the trial court applied the rule correctly.

The summary judgment of the Fayette Circuit Court is therefore affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Robert E. Reeves,
Lexington, Kentucky

BRIEF FOR APPELLEES:

J. Dale Golden
Sarah E. Noble
Lexington, Kentucky