

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

CHARLOTTE MAE SINKEWITZ,

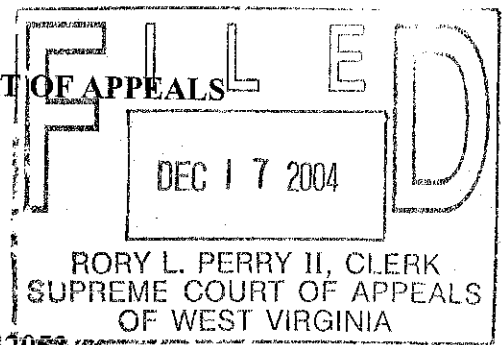
Appellee,

vs.

APPEAL NUMBER: 32053

From the Circuit Court of Wayne County, WV

Civil Action No.: 02-C-248



THE CITY OF HUNTINGTON,

Appellant.

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BRIEF OF THE APPELLEE, CHARLOTTE MAE SINKEWITZ

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## TABLE OF CONTENTS

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I.	Kind of Proceeding and Nature of Ruling in the Lower Tribunal.....	1
II.	Alleged Omissions and inaccuracies and Appellee's Statement of the case .....	2
III.	Statement in Opposition to the Allegation of Error.....	4
IV.	Points and Authorities.....	5
V.	Argument.....	5
	The 1997 decision of the Circuit Court of Wayne County, West Virginia is not res judicata as to the subsequent suit challenging The City of Huntington's refusal to grant business license to the Appellee	
	A. General Principles of Res Judicata.....	5
	B. Change in Facts.....	7
	C. Different Evidence.....	8
	D. Rigid Application of the Doctrine of Res Judicata.....	9
VI.	Conclusion.....	10
	Certificate of Service.....	11

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vs.

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THE CITY OF HUNTINGTON,

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**BRIEF OF THE APPELLEE, CHARLOTTE MAE SINKEWITZ**

I.

**KIND AND NATURE OF PROCEEDING AND RULING IN THE LOWER TRIBUNAL**

This is an appeal by The City of Huntington from a decision by the Circuit Court of Wayne County, West Virginia. The ruling of the Circuit Court of Wayne County recognized a prior Cabell County Circuit Court ruling which ruled a portion of the City Zoning Ordinance unconstitutional. The Circuit Court of Wayne County ruled that the Appellee be allowed to proceed with her application for appropriate licensing subject to her properly completing the application process. The Appellee contends the previous decision of the Circuit Court of Wayne County is not *res judicata* and that the Circuit Court of Wayne County did not err in its ruling herein.

## II.

### ALLEGED OMISSIONS AND INACCURACIES IN THE APPELLANT'S STATEMENT OF THE CASE

The Appellee, Charlotte Mae Sinkewitz, became the owner of the property which is the subject of the present action by virtue of inheritance from her deceased mother. In conforming with the then existing versions of the Code of the City of Huntington, the Appellee, on expiration of the business license, applied for a special exception permit to continue operation of non-conforming use of the property. The Board of Zoning and Appeals of The City of Huntington denied the special exception application however no specific grounds for such denial were set forth by the Board's decision.

On August 15, 1997, the Appellee filed suit in the Circuit Court of Wayne County, West Virginia, seeking to overturn the decision of the Board of Zoning and Appeals on the grounds that:

1. The decision of the Board was arbitrary and capricious;
2. The provisions of the City Code were duly vague and violated the equal protection provisions of the Constitution of the State of West Virginia; and
3. The Board of Zoning and Appeals failed to develop an adequate record and make appropriate findings of fact.

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

The Circuit Court of Wayne County, by Order entered September 11, 1997, denied the Writ of Certiorari and upheld the actions of the Board of Zoning and Appeals for the City of Huntington.

On November 7, 2002, the Appellee instituted a Complaint against The City of Huntington, challenging the decision of the Department of Development and Planning for the City of Huntington, for its refusal to issue a business license for operation of a bar/tavern. Such refusal was based upon the discontinued non-conforming use of the property for a period of two (2) years. This Complaint raised the factual issue that the discontinuance of use was as a result of the statute which, subsequent thereto, had been ruled, in pertinent part, unconstitutional by the Circuit Court of Cabell County. Sinkewitz v. The City of Huntington, Civil Action No. 02-C-248. (Wayne County Circuit Court 2002).

