

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on* Friday *the* 25th *day of* May, 2012.

106 Union Dublin, LLC, et al., Appellants,

against Record No. 111330
Circuit Court No. CL10003017

Old Dominion Boat Club, Appellee.

Alexandria City Council, et al., Appellants,

against Record No. 111331
Circuit Court No. CL10003017

Old Dominion Boat Club, Appellee.

Upon appeals from a
judgment rendered by the Circuit
Court of the City of Alexandria.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is reversible error in the judgment of the circuit court.

At issue in this appeal is whether the circuit court erred in ruling that the 106 Union Ireland, LLC and 106 Union Dublin, LLC were barred by the doctrine of res judicata from constructing an outdoor dining patio in "Wales Alley." The circuit court ruled that res judicata applied based on a 1972 final decree from the Corporation Court of the City of Alexandria. Based on that conclusion, it found in favor of Old Dominion Boat Club ("ODBC") on count two of ODBC's complaint, decreeing that ODBC has a vested easement in a 30-foot right of way over Wales Alley, and count four, permanently enjoining the Union defendants and their

successors from erecting any obstruction in Wales Alley. The circuit court dismissed the other three counts of ODBC's complaint, including count five, which sought to enjoin the city from erecting any obstructions in Wales Alley or authorizing any change in the nature of the use of Wales Alley.

On appeal, the City of Alexandria, Alexandria City Council, and 106 Union defendants argue that the circuit court erred in its application of the law of res judicata. ODBC assigns cross-error to the circuit court's dismissal of count 5 of its complaint.

The appellants argue that pursuant to the test set forth in Davis v. Marshall Homes, 265 Va. 159, 576 S.E.2d 504 (2003), the remedy sought in the current case is different than the one sought in the prior case.* Additionally, they argue that neither the parties nor "the quality of the persons for or against whom the claim is made" are identical. See id. at 164, 576 S.E.2d at 506. According to the appellants, the current case involves the city and city council as parties and the city's authorization of construction by special use permit.

"[T]he bar of res judicata precludes relitigation of the same cause of action, or any part thereof, which could have been litigated between the same parties and their privies." Id. (internal quotation marks omitted) (emphasis added). The 1972 case between ODBC and the 106 Union defendants' predecessor, Dockside Sales, Inc., concerned a fence and wall that was built by Dockside

* The parties agree that Rule 1:6, as presently in effect, does not apply to this case because ODBC's prior action was concluded in 1972, "and the Rule applies only to judgments entered in civil actions commenced after July 1, 2006." Gunter v. Martin, 281 Va. 642, 645, 708 S.E.2d 875, 876 (2011).

and prevented ODBC from using the alley. By contrast, the current matter includes the city and city council as parties and involves the city's formal authorization by special use permit pursuant to the Alexandria City Charter.

Given the nature of the city's involvement in the current case, it is evident that the current dispute "could [not] have been litigated" in the 1972 case between ODBC and Dockside. The circuit court therefore erred in ruling that ODBC had established the identity of parties in both cases for the purposes of res judicata. "[T]he failure to establish any one element is fatal to the plea of res judicata." Gunter, 281 Va. at 646, 708 S.E.2d at 877. The Court therefore need not address the circuit court's analysis of the other elements required to prevail under the doctrine. See id.

Both appellants and appellees ask this Court, upon a finding of error in the circuit court's application of the doctrine of res judicata, to enter final judgment in their favor. Having reviewed the assignments of error and cross-error, and the remaining issues in this case, the Court declines to do so.

The judgment of the circuit court is reversed, and the case is remanded to the Circuit Court for the City of Alexandria for further proceedings consistent with this Order.

CHIEF JUSTICE KINSER, concurring in part and dissenting in part.

I agree that the circuit court erred in its application of the doctrine of res judicata pursuant to the test set forth in Davis v. Marshall Homes, Inc., 265 Va. 159, 576 S.E.2d 504 (2003). To bar a claim based on that doctrine, a litigant must establish: "identity

of the remedy sought; identity of the cause of action; identity of the parties; and identity of the quality of the persons for or against whom the claim is made." Id. at 164, 576 S.E.2d at 506. Here, the Old Dominion Boat Club did not establish the identity of the cause of action.

I disagree, however, with the majority's refusal to address one of the remaining issues. 106 Union Dublin, LLC and 106 Union Ireland, LLC assign error to the circuit court's failure to find that they were properly authorized to construct the dining deck in Wales Alley. The circuit court concluded that Wales Alley had been dedicated to public use because of its long-term usage by the public as an alley. The court further concluded that the City of Alexandria had accepted Wales Alley as a public alley. Those two findings are not challenged on appeal. Although the City of Alexandria Charter § 2.03(a) gives the City authority to alter streets and alleys whenever such have been open and used by the public for ten years, the circuit court did not decide whether the City has the authority to deprive Old Dominion Boat Club of its easement in the absence of a dedication of that easement to the public by Old Dominion Boat Club and the City's acceptance of that dedication. The court did not need to answer that question because it applied the doctrine of res judicata.

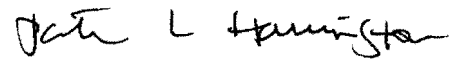
Having reversed the judgment of the circuit court applying the bar of res judicata, this Court, unlike the circuit court, needs to address that remaining legal issue, which has been extensively briefed and argued before this Court. Nevertheless, without explanation, the majority declines to do so. Remanding this case to the circuit court without deciding that legal issue is a waste

of judicial resources. Arlington Cnty. v. White, 259 Va. 708, 722, 528 S.E.2d 706, 714 (2000) (Hassell, J., dissenting) ("The majority's decision to ignore [an] issue may also result in a waste of judicial resources because, presumably, the circuit court and this Court will confront this issue again.").

For these reasons, I respectfully concur in part and dissent in part.

A Copy,

Teste:

A handwritten signature in cursive script, appearing to read "Dale L. Hamilton".

Clerk