2001

John Collins and June Collins v. Sandy City Board of Adjustmant and Sandy city Corporaiton, a municipal corporation: Reply Brief of Appellants

Utah Supreme Court

Steven C. Osborn; Attorney for Respondents-Appellees.
Franklin L. Slaugh; Attorney for Petitioners-Appellants.

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN COLLINS and JUNE COLLINS,	)	
	:	**REPLY BRIEF OF APPELLANTS**
Petitioners and Appellants,	)	
vs.	:	Appellate Case No. 20010144-SC
	)	
SANDY CITY BOARD OF ADJUSTMENT and SANDY CITY CORPORATION, a municipal corporation,	:	Oral Argument Priority No. 13
	)	
Respondents.	:	

On Writ of Certiorari from a Decision of the Utah Court of Appeals

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ARGUMENT

I. NO NEW ISSUES HAVE BEEN RAISED BY MR. AND MRS. COLLINS IN THE APPEAL BEFORE THIS COURT.

Mr. and Mrs. Collins have raised no new issues in this appeal from the decision of the Utah Court of Appeals. Mr. and Mrs. Collins have argued that Sandy City, having been a party to *Brown, et. al. v. Sandy City Board of Adjustment; and Sandy, a political subdivision of Utah,* 957 P.2d 207 (Utah App. 1998), was collaterally estopped from asserting that it had a valid ordinance prohibiting short-term leases, prior to actually enacting such an ordinance. This argument was first raised by Mr. and Mrs. Collins in the District Court in their Memorandum in Support of Motion for Summary Judgment. [R. 17] Furthermore, as this Court recently stated in *Macris & Associates, Inc. v. Neways, Inc.,* 2000 UT 93, 16 P.3d 1214, 1224, "Unlike the doctrine of claim preclusion, issue preclusion does not require that '*both cases* . . .involve *the same parties or their privies.*' [citation omitted] Rather, issue preclusion applies even if only 'the party *against* whom the [doctrine] is asserted [was] a party or in privity with a party to the prior adjudication."

II. BECAUSE THE CONTROLLING LEGAL PRINCIPLES HAVE CHANGED, COLLATERAL ESTOPPEL SHOULD NOT APPLY.

Sandy City argues that even if the Court of Appeals was in error in relying on *Federated Dept. Stores v. Moitie,* 452 U.S. 394 (1981), issue preclusion should still apply in this case, arguing that homeowners who expressed opposition and concern [about ski rental homes in their neighborhoods] may have relied upon the decision of the

Board [of Adjustment]. This is mere conjecture on the part of Sandy City at this point while the property rights of Mr. and Mrs. Collins is an issue directly before this Court and not a matter of speculation.

Because zoning ordinances "are in derogation of a property owner's common law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner." *Brown v. Sandy City Board of Adjustment,* 957 P. 2d 207, 210 (Utah App. 1998) (*quoting Patterson v. Utah County Board of Adjustment,* 893 P. 2d 602, 606 (Utah App. 1995). Further, the right of a property owner to the continued existence of uses and structures which lawfully existed prior to the effective date of a zoning restriction is grounded in constitutional law. 8A McQuillin Municipal Corporations Sec. 25.180-25-180.20, at 8-9 (3d ed. 1994) The Fifth Amendment of the United States Constitution and Article I Section 7 of the Constitution of Utah provide that no person shall be deprived of life, liberty or property without due process of law. Therefore, due process principles protect a property owner from having his or her vested property rights interfered with, and preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not abrogate. 8A McQuillan Municipal Corporations Sec 15.180.20, at 10.

In the case at bar, applying issue preclusion as a bar to the 1998 suit by Mr. and Mrs. Collins does nothing to further the traditional purpose of the rule barring relitigation of issues between the same parties. On the contrary, it gives Sandy City

the right to perpetuate an erroneous ruling as to one property owner while it is precluded from applying that ruling to every other property owner, similarly situated, in its jurisdiction.

The intervening change in the law effected by *Brown, et. al. v. Sandy City Board of Adjustment,* 957 P. 2d 207 (Utah App. 1998) established that the ruling of the District Court in the 1996 case filed by John Collins and June Collins against Sandy City was erroneous and it is therefore inappropriate to apply issue preclusion in this case under the principles enunciated by this Court in *Norman v. Murray First Thrift & Loan Company,* 596 P. 2d 1028 (Utah 1979).

III. THE BALANCING OF INTERESTS FAVORS NON-APPLICATION OF PRINCIPLES OF RES JUDICATA.

Sandy City argues that the balancing of interests for and against preclusion in this case must weigh on one side the [Collins's] need for equal treatment and on the other side the interests of families living in the neighborhoods affected by the [Collins's] short-term rentals. Assuming, *arguendo,* that this is indeed the balancing test that should be applied, it should be pointed out that the opposition expressed by the homeowners at the Board of Adjustment hearing on November 12, 1998 centered only on tenants who were renting from Mr. and Mrs. Collins under long-term leases, not short-term "ski rentals", inasmuch as Mr. and Mrs. Collins had obeyed the cease and desist order of Sandy City from March, 1996 forward. [See Board of Adjustment Record at R. 284-343.]

The case cited by Sandy City in support of its balancing of interests argument, *Marsland v. International Society of Krishna Consciousness,* 66 Haw. 119, 657 P.2d 1035

(1983) is inapposite here because that case involved enforcement of an existing ordinance. Sandy City, by virtue of the ruling in *Brown,* supra, had no such ordinance to enforce against Mr. and Mrs. Collins or anyone else in the city of Sandy. There was no "violation" of a zoning ordinance by Mr. and Mrs. Collins.

Mr. and Mrs. Collins are in fact only attempting to restore their property rights as they existed at the time that Sandy City issued its cease and desist order [R. 28] against Mr. and Mrs. Collins. They will not acquire any immunity or privilege were this to happen. They will continue to be subject to all of the pertinent zoning and criminal laws and ordinances of Sandy City and any violation of those laws may be addressed by any aggrieved property owner in Sandy in any court of competent jurisdiction.

CONCLUSION

This Court should apply the principles enunciated in *Norman v. Murray First Thrift,* supra, to conclude that the intervening change in law effected by *Brown v. Sandy City Board of Adjustment,* supra, precludes the strict application of the principles of *res judicata* as held by the Utah Court of Appeals in this case. The decision of the Court of Appeals should be reversed and the case remanded to the District Court for further proceedings.

Respectfully submitted this 11th day of March, 2002.

Franklin L. Slaugh
Attorney for Appellants John and
June Collins

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Reply Brief of Appellant were mailed, first class postage prepaid, this 11th day of Mar., 2002 to the following:

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