RENDERED: SEPTEMBER 2, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001303-MR

MELISSA DAUM — APPELLANT

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 15-CI-00123

BETTY JO GINTER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES; D. LAMBERT; AND MAZE JUDGES.

JONES, JUDGE: Melissa Daum appeals from a Woodford Circuit Court order dismissing her complaint for failure to state a claim upon which relief may be granted.

Daum broke her elbow when she tripped and fell on a sidewalk in front of the residence of Betty Jo Ginter. According to Daum, the sidewalk is

parallel to the street, the same as any ordinary subdivision sidewalk, and appears to be open to the public.

Daum filed suit against Ginter. Her complaint contained the following allegations:

> On May 7, 2014, the Defendant [Ginter] owned a residential dwelling at 288 Paddock Dr., Woodford County, Kentucky with a **public sidewalk** adjacent thereto. At said time and place aforesaid, the Defendant permitted the said **public sidewalk** to become dangerous. While walking on the public sidewalk referenced above, Plaintiff, MELISSA R. DAUM, tripped and fell, thereby causing serious and disabling personal and bodily injuries to her.
>
> Defendant had a duty to exercise reasonable care in keeping the said sidewalk reasonably safe for the benefit of the Plaintiff. The Defendant's duty included warning the Plaintiff of any concealed, or dangerous condition and/or the duty to discover said dangerous condition and make it safe. The Defendant breached one or more of the above duties to the Plaintiff, and such breach constitutes negligence.

(Emphasis supplied.)

Ginter moved to dismiss the action pursuant to Kentucky Rules of Civil Procedure (CR) 12.02(f) for failure to state a claim upon which relief can be granted. She argued that Daum's injury occurred as a result of the condition of a public sidewalk with respect to which Ginter had no duty of care to pedestrians.

In her response to the motion to dismiss, Daum attached a copy of the plat of the subdivision dating from 1979, the year in which Ginter purchased her home. Daum claimed that the plat indicated that the streets and sewers of the

subdivision were dedicated for public use, but the sidewalks were not. Consequently, she contended, the sidewalk was not located within a municipality, was not dedicated to any municipality, nor even to the county. She contended that the sidewalk should be treated as any other sidewalk on private property, and that consequently Ginter had a duty to maintain the sidewalk in a reasonably safe condition and warn of any dangerous condition. She concluded that to rule otherwise would leave no one responsible for the condition of the sidewalk.

At the hearing on the motion, Daum reiterated that the sidewalk was not truly public as it had never been dedicated to the city, had never been annexed and was akin to the "sidewalk leading up to your front door." Ginter responded that the sidewalk was open to and used by the public, and that she had no duty to maintain the sidewalk or responsibility for injury to a member of the public on the sidewalk.

The trial court granted Ginter's motion to dismiss. Its order noted that Daum's complaint twice described the sidewalk as a "public sidewalk." The trial court acknowledged that Daum had attempted to assert at the hearing that the sidewalk was not public as it had not been dedicated to the city at the time the adjacent streets were so dedicated, but that she had made no attempt to amend her complaint, and that in any event sidewalks along city streets are public sidewalks.

We note as a preliminary matter that although Daum's complaint was dismissed pursuant to CR 12.02(f), her response to Ginter's motion to dismiss was supplemented with additional exhibits consisting of copies of the subdivision plats.

If "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided for in Rule 56[.]" CR 12.03; *Adams v. Meko*, 341 S.W.3d 600, 602 (Ky. App. 2011). In its ruling, however, the trial court relied only on the allegation in the complaint that the sidewalk was public; consequently, we will apply the standard of review for motions to dismiss:

> A motion to dismiss for failure to state a claim upon which relief may be granted admits as true the material facts of the complaint. So a court should not grant such a motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved. . . . Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief? Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue de novo.

Fox v. Grayson, 317 S.W.3d 1, 7 (Ky. 2010), reh'g denied (Aug. 26, 2010) (internal citations and quotation marks omitted).

On appeal, Daum argues that although the complaint alleged that the sidewalk is "public" by virtue of its location adjacent to a public street, the sidewalk has never been dedicated to public use and therefore should not be considered a municipal sidewalk for the purpose of determining responsibility.

"[S]treets and sidewalks are established and maintained primarily for purposes of travel by the public and uses incidental thereto and not inconsistent therewith. The public has the right to the unobstructed use of a sidewalk." *Terrell*

v. Tracy, 312 Ky. 631, 633, 229 S.W.2d 433, 434 (1950) (internal citations omitted). "The general rule is that no common–law duty rests upon the owner or occupant of premises abutting on a public street to keep the sidewalk in repair." *Equitable Life Assur. Soc. of U. S. v. McClellan*, 286 Ky. 17, 149 S.W.2d 730, 731-32 (1941) (internal citations omitted).

There are two instances when a duty is imposed upon the abutting landowner in regard to a public sidewalk. One of these occurs when the owner's affirmative conduct, or negligence rising to the level of a nuisance, causes the defect. Thus, the owner of property abutting on a public sidewalk is only liable to "persons injured in consequence of a dangerous condition of the sidewalk created by some affirmative act of the owner or by some act of negligence on his part constituting a nuisance." *Id*. Neither allegation was made by Daum.

The other situation arises when a city ordinance places an obligation on an abutting property owner to keep a public sidewalk in good repair. Such an ordinance only creates a duty from the landowner to the city for costs of maintenance and repair, however, and does not establish any duty to sidewalk travelers or liability for their injuries. *Schilling v. Schoenle*, 782 S.W.2d 630, 632-34 (Ky. 1990). Daum does not claim a duty imposed on Ginter by ordinance; indeed, she expressly argues that the sidewalk that caused her injury was not located within a municipality and was not dedicated to any municipality.

Consequently, we are unable to discern any basis for imposing a duty on Ginter to maintain the public sidewalk in the same manner as a sidewalk on her

private property. Essentially, Daum alleges that although the sidewalk is "public," she has been unable to discover who bears responsibility for it and, therefore, the abutting property owner must owe a duty to pedestrians.

The complaint was properly dismissed because there is no legal basis to support a cause of action which imposes liability on a landowner simply because her property happens to adjoin a public walkway.

The order dismissing the complaint for failure to state claim upon which relief can be granted is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

James O. Springate
Versailles, Kentucky

BRIEF FOR APPELLEE:

J. Stan Lee
Jessica B. Droste
Lexington, Kentucky