The City of Huntington raised, as a part of its defense of the second suit, the defense of res judicata however, the Circuit Court of Wayne County found res judicata to be inapplicable in the case due to finding that:

Subsequently, in 2001, the relevant, special section of the Zoning Ordinance came under scrutiny in a case before Judge Cummings of the Cabell County Circuit Court. See Cabell and Wayne County Tavern and Restaurant Assn., Inc. v. The Board of Zoning and Appeals for the City of Huntington, Civil Action No.: 99-C-00063 (Cabell County Circuit Court 2001).

Judge Cummings ruled that Section 20 and 21 of the Zoning Ordinance of the City of Huntington violated statutory provisions of W.Va. Code Section 8-24-50 because the 1994 and 1998 Amendments removed the "Grandfather Clause" as to special exceptions to non-conforming use of property. The Order stated that:

Elimination of the "Grandfather Clause" is a violation of the procedural due process as it restricts the rights and alienation of property of the person, and not just the property of the person in whom those rights are vested....

The City of Huntington did not appeal the ruling of Judge Cummings. The City of Huntington stipulated that the facts asserted by Petitioners are correct. Instead, the City defends this action on the doctrine of estoppel and the doctrine of res judicata. Their theory is based on the assertion that the bar/tavern had been abandoned and ceased to operate as a bar/tavern in July 1997, therefore, the right to continue the non-conforming use had expired in July 1999; and that the Court has already ruled on the issue in the case.

Charlotte Mae Sinkewitz v. The City of Huntington, Civil Action No. 02-C-248.  
(Wayne County Circuit Court 2002). (Opinion Order of October 29, 2003).

The Circuit Court of Wayne County further recognizes the inapplicability of the doctrine of res judicata wherein the Court states:

This Court also accepts the practical and logical conclusion that these zoning ordinances in the City of Huntington should be uniformly applied regardless of whether the subject property is in Cabell County or Wayne County.

It is therefore, adjudge, ordered and decreed that the death of the previous owner of the property, and inheritance by the present owner, does not terminate a lawful permit for a non-conforming use. It is further adjudged, ordered and decreed that the death of the previous owner does not constitute abandonment of the special exception use. If the death of the previous owner results in an interruption of business for a period of two (2) years, it may result in a finding of abandonment of the non-conforming use. It is further adjudged, ordered and decreed that abandonment must be voluntary in that an administrative order closing a business cannot be a calculation in the period of abandonment.

Charlotte Mae Sinkewitz v. The City of Huntington, Civil Action No. 02-C-248.  
(Wayne County Circuit Court 2002). (Opinion Order of October 29, 2003).

The City of Huntington has now appealed the above-referenced decision in the Circuit Court of Wayne County on the grounds that the prior litigation is res judicata.

### III.

#### **STATEMENT IN OPPOSITION TO THE ALLEGATION OF ERROR**

The Circuit Court of Wayne County did not err in ruling that res judicata did not bar the present litigation.

IV.

POINTS AND AUTHORITIES

Brick & Tile Co. v. Pub. Serv. Com., 107 W. Va. 569, 149 S.E. 677 (1929)

Hannah v. Beasley, 132 W.Va. 814, 53 S.E.2d 729 (1949)

White v. SWCC, 164 W. Va. 284, 262 S.E.2d 752, (1980)

Sattler v. Bailey, 184 W.Va. 212, 400 S.E.2d 220 (1990)

Blake v. Charleston Area Medical Center, 201 W. Va. 469, 498 S.E.2d 41 (1997)

Charlotte Mae Sinkewitz v. The City of Huntington, Civil Action No. 02-C-248 (Wayne County Circuit Court 2002). (Opinion Order of April 16, 2004)

V.

