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John Collins and June Collins v. Sandy City Board of Adjustment and Sandy City Corporation, a municipal corporation : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN COLLINS and JUNE COLLINS,)	
	:	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 APPEAL FROM A DECISION OF THE
COURT OF APPEALS OF THE STATE OF UTAH

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FILED

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CLERK SUPREME COURT
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN COLLINS and JUNE
COLLINS

)

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BRIEF OF APPELLANTS

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STATEMENT OF JURISDICTION

The Opinion of the Utah Court of Appeals affirming the order of summary judgment in favor of the Sandy City Board of Adjustment was entered December 21, 2000. 2000 UT App 371 [reproduced in Addendum as Exhibit “A”] The Utah Supreme Court granted the Petition for Writ of Certiorari in this case by Order dated June 28, 2001 and has jurisdiction pursuant to §78-2-2(5) Utah Code Ann. (1953, as amended).

ISSUE PRESENTED FOR REVIEW

The issue presented for review is whether the Court of Appeals correctly adopted the rule in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) to govern determination of issues where the law has changed but a party fails to appeal.

Standard of Review: When exercising its certiorari jurisdiction, the Utah Supreme Court reviews the decision of the court of appeals not of the trial court. *Carrier v. Pro-Tech Restoration*, 944 P.2d 346, 350 (Utah 1997). When reviewing questions of law, the Utah Supreme Court accords no particular deference to the conclusions of law made by the court of appeals but reviews them for correctness. *Allen v. Utah Dep’t of Health*, 850 P.2d 1267, 1269 (Utah 1993).

CONTROLLING LEGAL PROVISIONS

None. This case involves the interpretation of case law.

STATEMENT OF THE CASE

This case involves an action by John Collins and June Collins against the Sandy City Board of Adjustment and Sandy City Corporation for review of a decision by the Sandy City Board of Adjustment denying non-conforming use status for certain real properties located in Sandy City owned by John and June Collins that had been utilized as short-term rentals prior to the enactment by Sandy City of an ordinance prohibiting such short-term rentals.

On October 27, 1998 the Petitioners John and June Collins filed an application for non-conforming use status with the Sandy City Board of Adjustment. This application was denied on November 12, 1998. The Petitioners filed a Petition for Review on December 11, 1998. (R. 1-6) Cross motions for summary judgment were subsequently filed (R. 15-16; 140-141) and the Motions were argued on August 16, 1999. (R. 431)

The District Court granted the Respondent's Motion for Summary Judgment and denied the Petitioners' Motion. (R. 446-448; Add. 1-3) Petitioners filed this appeal on December 16, 1999. (R. 449-450). On December 21, 2000 the Utah Court of Appeals affirmed the summary judgment of the District Court. [2000 UT App. 371]. The Utah Supreme Court granted the Petition for Writ of Certiorari by Order dated June 28, 2001.

STATEMENT OF FACTS

Petitioners are the owners of certain real properties located within the boundaries of Sandy City. For a lengthy period of time prior to March, 1996, the

Petitioners utilized the properties as short-term rental properties, sometimes referred to as “ski rentals”. In March, 1996 the respondent Sandy City Corporation issued a cease and desist order requiring the petitioners to cease using the properties for that purpose. (R. 28) Sandy City did not at that time pass an ordinance prohibiting short-term rentals but relied instead on the existing ordinance, arguing that such use was already prohibited.

The Petitioners filed an appeal to the respondent Sandy City Board of Adjustment in 1996, which upheld Sandy City’s interpretation of the Sandy zoning ordinances to preclude such use by the petitioners. Petitioners appealed that decision to the Third District Court and the District Court upheld the decision of the Sandy City Board of Adjustment. The Revised Summary Judgment and Order of Dismissal was signed November 17, 1997 and dated September 29, 1997. [Third District Court Case No. 960905929CV] (R. 210)

