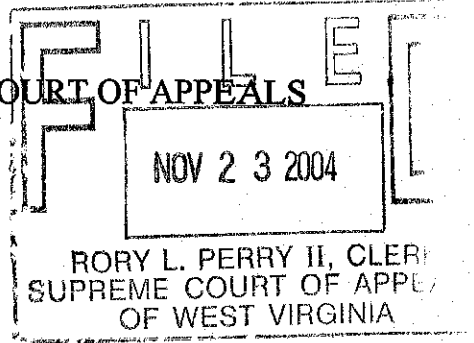


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



CHARLOTTE MAE SINKEWITZ,

Appellee,

vs.

APPEAL NUMBER: 32053

From the Circuit Court of Wayne County, W.Va.

Civil Action No. 02-C-248

THE CITY OF HUNTINGTON,

Appellant.

BRIEF OF THE APPELLANT, THE CITY OF HUNTINGTON

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I.

Kind of Proceeding and Nature of the Ruling in the Lower Tribunal

This is an appeal by The City of Huntington from a decision by the Circuit Court of Wayne County that ruled a city zoning ordinance unconstitutional. The City contends a previous decision by the Circuit Court of Wayne County involving the same parties that upheld the same ordinance is *res judicata* and that the Circuit Court erred when it ruled otherwise.

II.

Statement of the Facts

This case involves a bar located in the Wayne County section of The City of Huntington in a residential neighborhood. The bar was "grandfathered in" as a nonconforming use property when the ordinance zoning the neighborhood residential was adopted.

After the owner of the bar died, the heirs were required by city ordinance to apply for a special exception to permit the bar to continue operating as a nonconforming use property in the otherwise residential neighborhood. After a hearing, the Board of Zoning Appeals of The City of Huntington denied the special exception application on grounds of public safety, health and general welfare of the neighborhood. The new owner, Charlotte Mae Sinkewitz, then brought suit in 1997 in the Circuit Court of Wayne County against the City seeking to overturn the Zoning Board decision on grounds the zoning ordinance was unconstitutional. The Circuit Court upheld the constitutionality of the ordinance and affirmed the decision of the Zoning Board. Sinkewitz v. Huntington Board of Zoning Appeals, Civil Action No. 97-C-198. (Wayne Co. Circuit Court 1997).

Five years later in 2002, Ms. Sinkewitz brought a second suit in Wayne County Circuit Court against the City again challenging the constitutionality of the zoning ordinance. The second action was predicated on a 2001 decision by the Circuit Court of Cabell County, in an unrelated case, wherein the Cabell County Circuit Court declared a portion of the City zoning ordinance unconstitutional. Cabell and Wayne County Tavern and Restaurant Assn., Inc. vs. The City of Huntington, Civil Action Number: 99-C-00063. (Cabell Co. Circuit Court 2001).

The City defended the second Wayne County suit on grounds that the prior 1997 decision of the Wayne County Circuit Court was *res judicata*. The Circuit Court rejected this argument reasoning that *res judicata* did not apply because different constitutional issues were raised in the 1997 action. The Court stated:

The original case in 1997 in this Court dealt with Constitutional vagueness and a violation of equal protection. It did not address the due process issues presented in the Cabell County Circuit Court Case and the current case before this Court. The record of the 1997 Board of Zoning Appeals dealt with the issues of public safety, health, and general welfare of the neighborhood. The current record of the Board of Zoning Appeals deals with the abandonment of the use as the reason for not granting the special exception permit. Therefore, the issues are not the same, and the doctrine of *res judicata* does not apply.

The City now appeals the Wayne County Circuit Court's ruling on grounds that the Circuit Court's decision is erroneous because prior litigation between these same parties regarding the same ordinance is *res judicata* as to all issues that were *or could have been* litigated in the 1997 case, therefore barring re-litigation in a second suit.

III.