ARGUMENT

**The 1997 decision of the Circuit Court of Wayne County, West Virginia is not res judicata as to the subsequent suit challenging The City of Huntington's refusal to grant business license to the Appellee.**

**A. General Principles of Res Judicata**

This Court has dealt with the issues of the doctrine of res judicata extensively. In the case of Sattler v. Bailey, 184 W.Va. 212, 400 S.E.2d 220 (1990), this Court gave a lengthy review of basic principles of the doctrine as set forth as follows:

The doctrine of res judicata, while often difficult to apply, is rather well settled in its general contours. See Conley v. Spillers,-----W.Va.-----,----- n. 2, 301 S.E.2d 216, 219 n. 2 (1983). The essence of the doctrine of res judicata (meaning, a matter adjudged) is that a judgment in a prior actions bars a subsequent action involving the same parties (or their privies) and the same cause of action which were involved in the prior action. The thrust of the res judicata doctrine is the finality of judicial decisions. Black's Law Dictionary 1305 (6<sup>th</sup> ed. 1990). See

also Restatement (Second) of Judgments § 19 (1980). The purpose of this doctrine, sometimes referred to as "claim preclusion," is to preclude the expense and vexation attending relitigation of causes of action which have been fully and fairly decided. The doctrine also conserved judicial resources and minimizes the risk of inconsistent decisions. Conley, ----- W.Va. at -----, 301 S.E.2d at 219-20.

[1,2] In the present case we need not attempt a comprehensive explanation of each of the elements of res judicata. Simply stated, the two basic elements of the doctrine of res judicata, in addition to a final judgment on the merits by a court of competent jurisdiction in a former action, are (1) identity of the cause of action and (2) identity of the parties (or their privies); that is, the same cause of action and the same parties (or those in privity with them) are involved in the former and subsequent actions. With respect to the first "identity," that of the cause of action, the doctrine of res judicata does not require that the matter was in fact litigated in the prior action; instead, such doctrine applies to bar subsequent litigation of every matter which legitimately could have been litigated on the merits in the prior action, as within the subject matter of the prior action.

Ib. p. 225

The brief of the Appellant sets forth the same general principles of res judicata and at the conclusion thereof summarily asks this Court to overturn the decision of the Circuit Court of Wayne County based upon the first suit having come to a final adjudication and the second suit being between the same parties and the second suit allegedly involving the same questions of constitutionality resolved in the first suit or claims that could have been raised therein.

Had the facts involved in the appeal before this Court been of such great clarity, one could surmise that the Circuit Court of Wayne County would have so ruled at the time of its decision in the case. However, as this Court has so aptly stated in the case of Hannah v. Beasley, 132 W.Va. 814, 53 S.E.2d 729 (1949):

The rule of res judicata has been often stated, and there is little conflict in what constitutes the true rule. The difficulty lies in applying the same to particular facts and situations.

Ib. p. 819

This Court further recognized the difficulty and application in the Hannah case, Lutz v. Williams, 84 W. Va. 216, 99 S.E. 440, wherein this Court held that:

A cause of action between persons who were parties of a former adjudication, must set up in subsequent action between them, is not res judicata by the former decision, unless it is identical to the one actually or constructively heard and determined in the former suit.

Ib. p. 821-822

### **B. Change in Facts**

The opinion order of the Circuit Court of Wayne County recognized the existence of new facts and circumstances surrounding the present situation relative to the decision of the Circuit Court of Cabell County, which determined the failure to maintain the "Grandfather Clause" to be unconstitutional. In addition, the opinion recognized the absurdity of allowing two different applications of the City Zoning Ordinance to control differing areas of the City of Huntington merely because those areas are located in Cabell County or Wayne County.

This Court has refused mechanical application of the doctrine of res judicata when new facts exist which may alter rights of the litigants. In the case of Brick & Tile Co. v. Pub. Serv. Com., 107 W. Va. 569, 149 S.E. 677 (1929), this Court held:

We therefore find the conditions affecting the defendants have changed so materially since the former decision that the doctrine of res judicata does not apply. "The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a re-examination of the same questions between the same parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants." 34 C. J., 905, sec. 1313; Freeman on Judgments, 5<sup>th</sup> Ed., sec. 712.