On March 26, 1998 the Utah Court of Appeals rendered a decision in a case involving precisely the same issues as those presented by the Petitioners herein in the above-referenced 1996 case which was pending at the same time as the petitioners’ 1996 case, in *Brown, et. al. vs. Sandy City Board of Adjustment; and Sandy, a political subdivision of Utah*, 957 P. 2d 207 (Utah App. 1998) That case, decided March 26, 1998, held that Sandy City’s interpretation of the Sandy City Development Code to prohibit leases of less than thirty days in residential zones was not a correct interpretation, i.e., Sandy City had no valid ordinance prohibiting short-term leases in Sandy City. The respondent Sandy City then imposed a temporary moratorium on

short-term rentals, allegedly effective March 27, 1998, and subsequently enacted ordinances prohibiting short-term leases. (R. 36-45)

On or about October 27, 1998, the petitioners filed an application for determination of non-conforming status on their properties with the Sandy City Board of Adjustment. (R. 50) That application was heard by the Board on November 12, 1998. The Sandy City Board of Adjustment denied the petitioners' application for determination of non-conforming use status on the petitioners' properties, apparently relying on the 1996 District Court decision which denied the Motion for Summary Judgment filed by John and June Collins and granted the Motion for Summary Judgment filed by Sandy City Corporation. (R. 446-448) Petitioners filed a Petition for Review of that decision in Case No. 980912601 in the Third District Court. On cross motions for summary judgment the District Court ruled that because the Petitioners/Appellants had not appealed the prior order in Third District Court Case No. 960905929CV, that case was *res judicata* in the present case (Case No. 980912601) and precluded the Petitioners/Appellants from obtaining non-conforming use status on the subject properties.

The Utah Court of Appeals affirmed the decision of the lower court, holding that because the Appellants, John Collins and June Collins, chose not to pursue an appeal of the 1996 District Court decision, they could not benefit from the change of law exception to *res judicata* where, had they chosen to appeal, the change of law would have been obtained. [2000 UT App. 371]

SUMMARY OF ARGUMENT

The Utah Court of Appeals erred in its holding that the intervening change in the law in this case did not operate as a defense to Sandy City's claim that the 1998 suit filed by Mr. and Mrs. Collins was barred under principles of *res judicata* by the Summary Judgment entered in the 1996 suit between the same parties.

Barring the Petitioners from proceeding in the 1998 suit does nothing to further the traditional purposes of issue preclusion or claim preclusion. Applying *res judicata* as a bar in this case only perpetuates an erroneous ruling without valid reasons.

ARGUMENT

POINT I: THE COURT OF APPEALS INCORRECTLY ADOPTED THE RULE IN FEDERATED DEPARTMENT STORES v. MOITIE TO GOVERN DETERMINATION OF ISSUES WHERE THE INTERVENING LAW HAS CHANGED BUT A PARTY FAILS TO APPEAL.

The Court of Appeals ruled in this case that in a situation where one party in cases litigating the same legal issue chooses not to pursue an appeal, that party may not benefit from the change of law exception to *res judicata* where had that party chosen to appeal the change of law would have been obtained. 2000 UT App 371, 16 P. 3d 1251, 1256 (Utah App. 2000) In so holding, the Utah Court of Appeals failed to properly apply additional principles recognized by the Utah Supreme Court as necessary in cases where issue preclusion is in dispute. The case of *Norman v. Murray First Thrift & Loan Co.*, 596 P. 2d 1028 (Utah 1979) requires the lower court, in

examining the issue of whether principles of res judicata should constitute a bar to this action, to further inquire as to whether the controlling facts or legal principles have changed significantly since the prior judgment. In that case the Utah Supreme Court stated:

“To determine whether it is appropriate to apply collateral estoppel necessitates three further inquiries: First, whether the issues presented in the current litigation are in substance the same as resolved in the prior litigation; second, *whether the controlling facts or legal principles have changed significantly since the prior judgment* [emphasis added]; third, whether other special circumstances warrant an exception to the normal rules of preclusion.” At 1032.

