

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000657-MR

TERRY L. UNDERWOOD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE THOMAS B. WINE, JUDGE  
ACTION NO. 01-CI-006068

REGAL NAILS, LLC

APPELLEE

OPINION

AFFIRMING

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BEFORE: EMBERTON, CHIEF JUDGE; BARBER AND DYCHE, JUDGES.

EMBERTON, CHIEF JUDGE. Terry Underwood appeals from an order of the trial court dismissing her negligence action against Regal Nails, LLC, because she filed her amended complaint against Regal Nails outside the applicable statute of limitations. We affirm.

Underwood alleges that on September 6, 2000, she was injured at a nail salon located in a Wal-Mart Store at 11901 Standiford Plaza Boulevard in Louisville. She filed a complaint

with Wal-Mart who advised her that Linh Than, owner of Nail Graphics, a Wal-Mart vendor, should be notified.

On October 2, 2000, Underwood's counsel sent a letter to Than and, on October 11, 2000, Scottsdale Insurance Company responded by letter advising that their client was Regal Nails, LLC. On July 12, 2001, a claims adjuster for Crawford and Company, an investigating company and agent for Scottsdale, wrote Underwood again acknowledging that Regal Nails was the insured. Prior to filing the complaint, Underwood's counsel noticed inconsistencies in the identity of the salon and unsuccessfully attempted to contact a Crawford agent. After contacting the Secretary of State and finding no listing for Regal Nails, LLC, on September 5, 2001, Underwood filed a complaint against Nail Graphics, Inc. Although Regal Nails was referenced in the body of the complaint as the site of the injury, Regal Nails was not named as a party.

Two days after the filing of the complaint, Underwood's counsel sent a copy to Crawford which then sent it to Scottsdale. Although Regal Nails was not a named party, Scottsdale forwarded a copy to its counsel who requested an extension to investigate the status of Nail Graphics and Regal Nails. After finding that there was no affiliation between the two entities, Scottsdale's counsel notified Underwood that their insured was not a named defendant. On December 17, 2001,

Underwood then amended her complaint to name Regal Nails. Regal Nails responded by filing a motion to dismiss the complaint as barred by the statute of limitations.

The amended complaint was filed beyond the statute of limitations period provided for in KRS<sup>1</sup> 413.140(1)(a). CR<sup>2</sup> 15.03 provides that under certain circumstances, a pleading can relate back to the date of the original pleading:

- (1) Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.
- (2) An amendment changing the party against whom a claim is asserted relates back if the condition of the paragraph (1) is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (a) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The proper party is Regal Nails, LLC, an entity unrelated to Nail Graphics, Inc. Underwood attempts to persuade this court that Regal Nails received notice of the action and

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<sup>1</sup> Kentucky Revised Statutes.

<sup>2</sup> Kentucky Rules of Civil Procedure.

knew, or should have known, that but for the mistake of naming Nail Graphics, Inc., the action would have been brought against it. Although it is not clear from the record, it appears that it was from the information gained from Wal-Mart's claim processor that Underwood had the initial impression that Nail Graphics owned the premises on which the injury occurred. It is apparent from the record that the communications from Scottsdale and Crawford and Company expressly stated that their insured was Regal Nails, LLC, yet there is no attempt to explain or provide a justifiable reason why Underwood or her counsel did not seek to identify the proper defendant until just prior to the expiration of the statute of limitations. The simple failure to identify a defendant within the limitations period is not a mistake contemplated by CR 15.03.<sup>3</sup>

Regal Nails did not receive notice of the institution of any action against it within the limitations period. The order dismissing the amended complaint is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Christopher T. Kurtz  
KURTZ AND KURTZ  
Louisville, Kentucky

BRIEF FOR APPELLEE:

R. Kent Westberry  
Jennifer A. Peterson  
Louisville, Kentucky

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<sup>3</sup> Reese v. General Am. Door Co., Ky. App., 6 S.W.3d 380 (1998).