See in accord Wolfe v. Forbes, et al., 159 W. Va. 34, 217 S.E.2d 899 (1975);

Ib. p. 573

The Circuit Court of Wayne County, having found the same City Ordinance should apply in both Wayne and Cabell Counties, recognized the different facts would be required to sustain the present action wherein the Court stated:

The current record of the Board of Zoning and 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 Court further stated:

The record in this case is not sufficiently developed for me to determine whether the bar had actually closed for any period of time prior to the application of process in 1997.

Charlotte Mae Sinkewitz v. The City of Huntington, Circuit Court of Wayne County, Civil Action No.: 02-C-248. (Opinion Order of April 16, 2004).

### C. Different Evidence

The Court then proceeded to remand the matter to the City of Huntington Board of Zoning and Appeals to develop evidence regarding that significant issue of abandonment. Upon further development of the factual issues, the final order was entered on April 16, 2004, having found that there was no interrupted use of the subject property for a bar for a period of six months prior to the administrative termination of operation. Charlotte Mae Sinkewitz v. The City of Huntington, Circuit Court of Wayne County, Civil Action No.: 02-C-248. (Opinion Order of April 16, 2004).

This Court stated in White v. SWCC, 164 W. Va. 284, 262 S.E.2d 752, (1980) that:

The test to determine if the issue or cause of action involved in the two suits is identical is to inquire whether the same evidence would support both actions or issues. Gallaher v. City of Moundsville, 34 W. Va. 730, 12 S.E. 859 (1891); see McNunis v. Zukosky, 141 W. Va. 145, 89 S.E.2d 354 (1955). If the two cases require substantially different evidence to sustain them, the second cannot be said to be the same cause of action and barred by res judicata.

Ib. p. 290

See in accord Slider v. State Farm Mutual Automobile Insurance Company, 210 W.Va. 476, 557 S.E.2d 883 (2001).

Based upon the substantially different evidence required in the present action, your Appellee would submit that the Circuit Court of Wayne County was correct in its determination that res judicata was not applicable.

**D. Rigid Application of the Doctrine of Res Judicata**

The facts as contained within the record of this pending appeal are unique in that this Court is asked to deal with the issues concerning application of a City Code provision which covers two counties in one State. In addition, the Appellee, upon the expiration of her business license in 1997, locked the doors of her establishment and has made no use of the property since that time. Her business, if located across the county line in Cabell County, would be fully protected by the status of the present application of the Code of the City of Huntington.

The City of Huntington had every opportunity to have appealed the decision of Judge Cummings however, as reflected in the Opinion Order of Judge Pratt, such an appeal was not taken and the status of the matter in Cabell County is now settled.

To allow the City of Huntington to prevail in this pending appeal would create an inequitable and untenable division based merely upon the county boarders running through the City.

This Court has recognized that such application was not the purpose for development of the doctrine of res judicata. In the case of Blake v. Charleston Area Medical Center, 201 W. Va. 469, 498 S.E.2d 41 (1997), this Court stated:

Notwithstanding this scrupulous assessment of the applicability of res judicata to a particular case, we reiterate our prior admonishment that, even though the requirements of res judicata may be satisfied, we do "not rigidly enforce [this doctrine] where to do so would plainly defeat the ends of Justice". Gentry v. Farruggia, 132 W. Va. 809, 811, 53 S.E.2d 741, 742 (1949). See also White v. SWCC, 164 W. Va. At 291, 262 S.E.2d at 757 (same).

Ib. p. 478

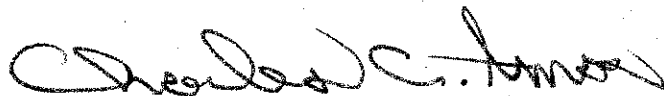
Application of the doctrine of res judicata to overturn the present decision of the Circuit Court of Wayne County would "*plainly defeat the ends of justice*".

## VI.

### CONCLUSION

Based upon the foregoing points and authorities, your Appellee, Charlotte Mae Sinkewitz, respectfully requests that this Honorable Court affirm the decision of the Circuit Court of Wayne County.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certified that on December 16, 2004, he served a copy of the foregoing Brief of the Appellee, Charlotte Mae Sinkewitz, on all counsel of record by mailing true and exact copies thereof, postage prepaid, in the United States Mail to:

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