The Utah Court of Appeals in the instant case agreed that it is the general rule that a subsequent change in the operative facts or the controlling law has generally relieved a party from the application of res judicata, and further agreed that, in the instant case, the law had changed since the 1996 suit. *Collins v. Sandy City Board of Adjustment*, 16 P. 3d 1251, 1254 (Utah App. 2000). The Utah Court of Appeals declined to apply the general rule in this case, relying on the case of *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S. Ct. 2424 (1981).

The Court of Appeals asserts that *Moitie*, supra, is a case strikingly similar to the case Mr. and Mrs. Collins have brought. If one examines the facts in each case, however, the instant case bears little resemblance to the situation presented in *Moitie*. In the *Moitie* case, the change in the law that occurred was entirely unanticipated, whereas in this case, *Brown*, supra, was a fully prepared appeal pending before the Court of Appeals when the Collins’ 1996 District Court decision was rendered. It made no sense to file an appeal when a fully briefed appeal was already pending.

Judicial economy would dictate that Mr. and Mrs. Collins simply await the outcome in *Brown*.

Unlike the petitioners in *Moitie*, Mr. and Mrs. Collins were not forum shopping and they were not trying to mount a collateral attack.. Further, unlike the *Moitie* case, the Petitioners in this case were not originally parties to the action that resulted in the *Brown* decision.

Since *Brown* ruled there was no ordinance in Sandy City prohibiting short-term rentals, *Brown* also essentially established that it was legal for everyone, *including Mr. and Mrs. Collins*, to rent, or to have rented, residential property in Sandy for the short-term. Sandy City, having been a party to the *Brown* case as well as the case with Mr. and Mrs. Collins, was collaterally estopped, by virtue of *Brown*, from asserting that it had a valid ordinance prohibiting short-term leases as against any property owner in Sandy City, prior to the enactment of a valid ordinance. *Hill vs. Seattle First Nat. Bank*, 827 P. 2d 241 (Utah 1992)

The additional inquiry set forth in *Norman v. Murray First Thrift & Loan Co.*, *supra*, should govern in this case. The facts in the instant case are not similar to the facts in *Moitie*. The instant case was not a complex, multi-party suit involving questions of federal and state law. While *Moitie* is controlling case law in the federal court system, *Moitie* did not overrule *Norman* and there are valid reasons for applying the analysis set forth in *Norman* to the facts in the instant case.

The *Brown* decision essentially stated that Sandy City had no ordinance in effect that would prohibit any property owner in Sandy City from leasing their

property short term. Every property owner utilizing his property for that purpose prior to the enactment of a valid ordinance prohibiting such use would be eligible for “grandfathering” under the non-conforming use ordinance. However, in the instant case, the Petitioners John and June Collins are foreclosed from benefiting from the holding in *Brown* because they did not appeal a District Court ruling that was overruled by *Brown*. This is manifestly unjust and unfair. In the concurring opinion in *Moitie*, supra, Justice Blackmun wrote:

“First, I, for one, would not close the door upon the possibility that there are cases in which the doctrine of res judicata must give way to what the Court of Appeals referred to as ‘overriding concerns of public policy and simple justice.’ Professor Moore has noted: ‘Just as res judicata is occasionally qualified by an overriding, competing principle of public policy, so occasionally it needs an equitable tempering.’” [citation omitted] 452 U.S. 394, 403.

Likewise, in the case of *Reed v. Allen*, cited in *Moitie*, Justice Cardozo wrote, in dissent, concerning the application of the doctrine of res judicata, “A system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity.” 286 U.S. 191, 209 (1932).

The instant case is a case where the doctrine of res judicata needs an equitable tempering. John and June Collins are essentially being penalized for pursuing their legal remedy. They cannot benefit from the holding in *Brown* but any other property owner who did not pursue a legal remedy prior to *Brown* can benefit. This is an unfair and unjust result, and it serves no valid, judicial purpose. Such a result simply perpetuates the trial court’s erroneous ruling in the 1996 case. Appellate courts of other jurisdictions have declined to apply res judicata as a bar in these circumstances.

