

NOTICE
Decision filed 10/29/18. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2018 IL App (5th) 170365-U

NO. 5-17-0365

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

LAWRENCE BUTLER,)	Appeal from the
)	Circuit Court of,
Plaintiff-Appellant,)	Madison County.
)	
v.)	No. 15-L-1551
)	
SCHNUCK MARKETS, INC., and HANKS)	
EXCAVATING AND LANDSCAPING, INC.,)	Honorable
)	William A. Mudge,
Defendants-Appellees.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Moore and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's dismissal of the plaintiff's third amended complaint, which brought a negligence action against the defendants for injuries he sustained in a slip and fall accident, is affirmed where the third amended complaint was filed outside of the applicable statute of limitations, and the third amended complaint did not relate back to the original, timely filed complaint because changing the accident location from a Schnuck's store in East St. Louis to a Schnuck's store in Belleville rendered the incident a distinct occurrence and, thus, amounted to a new cause of action.

¶ 2 The plaintiff, Lawrence Butler, brought a negligence action against the defendants, Schnuck Markets, Inc. (Schnuck), and Hanks Excavating and Landscaping, Inc. (Hanks), for injuries that he sustained after a slip and fall accident in a Schnuck's store parking lot.

The plaintiff's original complaint, which was timely filed in December 2015, asserted that the accident occurred at a Schnuck's store in East St. Louis. On November 28, 2016, the plaintiff filed a third amended complaint, outside of the statute of limitations, alleging that the accident occurred at a Schnuck's store in Belleville. On May 15, 2017, the trial court dismissed the plaintiff's third amended complaint, finding that the change in accident location amounted to a new cause of action that did not relate back to the plaintiff's original, timely filed complaint. For the reasons that follow, we affirm.

¶ 3 On December 1, 2015, the plaintiff filed a complaint against Schnuck and Hanks, seeking damages for injuries he sustained when he slipped and fell on an unnatural accumulation of ice in a Schnuck's store parking lot. The plaintiff alleged that the accident occurred at the Schnuck's store located at 2511 State Street, East St. Louis. On January 11, 2016, the plaintiff filed a first amended complaint, joining JJGK Realty Corp., whom he alleged owned or controlled the property where the accident occurred. On January 19, 2016, he filed a second amended complaint to join State Street Shopping Center as a defendant in the case. Both the first and second amended complaint alleged that the incident occurred at the same Schnuck's store in East St. Louis.

¶ 4 On November 28, 2016, the plaintiff filed a third amended complaint, which changed the address of the location of the fall to 5720 North Belt W., Belleville. The negligence allegations against the defendants remained the same. Thereafter, on December 9, 2016, Hanks filed a motion to dismiss the plaintiff's third amended complaint, asserting that the change in location of the incident amounted to a new occurrence that did not relate back to the original complaint and was, thus, barred by the

statute of limitations. Thereafter, Schnuck filed a motion to dismiss, which made similar arguments.

¶ 5 On May 15, 2017, the trial court entered an order dismissing the plaintiff's third amended complaint. Relying on *Zeh v. Wheeler*, 111 Ill. 2d 266 (1986), the court found that a change to the location of an injury is a change to the occurrence and, therefore, the untimely filed third amended complaint did not relate back to the timely filed original complaint. In making this decision, the court rejected the plaintiff's argument that because the two locations were owned by the same defendant, and the snow removal was completed by the same defendant company, that they both had sufficient notice and were not prejudiced by the change in location. The court noted that this same argument was considered and rejected by the supreme court in *Zeh*.

¶ 6 On June 13, 2017, the plaintiff filed a motion to vacate the trial court's order, arguing that the relation-back doctrine applied to the third amended complaint because the change in location did not materially affect the pleadings nor did it result in a surprise to the defendants. On August 31, 2017, the court denied the plaintiff's motion. The plaintiff appeals.

¶ 7 The sole issue on appeal is whether the plaintiff's third amended complaint, which was filed after the expiration of the applicable statute of limitations, may be deemed to have been filed at the time of the original complaint (the plaintiff's third amended complaint is barred by the applicable statute of limitations period unless the amendment relates back to the date of the filing of the original complaint).

¶ 8 Section 2-616(b) of the Code of Civil Procedure governs the relation back doctrine and provides as follows:

"The cause of action, cross claim or defense set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted, or the defense or cross claim interposed in the amended pleading *grew out of the same transaction or occurrence* set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some other matter which is a necessary condition precedent to the right of recovery or defense asserted, if the condition precedent has in fact been performed, and for the purpose of preserving the cause of action, cross claim or defense set up in the amended pleading, and for that purpose only, an amendment to any pleading shall be held to relate back to the date of the filing of the original pleading so amended." (Emphasis added.) 735 ILCS 5/2-616(b) (West 2016).

¶ 9 Thus, there are two requirements that must be met for the relation-back doctrine to apply: (1) the original pleading was timely filed and (2) the original and amended pleadings show that the cause of action asserted in the amended pleading grew out of the same transaction or occurrence set up in the original pleading. *Id.*; *Doherty v. Cummins-Allison Corp.*, 256 Ill. App. 3d 624, 628-29 (1993).

