

**IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA  
CIVIL DIVISION**

<b>DANIEL HAMSHER and KATRINA HAMSHER,</b>	:	
	:	<b>NO. 2017-C-1731</b>
<b>Plaintiffs</b>	:	
	:	
<b>v.</b>	:	
	:	<b>ASSIGNED TO:</b>
<b>NATHAN SHOOK,</b>	:	<b>Honorable J. Brian Johnson</b>
	:	
<b>Defendant</b>	:	

**Appearances:**

**Maria K. McGinty-Ferris, Esquire  
For Plaintiffs**

**Gregory C. Kunkle, Esquire  
For Defendant**

**MEMORANDUM OPINION**

**J. Brian Johnson, Judge**

**I. INTRODUCTION**

Before the Court for consideration are Defendant’s Motion For Summary Judgment filed April 9, 2018 and Plaintiffs’ Motion To Amend Complaint To Reflect Correct Address Of Subject Accident filed April 20, 2018. Argument was held on said motions on July 10, 2018.

Defendant’s Motion For Summary Judgment asserts that, despite the fact that Plaintiffs have averred, in three (3) successive Complaints, that the alleged accident occurred at 28 Bowell Street, Slatington, PA 18080 (“Bowell Property”), Defendant does not own or lease the Bowell Property.

Plaintiffs' Motion To Amend Complaint To Reflect Correct Address Of Subject Accident seeks to change the identification of the location of the situs of the accident from the Bowell Property to 320 W. Franklin Street, Slatington, PA 18080 ("Franklin Property").

This is a premises liability action arising out of an alleged fall down accident occurring on November 30, 2015 in Lehigh County, Pennsylvania. Plaintiffs initiated the present civil action by filing a Complaint against Defendant alleging that, while Plaintiff Daniel Hamsher was descending the stairs inside the Bowell Property on November 30, 2015, he slipped on "unreasonably slippery wooden stairs" and fell, sustaining injuries. In Plaintiffs' Complaint, Amended Complaint and Second Amended Complaint, the location of the situs of the accident was identified as the Bowell Property.

## **II. ISSUES PRESENTED**

- A. WHETHER PLAINTIFFS MAY AMEND THEIR COMPLAINT TO CHANGE THE LOCATION OF THE ACCIDENT AFTER THE STATUTE OF LIMITATIONS HAS EXPIRED?
- B. WHETHER ANY GENUINE ISSUES OF MATERIAL FACT REMAIN?

## **III. DISCUSSION**

- A. WHETHER PLAINTIFFS MAY AMEND THEIR COMPLAINT TO CHANGE THE LOCATION OF THE ACCIDENT AFTER THE STATUTE OF LIMITATIONS HAS EXPIRED?**

Plaintiffs argue that, due to a clerical error, in their Complaint, Plaintiffs incorrectly indicated that the November 30, 2015 accident had taken place at the Bowell Property. While Plaintiffs allege they were residing at the Bowell Property at the time the Complaint was filed, Plaintiffs argue they were residing at the Franklin Property owned by Defendant on November 30, 2015. Plaintiffs contend that they were unaware of the "clerical error" in their Complaint, Amended Complaint and Second Amended Complaint until they received the subject

Defendant's Motion For Summary Judgment which is based on Plaintiffs identifying the accident location as the Bowell Property, a property Defendant does not own or lease.

A party may at any time, by leave of court, change the form of the action, correct the name of a party or amend his pleading. Pa. R.C.P. 1033. A cause of action seeking recovery for personal injury under a theory of negligence must be commenced within two (2) years. 42 Pa.C.S. § 5524. While a complaint may be amended pursuant to Pa.R.C.P. 1033, amendments that prejudice a defendant or that would introduce a new cause of action or that would cure a material, vital, or fatal defect in the complaint are not permitted after the applicable period of limitations has expired. Olson v. Grutza, 631 A.2d 191, 198 (Pa.Super. 1993). Pennsylvania law is clear that a “new cause of action” arises and will preclude the amendment of a pleading after the expiration of the statute of limitations, if the operative facts supporting the claim are changed. Matos v. Rivera, 648 A.2d 337, 340 (Pa.Super. 1994)(citing Del Turco v. Peoples Home Savings Association, 329 Pa.Super. 258, 274, 478 A.2d 456, 464 (1984)). An amendment that would change the location of an accident from one at which the Defendant owed no duty to a location where a different duty would apply, changes the occurrence pled and, therefore, is not permissible after the applicable period of limitation has expired. Herz v. Pennsylvania R. R. Co., 302 Pa. 324 (1931).

In Herz, the Pennsylvania Supreme Court denied leave to amend the complaint to change the location of the situs of an accident to a different location after the expiration of the statute of limitations, holding that “the effect of the amendment, if allowed, would be to introduce a new cause of action.” Id.