In the case of *Cassidy v. Board of Education*, 557 A.2d 227 (Md. 1989), the Court of Appeals of Maryland considered the issue of whether a plaintiff could sue the Board of Education even though her prior suit was dismissed for failure to allege notice to the Board. An intervening appellate court decision had ruled that educational boards were not municipal organizations and thus were not subject to the notice provision in question. *Id.* at 233. The Maryland Court of Appeals noted that continuing to apply the notice statute in that case would compel Cassidy to meet a standard no other plaintiff needed to meet and would provide the Board with a windfall by way of a mistake which could still be corrected. *Id.* at 234. That Court, citing the *Restatement (Second)* §28(2), held that “where there has been an intervening change in the applicable legal context, an issue of law may be relitigated to avoid an inequitable administration of the laws.” *Id.* The Maryland Court of Appeals further stated that, “Our conclusion that issue preclusion does not apply here is consistent with the rule’s traditional purpose. The rule ‘is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time.’ . . .” [citation omitted] *Cassidy v. Board of Education*, 557 A. 2d 227, 234 (Md. 1989).

Other state courts have likewise held that *res judicata* and its related doctrines are flexible, not absolute, and should give way in extraordinary circumstances such as a change in law. See, e.g., *Snyder v. Newcomb Oil Co., Inc.*, 603 N.Y.S. 2d 1010 (A.D. 4 Dept. 1993); *Foley v. Roche*, 447 N.Y.S. 2d 528 (A.D. 2 Dept. 1982). This is consistent

with the general rule that statutes operate only prospectively, while judicial decisions operate retrospectively because they theoretically reflect interpretations of laws as they always should have been. *United States vs. Security Industrial Bank*, 459 U.S. 70, 79 (1982).

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.

CONCLUSION

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*, supra. The Utah Court of Appeals agreed that *Norman* correctly stated the law that a subsequent change in the controlling law generally relieves a party from the application of *res judicata*. The Court of Appeals also agreed that there had been a change in the law in this case. Applying issue preclusion in this case does nothing to further the traditional purpose of that rule. It would only serve to perpetuate an error and achieves an inequitable and unjust result in the context of this case.

This Court should apply the principles enunciated in *Norman v. Murray First Thrift & Loan Co.*, supra, reversing the decision of the Utah Court of Appeals based upon the intervening change in law brought about by *Brown, et. al. v. Sandy City Board of Adjustment*, supra. This would be consistent with the general rule that judicial decisions be applied retrospectively to reflect an interpretation of the law as it should have been.

Dated this _____ day of November, 2001.

Respectfully submitted,

Franklin L. Slaugh
Attorney for Petitioners-Appellants

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief of Appellant were mailed, first class postage prepaid, this _____ day of November, 2001 to the following:

Steven C. Osborn
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ADDENDUM

DEC 21 2000

Paulette Stagg
Clerk of the Court

This opinion is subject to revision before
publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

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John Collins and June Collins,)	AMENDED OPINION
)	(For Official Publication)
Petitioners and Appellants,)	
)	Case No. 991068-CA
v.)	
)	F I L E D
Sandy City Board of)	(December 21, 2000)
Adjustment; and Sandy City)	
Corporation, a municipal)	2000 UT App 371
corporation,)	
)	
Respondents and Appellees.)	

Third District, Salt Lake Department
The Honorable Timothy R. Hanson

Attorneys: Franklin L. Slauch, Sandy, for Appellants
Steven C. Osborn, Sandy, for Appellees

Before Judges Greenwood, Billings, and Davis.

BILLINGS, Judge:

¶1 John and June Collins (Collins) appeal from summary judgment in favor of the Sandy City Board of Adjustment (Board). We affirm.

BACKGROUND

¶2 The Collins own certain real properties located in R-1-8 residential zones in Sandy City.¹ The Collins claim they used the properties as short-term rentals (rentals of less than thirty days) until March 26, 1996 when Sandy City ordered them to cease such use. Sandy City claimed their use was in violation of a

1. The properties at issue on appeal include those located at 1875 East Alla Panna Way, 472 East 9400 South, and 9255 Maison Drive. The property located at 1456 East Longdale Drive was not part of the trial court's order and therefore is not properly before this court on appeal.

zoning ordinance which the City claimed prohibited short-term rentals.

