

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-001855-MR

GEORGETTE CAHILL

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE THOMAS KNOFF, JUDGE  
ACTION NO. 98-CI-004091

KEYSTONE SERVICES, INC. D/B/A  
KENTUCKIANA NURSING SERVICE

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, BUCKINGHAM AND MILLER, JUDGES.

BARBER, JUDGE: This is an appeal of a dismissal of an amended complaint adding a party as a defendant to the action. We affirm.

Appellant Georgette Cahill (Cahill), a nursing home resident, was injured by Declondia White, a nursing aide at the Parkway Extended Care Center. The assault took place on October 27, 1997. The aide pleaded guilty to second degree criminal assault. Cahill sued Parkway Extended Care for her injuries in July, 1998. In September, Parkway provided information in discovery responses showing that Appellee Keystone Services, Inc.

d/b/a Kentuckiana Nursing (Kentuckiana), an agency which provides temporary employees, had provided the nursing aide to Parkway. Cahill filed a motion to amend the complaint on October 27, 1998. The amended complaint was filed of record on November 3, 1998.

Kentuckiana moved to dismiss the amended complaint against it, arguing that it was barred by the applicable statute of limitations. KRS 413.140 provides a one year statute of limitations for this action. On May 20, 1999, the trial court granted the motion to dismiss. Cahill argues that this dismissal was improper, and that the amended complaint should relate back to the date of the original filing. A one year statute of limitations in this action would have run on October 27, 1998, the date the motion to amend the complaint was filed. The amended complaint was attached thereto, and was served upon Parkway. The record does not show any service to Kentuckiana of the motion to amend the complaint, or the amended complaint itself.

An action commences in this Commonwealth by "the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith." CR 3; Delong v. Delong, Ky., 335 S.W.2d 895 (1960).

CR 15.03 holds that:

(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 a party against whom a claim is asserted relates back if the condition of paragraph (1) is satisfied, and

within the period provided for 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.

Actual, formal notice to a party who would have been named in the original action, but for a mistake, is not required, where that party knew or should have known of the mistake. Nolph v. Scott, Ky., 725 S.W.2d 860 (1987).

On December 7, 1997, counsel for Cahill contacted Kentuckiana regarding Cahill's claim against Parkway and Kentuckiana for failing to protect her from the criminal conduct of White. White is identified in this letter as an employee of Kentuckiana. This letter advised Kentuckiana to contact its insurance carrier. The initial lawsuit was timely filed, but failed to name Kentuckiana as a party defendant. Kentuckiana is mentioned in the initial complaint, and identified as an agent for providing personnel for assistant medical positions at Parkway's facility. White is identified as an employee and/or agent of Kentuckiana and Parkway. In the amended complaint, filed November 3, 1998, the negligence claim against Parkway is amended to include a negligence claim against Kentuckiana.

The trial court found that the claim against Kentuckiana was time-barred, as Cahill had known of the identity of Kentuckiana since the filing of the initial complaint, but had failed to name Kentuckiana as a party-defendant. The trial court held that the only mistake sufficient to permit relation back of

the amended complaint was "inadvertence due to mistaken identity or misnomer or mislabeling." The trial court held that the present case did not fit within these facts, and that for this reason, the motion to dismiss should be granted.

Cahill cites two cases in which a necessary party was added to an action after the identity of the omitted party was established during discovery. In Underhill v. Stephenson, Ky., 756 S.W.2d 459 (1988), a medical negligence action was filed against a physician. When the identity of a nurse who might have been liable for the plaintiff's injuries was discovered during a deposition, the plaintiff was permitted to add her as a party defendant even though the initial one year limitations period had passed. In Clark v. Young, Ky. App., 692 S.W.2d 285 (1985), an injured plaintiff sued the commercial carrier and driver, but discovered as the suit progressed that the company leasing the vehicle should also have been named a party defendant. The court permitted him to amend his complaint, and bring in the lease company as a defendant, holding that the amended complaint related back to the time of the filing of the original complaint. The court held that:

It is obvious that Young, as a Robintech employee, could not reasonably have been expected to know that Mercer leased the driver and equipment from Clark . . . Obviously Clark knew that he was a proper defendant and that Young was mistaken or without knowledge of his presence in the operation.

Id. at 288.

Cahill argues that a ninety-four year old woman in ill health could not have been expected to know that the employee working at Parkway, who injured her, was actually an employee of Kentuckiana. However, the initiating pleading shows that Cahill did have that information at the time the complaint was filed. Where there is no mistake as to the identity of the defendant, an amended complaint is not properly held to relate back. Pelphrey v. Cochran, Ky., 454 S.W.2d 675 (1970).

In the present case, the record shows that the intent of Cahill was to determine the involvement of Kentuckiana in the injury to the plaintiff. Cahill asserts that this involvement did not become certain until she received responses to discovery requests in late September, 1998. This case received extensive media coverage, and the relationship between Parkway and Kentuckiana appears to have been ongoing and of long standing. Under the circumstances, Kentuckiana cannot deny knowledge of the suit within the statutory period as required by CR 15.03(2)(b). As the action has been underway for several years, however, with only Parkway as a named defendant, there may be prejudice to Kentuckiana if it is forced to appear and defend at this stage of the proceedings. Discovery appears to be complete, and a tentative trial date (which has already passed) was set by the trial court. Where a party would be prejudiced by an amendment to the complaint, such amendment should not be permitted.

Here, the record does not show that there was a mistake made by Cahill in failing to add Kentuckiana as a named party to the appeal, such that relation back should be permitted.

The identity of Kentuckiana was long known, and any decision regarding its status was one of legal strategy. Under such circumstances, relation back of the complaint cannot be permitted. We affirm the dismissal of Cahill's claims against Kentuckiana.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffrey D. Stamper  
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BRIEF FOR APPELLEE:

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