Assignments of Error

The Circuit Court erred when it ruled that *res judicata* did not bar a second suit between the same parties concerning the same city ordinance as was litigated in a prior case.

IV.

Points and Authorities

Blake v. CAMC, 201 W.Va. 469, 498 S.E. 2d 41 (1997).

Cabell and Wayne County Tavern and Restaurant Assn., Inc. vs. The City of Huntington, Civil Action Number: 99-C-00063. (Cabell Co. Circuit Court 2001).

Chrysler Credit Corp. v. Copley, 189 W.Va. 90, 428 S.E.2d 313 (1993).

Slider v. State Farm Mut. Auto. Ins. Co., 210 W.Va. 476, 557 S.E.2d 883 (2001).

Sinkewitz v. Huntington Board of Zoning Appeals, Civil Action No. 97-C-198 (Wayne County Circuit Court 1997).

12A Virginia & West Virginia Digest Judgments §713(2) (West 2001 and 2003 Supp.).

V.

Argument

The 1997 decision of the Circuit Court of Wayne County upholding the constitutionality of the city zoning ordinance is *res judicata* as to a subsequent suit between the same parties, challenging the constitutionality of the same ordinance.

Res judicata generally applies when there is a final judgment on the merits which precludes the parties or those in privity with them from re-litigating the issues that were decided or the issues that could have been decided in the earlier action. Slider v. State Farm Mut. Auto. Ins. Co., 210 W.Va. 476, 557 S.E.2d 883 (2001).

Three elements must be satisfied to invoke *res judicata*:

1. There must have been a final adjudication on the merits in the prior action by a court having jurisdiction over the proceeding;
2. The two actions must involve either the same parties or persons in privity with those same parties; and
3. The cause of action in the second proceeding must be the same as the cause of action determined in the first proceeding or it must be such that it could have been resolved had it been presented in the first proceeding.

Blake v. CAMC, 201 W.Va. 469, 498 S.E. 2d 41 (1997).

As has been frequently stated by this Court:

An adjudication by a court having jurisdiction of the subject matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being *res judicata*.

See, e.g., Chrysler Credit Corp. v. Copley, 189 W.Va. 90, 428 S.E.2d 313 (1993), and cases collected at 12A Virginia & West Virginia Digest Judgments §713(2) (West 2001 and 2003 Supp.).

In this case, all three elements required to invoke the doctrine of *res judicata* have been satisfied. First, the 1997 decision by the Circuit Court of Wayne County was a final adjudication on the merits by a court having jurisdiction. Second, the two suits involved the same parties or persons in privity with those same parties. Charlotte Mae Sinkewitz was a plaintiff in both suits and the City of Huntington or its Board of Zoning Appeals was a defendant in both suits. Third, the cause of action in the second suit, i.e., the constitutionality of the city zoning ordinance, is the same cause of action determined in the prior action involving the constitutionality of the same ordinance, or is such that it could have been resolved if presented in the first action.

Although the first suit challenged the constitutionality of the ordinance on grounds of vagueness and equal protection whereas the second suit challenged the constitutionality of the ordinance on grounds of due process, the due process issue could have been resolved had it been presented in the prior action. *Res judicata* operates to bar the second proceeding even if the precise cause of action involved was not actually litigated in the former proceeding so long as the claim could have been raised and determined in the prior suit. See, e.g., Blake v. CAMC, supra. Because the issue raised in the 2002 action could have been raised and litigated in the 1997 action involving the same parties and the same city ordinance, the Circuit Court erred when it ruled that *res judicata* did not bar the 2002 action.

VI.

Conclusion

For the foregoing reasons, The City of Huntington respectfully requests that the Court reverse the decision of the Circuit Court of Wayne County on grounds that the second suit by Ms. Sinkewitz is barred by the doctrine of *res judicata*.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 22, 2004, he served a copy of the foregoing "Brief of the Appellant, The City of Huntington" on all counsel of record by mailing a true and exact copy thereof, postage prepaid in the United States Mails to:

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