In this case, Plaintiffs identified the location of the accident as the Bowell Property and now seek to amend their Complaint to change the location of the accident to the Franklin Property. It is alleged that the subject accident occurred on November 30, 2015; therefore, the statute of limitations expired on November 30, 2017. Plaintiffs' Motion To Amend Complaint To Reflect Correct Address Of Subject Accident was filed on April 20, 2018, almost five (5) months after the expiration of the statute of limitations deadline.

There is no evidence that Defendant ever had ownership or control over the Bowell Property. It appears that Defendant owns and leases out the Franklin Property. As such, in marked distinction from the duties that would attach to a property Defendant actually controlled, Defendant owed no duty to Plaintiffs with respect to the Bowell Property identified in Plaintiffs' pleadings. As in Herz, in this case, the changing of the location of the accident to a completely different location in which the Defendant had different duties, after the applicable statute of limitations expired, is not a mere technical defect; rather, it constitutes a different occurrence that precludes the amendment to the pleading.

Thus, Plaintiffs' Motion To Amend Complaint To Reflect Correct Address Of Subject Accident filed April 20, 2018 is **DENIED**.

#### **B. WHETHER ANY GENUINE ISSUES OF MATERIAL FACT REMAIN?**

Summary judgment is appropriate when there exist no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Sphere Drake Ins. V. Phila. Gas Works, 782 A.2d 510, 512 (Pa. 2001). Summary Judgment is proper when a party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action

or defense which in a jury trial would require the issues to be submitted to a jury. Pa. R.C.P. No. 1035.2(2).

The subject of Defendant's Motion For Summary Judgment is that, in the course of three (3) successive Complaints, Plaintiffs have averred that the alleged accident occurred at the Bowell Property. However, Defendant never owned or leased the Bowell Property. Under Pennsylvania law as analyzed above, this Court held that Plaintiffs cannot at this late juncture amend their pleading to change the location of the accident, as this would constitute a new cause of action arising after the expiration of the statute of limitations. Further, "the decision whether to allow a proposed amendment of a pleading is within the sound discretion of the court below, and that decision will not be disturbed on appeal absent an abuse of discretion." Pastore v. Anjo Construction Company, 396 Pa.Super. 58, 68, 578 A.2d 21, 27 (1990).

Therefore, the undisputed record establishes that Defendant owed no duty to Plaintiffs in relation to any alleged accident that occurred on November 30, 2015 at the Bowell Property identified in Plaintiffs' pleadings. There is no evidence that Defendant ever had ownership or control over the Bowell Property. The duty owed by a defendant flows as a consequence of possession of the realty, absent any ownership or control, no duty is owed to the plaintiff. Blackman v. Federal Realty Inv. Trust, 664 A.2d 139, 142 (Pa. Super. 1995). As such, Defendant owed no duty to Plaintiffs in respect to the Bowell Property identified in their pleadings.

Thus, Defendant's Motion For Summary Judgment filed April 9, 2018 is **GRANTED**.

#### **IV. CONCLUSION**

For the foregoing reasons, Plaintiffs' Motion To Amend Complaint To Reflect Correct Address Of Subject Accident filed April 20, 2018 is **DENIED** and Defendant's Motion For

Summary Judgment filed April 9, 2018 is **GRANTED**. Judgment is entered in favor of Defendant, Nathan Shook, and against Plaintiffs, Daniel Hamsher and Katrina Hamsher, in no amount.

**DATE:** \_\_\_\_\_

\_\_\_\_\_  
**J. Brian Johnson, J.**

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<b>DANIEL HAMSHER and</b>	:	
<b>KATRINA HAMSHER,</b>	:	<b>NO. 2017-C-1731</b>
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<b>Plaintiffs</b>	:	
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<b>v.</b>	:	
	:	<b>ASSIGNED TO:</b>
<b>NATHAN SHOOK,</b>	:	<b>Honorable J. Brian Johnson</b>
	:	
<b>Defendant</b>	:	

**ORDER**

**AND NOW**, this \_\_\_ day of August, 2018, upon consideration of Defendant’s Motion For Summary Judgment filed April 9, 2018, and Plaintiffs’ Motion To Amend Complaint To Reflect Correct Address Of Subject Accident filed April 20, 2018, after argument held July 10, 2018, and for the reasons set forth in the accompanying Memorandum Opinion;

**IT IS ORDERED** that:

1. Plaintiffs’ Motion To Amend Complaint To Reflect Correct Address Of Subject Accident filed April 20, 2018 is **DENIED**;
2. Defendant’s Motion For Summary Judgment filed April 9, 2018 is **GRANTED**;
3. Judgment is entered in favor of Defendant, Nathan Shook, and against Plaintiffs, Daniel Hamsher and Katrina Hamsher, in no amount; and
4. The Pre-Trial Conference scheduled for April 9, 2019 at 10:00 a.m. and the Jury Trial scheduled for April 29, 2019 at 9:00 a.m. are **CANCELLED**.

**BY THE COURT:**

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**J. Brian Johnson, J.**