¶3 The Collins appealed the cease and desist order to the Board. The Board upheld the City's interpretation of the ordinance. The Collins appealed the decision of the Board to the third district court, which affirmed the Board's decision.

¶4 The Collins did not appeal the district court's decision. Rather, they chose to await the outcome of Brown et al. v. Sandy City Board of Adjustment, 957 P.2d 207 (Utah Ct. App. 1998), which involved the same issue of whether the Sandy City Land Development Code prohibited short-term rentals in R-1-8 and R-1-10 residential zones as the Board and district court had concluded. See id. at 212. In Brown, this court held that "short-term leases of residential properties are not prohibited by the zoning ordinance," and thus invalidated the City's interpretation of the ordinance.² Id. In response to Brown, Sandy City placed a moratorium on all short-term rentals, effective March 27, 1998, see Sandy City, Utah, Ordinance No. 98-19, and thereafter, on September 1, 1998, amended the ordinance specifically prohibiting short-term leases. See Sandy City, Utah, Ordinance No. 98-35.

¶5 On October 27, 1998, the Collins filed an application with the Board seeking nonconforming use status on their properties. The Board denied the application because the Collins did not establish that they were using the properties as short-term rentals on March 27, 1998, the effective date of the moratorium.

¶6 The Collins appealed the Board's decision to the trial court. On cross motions for summary judgment, the trial court entered summary judgment for the Board on all properties. The trial court held that the Collins' claim was barred on the grounds of res judicata because the Collins failed to appeal the 1996 trial court decision. Additionally, the trial court found that the properties did not qualify for nonconforming use status because the Collins had failed to produce evidence to show that they were using their properties as short-term rentals on March 27, 1998, and that the Collins had failed to produce evidence to show that their use of the properties was in conformity with the applicable zoning ordinances. The Collins appeal.

2. It is undisputed that, had the Collins appealed, they would also have obtained this result.

STANDARD OF REVIEW

¶7 Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Utah R. Civ. P. 56(c). "We review a grant of summary judgment for correctness." Baczuk v. Salt Lake Reg'l Med. Ctr., 2000 UT App 225, ¶5, 8 P.3d 1037 (citation omitted).

ANALYSIS

¶8 The doctrine of res judicata comprises two different branches: claim preclusion and issue preclusion. See Madsen v. Borthick, 769 P.2d 245, 247 (Utah 1988). Issue preclusion is before us in this appeal. Issue preclusion, often referred to as collateral estoppel, prevents relitigation of issues already determined in a previous action. See id. at 250. Issue preclusion applies if four requirements are met:

First, the issue in both cases must be identical. Second, the judgment must be final with respect to that issue. Third, the issue must have been fully, fairly, and competently litigated in the first action. Fourth, the party who is precluded from litigating the issue must be either a party to the first action or a privy of a party.

Id. "If any one of these requirements is not satisfied, there can be no issue preclusion." Hill v. Seattle First Nat'l Bank, 827 P.2d 241, 245 (Utah 1992) (citations omitted).

¶9 The Collins concede that three of the four requirements of issue preclusion are met but argue that the issues in the 1996 case and this case are not identical. The Collins argue that in the 1996 action the issue was whether the current Sandy City ordinances prohibited leases of dwellings for terms of less than thirty days. In this action, they argue that the issue presented is whether they are entitled to a nonconforming use status because of their use prior to the 1998 ordinance.

¶10 The Board responds that the central issue in the 1996 action was whether short-term rentals were lawful. The Board asserts that the legality of short-term rentals is also central to the Collins' claim for nonconforming use status because to qualify for a nonconforming use the applicant must show that the use was legally established and continued before the enactment or effective date of the restrictive legislation. See Sandy City, Utah, Rev. Dev. Code § 15-24-2.

¶11 In support of its position, the Board cites Robertson v. Campbell, 674 P.2d 1226 (Utah 1983). In Robertson, the issue was whether a finding of undue influence in the execution of a will collaterally estopped relitigation of the issue of undue influence as to a trust. See id. at 1230-31. The defendant argued that collateral estoppel was not applicable because the issue tried and resolved in the first case, the validity of a will, was different than that in the second, the validity of a trust. See id. at 1230.