¶ 10 The plaintiff here argues that the third amended complaint relates back to the original complaint, which was timely filed, because both arise out of the same occurrence in that they describe the same event at the same time with the same injury. In contrast, the defendants argue that the change in location from the East St. Louis Schnuck's store to the Belleville Schnuck's store renders the incident a separate and distinct occurrence and, thus, a separate and distinct cause of action. The defendants cite to our supreme court's decision in *Zeh*, 111 Ill. 2d 266, as support for their position.

¶ 11 In *Zeh*, plaintiff timely filed a slip-and-fall negligence complaint against defendants for failing to maintain a common stairway in an apartment building that defendants owned or managed. *Id.* at 268. After the expiration of the applicable statute of limitations period, plaintiff filed an amended complaint, which changed the address of the incident from 4400 South Wallace in Chicago to 4400 South Lowe in Chicago. *Id.* at 269. Although the buildings were managed by the same management company, they were two blocks apart and had different owners. *Id.* The parties agreed that the amended complaint would be barred by the appropriate statute of limitations unless the amendment related back to the date of filing of the original complaint. *Id.* at 270. Thus, the issue before the court was whether the relation-back doctrine applied to the amended complaint, *i.e.*, whether the negligence cause of action asserted in the amended complaint grew out of the same transaction or occurrence set up in the original complaint. *Id.*

¶ 12 The court concluded that the accident location was a material element of a slip-and-fall case and to change the accident location was to substantially change the occurrence. *Id.* at 276-77. Thus, the court concluded that plaintiff's amended complaint did not relate back because it grew out of a different occurrence from that alleged in the original complaint. *Id.* at 277. The court reasoned that the change of address was not merely a redescription of the location of the accident, or a more particular statement of the facts alleged in the original complaint, but a description of two different locations. *Id.* The court noted that the original complaint and the amended complaint described two different properties with different ownership. *Id.* In making this decision, the court rejected plaintiff's argument that the defendants had adequate notice and knowledge of

the precise location of the occurrence because they managed and maintained the two apartment buildings. *Id.* at 279. The court stated that accepting this argument would require an owner or manager of multiple parcels of real estate to investigate each and every property when confronted with a cause of action arising out of the alleged maintenance of one of its premises. *Id.*

¶ 13 Following the precedent established in *Zeh*, the court in *Digby v. Chicago Park District*, 240 Ill. App. 3d 88, 92 (1992), concluded that the change in location of the accident constituted a new occurrence in which the relation-back doctrine does not apply. In that case, plaintiff filed a second amended complaint, filed after the applicable statute of limitations period had expired, which changed the description of the location of the accident from "near the intersection of Jackson Boulevard and Throop Street in Chicago" to "near the intersection of Jackson Boulevard and Laflin Street." *Id.* at 89-90. Finding that the second amended complaint did not relate back, the court noted that the complaints did not give two descriptions of the same location but instead gave descriptions of different locations. *Id.* at 92.

¶ 14 The facts in the instant case are analogous to *Zeh* and *Digby*. The plaintiff filed a timely complaint identifying the location of the accident as the Schnuck's store located at 2511 State Street, East St. Louis. Subsequently, the plaintiff filed a third amended complaint, after the expiration of the applicable statute of limitations period, changing the location of the accident to 5720 North Belt W., Belleville. The original complaint and the third amended complaint did not give two different descriptions of the same location; instead, they gave descriptions of different locations. Thus, the third amended complaint

does not relate back to the original complaint and is time barred. The plaintiff attempts to distinguish *Zeh* by arguing that the rights and duties of the defendants were the same regardless of which Schnuck's location the incident occurred at because the defendants occupied the same positions as owner and contractor at both locations. However, the plaintiff has not provided any evidentiary support for this claim. Moreover, we note that a similar argument was considered and rejected by our supreme court in *Zeh*.

¶ 15 The plaintiff also argues that the defendants' reliance on *Zeh* is misplaced and instead the sufficiently-close-relationship test, which was adopted by our supreme court in *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343 (2008), is the relevant test to use when determining whether an amendment relates back to a previous pleading. The issue in that case was whether an amended pleading adding allegations of a misrepresentation of a CT scan at defendant's hospital could relate back to the originally filed complaint. *Id.* at 361. In analyzing this issue, the supreme court adopted the sufficiently-close-relationship test, which provides that a new claim will be considered to have arisen out of the same transaction or occurrence for purposes of relation back if the new allegations were close in time and subject matter and led to the same injury. *Id.* at 360. Applying this test, the court concluded that there was a sufficiently close relationship between the two allegations in that they were part of the same events leading up to the same injury, they were closely connected in time and location, and they were similar in character and subject matter. *Id.* at 361.

¶ 16 Relying on *Porter*, the plaintiff here argues that his third amended complaint relates back to the timely filed original complaint under the sufficiently-close-relationship

test because they describe the same event, make allegations involving the same negligent conduct, and seek damages for the same injury. Although we recognize that the two complaints describe the same event and raise the same negligence allegations, we find *Porter* distinguishable from the present case. *Porter* was a medical malpractice case in which plaintiff added new allegations in the amended complaint. That case did not involve an untimely amendment to a material element of a claim, *i.e.*, the accident location. Furthermore, *Porter* did not overrule the supreme court's previous decision in *Zeh*, which we find controlling. Thus, we conclude that the plaintiff's third amended complaint does not relate back to the date of the timely filed original complaint.

¶ 17 For the foregoing reasons, we affirm the judgment of the circuit court of Madison County.

¶ 18 Affirmed.