¶12 The court stated that "[w]hat is critical is whether the issue that was actually litigated in the first suit was essential to resolution of that suit and is the same factual issue as that raised in the second suit." Id. (citing Searle Bros. v. Searle, 588 P.2d 689, 691 (Utah 1978)). The court held that relitigation of the issue of undue influence was collaterally estopped because the validity or invalidity of the will was a legal conclusion based on the factual finding of undue influence. See id.

¶13 The court reasoned that:

"[I]t is not the identity of the thing sued for, or of the cause of action, which determines the conclusiveness of a former judgment upon a subsequent action, but merely the identity of the issue involved in the two suits. If an issue presented in a subsequent suit between the same parties or their privies is shown to have been determined in a former one, the question is res judicata [or collateral estoppel], although the actions are based on different grounds, or tried on different theories, or are instituted for different purposes and seek different relief."

Id. (quoting Pickeral v. Federal Land Bank, 15 S.E.2d 82, 85 (1941)) (alterations in original).

¶14 We conclude Robertson defeats the Collins' claim that because the actions are based on different legal grounds--legality of short-term rentals versus nonconforming use--they are not identical issues. Because the central issue in the 1996 action was the legality of the short-term rentals under the ordinance, and in this suit we must determine that the pre-1996 use was lawful in order to establish a valid nonconforming use, the same issue is involved.

¶15 The Collins next argue that, regardless of whether the issues in the 1996 suit and this suit are identical, because of

an intervening change in the law, they should not be barred under the principles of res judicata.

¶16 The Collins cite dicta from Norman v. Murray First Thrift & Loan Co., 596 P.2d 1028 (Utah 1979) for the proposition that in addition to the four requirements of issue preclusion, the court must further inquire as to "whether the controlling facts or legal principles have changed significantly since the prior judgment." Id. at 1032. This statement of dicta has never been cited in subsequent Utah case law. Nonetheless, we agree that it is the general rule that a subsequent change in the operative facts or the controlling law has generally relieved a party from the application of res judicata. See State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154, 162, 65 S. Ct. 573, 576 (1945); Community Hosp. v. Sullivan, 986 F.2d 357, 360 (10th Cir. 1993); Muchard v. Berenson, 307 F.2d 368, 369-70 (5th Cir. 1962); Wagner v. Baron, 64 So. 2d 267, 268 (Fla. 1953); Statler v. Catalano, 691 N.E.2d 384, 386-87 (Ill. Ct. App. 1997); Blevins v. Johnson, 344 S.W.2d 375, 377 (Ky. 1961); Farrow v. Brown, 873 S.W.2d 918, 920-21 (Mo. Ct. App. 1994); State v. J.P. Lamb Land Co., 401 N.W.2d 713, 718 (N.D. 1987); Marino v. State Farm Fire & Cas. Ins. Co., 787 S.W.2d 948, 950 (Tex. 1990).

¶17 In State Farm Mutual Automobile Insurance Co. v. Duel, 324 U.S. 154, 65 S. Ct. 573 (1945), the Supreme Court stated that "it is . . . the general rule that res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation." Id. at 162, 65 S. Ct. at 576.

¶18 An illustrative case is Statler v. Catalano, 691 N.E.2d 384 (Ill. Ct. App. 1997). Statler dealt with a dispute over the rights to the surface waters of a lake. See id. at 385. The court determined that, under the prevailing case law, the plaintiffs only had a right to use a portion of the lake rather than the whole. See id. Seven years later, the plaintiffs filed suit again seeking a declaration of their right to use the entire lake. See id. The defendant moved to dismiss under the doctrine of res judicata. See id. The trial court denied the motion, finding that a subsequent change in the case law rendered res judicata inapplicable. See id. at 385-86.

¶19 In affirming the trial court, the Illinois Court of Appeals reasoned that

[e]ven though the basic facts have not changed, it is generally accepted that [r]es judicata does not operate as an automatic bar where between the time of the first judgment and the second there has been an intervening

decision or a change in the law creating an altered situation.

Id. at 386-87 (citation omitted).

¶20 In the instant case, the interpretation of the ordinance the Board relied on, and which the district court held barred the Collins from using their properties as short-term rentals in the original 1996 action, was invalidated in Brown. Brown clearly held the ordinance in question did not bar short-term rentals. See Brown, 957 P.2d at 212. Thus the law has changed since the 1996 suit.

¶21 The Board responds claiming that res judicata is not defeated by a subsequent change in the law when a party elects to forgo an opportunity to appeal the first adverse judgment, and stands by while others with the same legal claim pursue appeals which result in the change in the law.

¶22 The Board relies on Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 101 S. Ct. 2424 (1981), a case strikingly similar to the one before us. In Moitie, seven civil class actions were brought against owners of various department stores alleging violation of federal antitrust law. See id. at 395, 101 S. Ct. at 2426. The district court dismissed all of the actions in their entirety concluding that the purchasers had not alleged an "injury" to their "business or property" within the meaning of the Clayton Act. See id. at 396, 101 S. Ct. at 2426. Plaintiffs in five of the suits appealed the judgment to the United States Court of Appeals for the Ninth Circuit while two of the plaintiffs did not, choosing instead to re-file their claims in state court. See id. at 395, 101 S. Ct. at 2427.

¶23 After removal of the state claims to federal court, the federal district court concluded that the claims were essentially the same as those decided in the original federal action and dismissed them under the doctrine of res judicata. See id. at 397, 101 S. Ct. at 2427. Subsequently, the United States Supreme Court in an unrelated case held that retail purchasers can suffer an "injury" to their "business or property" under the Clayton Act. See id. Based on this decision, the Ninth Circuit reversed and remanded the five class actions that had been appealed and were before the court. See id. When the two other cases came before the Ninth Circuit, the court again reversed, refusing to apply res judicata, reasoning that "non-appealing parties may benefit from a reversal when their position is closely interwoven with that of appealing parties." Id. at 398, 101 S. Ct. at 2427 (citation omitted). The Supreme Court reversed.

¶24 The Court reasoned that

an "erroneous conclusion" reached by the court in the first suit does not deprive the defendants in the second action "of their right to rely upon the plea of res judicata. . . . A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action]." We have observed that "[the] indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of res judicata to avert."

Id. at 398-99, 101 S. Ct. at 2448 (quoting Reed v. Allen, 286 U.S. 191, 201, 52 S. Ct. 532, 534 (1932)) (alterations in original). The Court also noted that the "respondents here made a calculated choice to forgo their appeals," id. at 400-01, 101 S. Ct. at 2429, and that

"[t]he predicament in which respondent finds himself is of his own making. . . . [We] cannot be expected, for his sole relief, to upset the general and well-established doctrine of res judicata, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation--a maxim which comports with common sense as well as public policy."

Id. at 401-02, 101 S. Ct. at 2429 (quoting Reed, 286 U.S. at 198-99, 52 S. Ct. at 533) (alterations in original). This language is similar to that used by the Court in Ackermann v. United States, 340 U.S. 193, 71 S. Ct. 209 (1950), which stated that "[p]etitioner made a considered choice not to appeal. . . [h]is choice was a risk, but calculated and deliberate and such as follows a free choice. Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong. . . . There must be an end to the litigation someday, and free, calculated, deliberate choices are not to be relieved from." Id. at 198, 71 S. Ct. at 211-12.

¶25 The case before us presents virtually the same factual situation as was presented in Moitie. The Collins deliberately

chose to forgo their appeal, instead choosing to rely on the outcome of the appeal of the same legal issue in Brown. The Collins now seek to be relieved from their "considered choice not to appeal," and to benefit from the change in the law which they could have obtained but which they chose not to pursue.³

¶26 This refusal to allow a non-appealing party to benefit from the normal change of law exception to collateral estoppel has also been recognized by our sister state courts. See Gail v. Western Convenience Stores, 434 N.W.2d 862, 863 (Iowa 1989) (stating "the res judicata consequences of a final, unappealed judgment on the merits are not altered by the fact that the judgment may have been wrong or rested on legal principles later overruled in another case"); Ellis v. Whittaker, 709 P.2d 991, 994 (Kan. Ct. App. 1985) (refusing to vacate judgment on basis of subsequent decision changing law because of failure to appeal judgment); Cleveland v. Ohio Dep't of Mental Health, 618 N.E.2d 244, 247-48 (Ohio Ct. App. 1992) (holding that failure to appeal judgment bars collateral attack even if judgment is based on erroneous view of law); see also Jachim v. Townsley, 619 N.E.2d 1317, 1319 (Ill. Ct. App. 1993); Whenery v. Whenery, 652 P.2d 1188, 1192 (N.M. 1982); In re Marriage of Vinson, 644 P.2d 635, 638 (Or. Ct. App. 1982).

¶27 Although Utah's courts have not specifically dealt with a Moitie res judicata situation, the Utah Supreme Court in Piacitelli v. Southern Utah State College, 636 P.2d 1063 (Utah 1981), cited Moitie for the proposition that a final order, "unless reversed on appeal, is res judicata and binding." Id. at

3. The Collins quote language from Arizona v. California, 460 U.S. 605, 103 S. Ct. 1382 (1983), in an attempt to bolster their argument that a subsequent change of law bars application of res judicata. Arizona v. California involved a dispute over water rights between several western states and Indian tribes. See id. One of the issues before the Court was whether to modify a prior adjudication and decree involving water rights within reservation boundaries. See id. at 615-16, 103 S. Ct. at 1389.

In Arizona, the Court stated that res judicata did not apply because there was a provision in the decree that allowed the Court to retain jurisdiction and modify, amend, or supplement the same where appropriate. See id. at 618, 103 S. Ct. at 1391. It was the propriety of doing the same that the Court was dealing with in Arizona, a wholly different set of circumstances than those before us. See id. The Court merely touched on the general rules of preclusion, noting that while they "are not strictly applicable, the principles upon which these rules are founded should inform our decision." Id. at 619, 103 S. Ct. at 1391.

1065 (citing Bradshaw v. Kershaw, 627 P.2d 528 (Utah 1981); Moitie, 452 U.S. 394, 101 S. Ct. 2424).

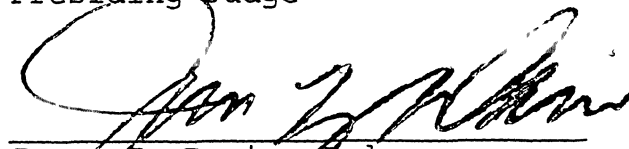
¶28 In Piacitelli, the plaintiff commenced action against Southern Utah State College (SUSC) alleging that its failure to renew his employment contract was a dismissal for cause and violated his rights under SUSC personnel policies. See id. at 1064. SUSC argued that the plaintiff's contract was on a year-to-year basis and thus expired on its own terms. See id. The trial court held that the plaintiff was not on a year-to-year contract and thus the procedures in the policy governed. See id. at 1065. The Utah Supreme Court noted that because the order of the trial court was not appealed it was binding upon the parties. See id. Thus, the court treated the plaintiff as an employee with permanent status who was entitled to the procedures set forth in the SUSC policy. See id.

¶29 We are persuaded by the reasoning of Moitie and similar cases. In a situation where one party in cases litigating the same legal issue chooses not to pursue an appeal, that party may not benefit from the change of law exception to res judicata where had that party chosen to appeal the change of law would have been obtained. Thus, we conclude the district court was correct in dismissing this case as it was barred under the doctrine of res judicata.⁴


Judith M. Billings, Judge

¶30 WE CONCUR:


Pamela T. Greenwood,
Presiding Judge


James Z. Davis, Judge

4. Because we agree with the trial court that the Collins' suit is barred on the grounds of res judicata we do not reach the other issues raised on appeal.