

ORIGINAL

IN THE SUPREME COURT OF OHIO

ELHANISE, INC.,	:	Case No. 2014-1135
	:	
Appellant,	:	On Appeal from the
	:	Franklin County
vs.	:	Court of Appeals,
	:	Tenth Appellate District
OHIO LIQUOR CONTROL	:	
COMMISSION,	:	Court of Appeals Case
	:	No. 13AP-937
Appellee.	:	

MEMORANDUM OPPOSING JURISDICTION

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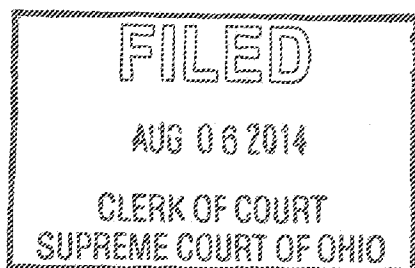


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I. INTRODUCTION

This appeal is not a case of public or great interest; nor is it a case that involves any constitutional issues. Instead, this administrative appeal involves a routine non-application of preclusion principles to the non-renewal of Elhanise's liquor permit.

Factually, it is uncontested that Elhanise disregarded the law pursuant to R.C. 4303.292(A)(1)(b) when it committed food stamp fraud spanning several months at its permit premise, which led to the owner's first degree misdemeanor criminal conviction and his manager's fifth degree felony conviction. Those convictions also directly called in to question both the owner's and his manager's privilege to operate a liquor establishment in the state of Ohio pursuant to R.C. 4303.292(A)(1)(a).

Liquor permits are tightly regulated in Ohio by several, distinct state agencies. Here, the common pleas and appellate courts decided that, consistent with Chapters 4301. and 4303. of the Ohio Revised Code, liquor permittees can be cited for violations of law that occurred on various dates from one agency and that the annual renewal of the associated liquor permits can also be subject to regulation and adverse consequences from another agency. There is nothing in preclusion law that prohibits this structure. Regardless, preclusion would not benefit appellants here because they lost in the initial administrative proceedings. This Court should not accept jurisdiction.

II. STATEMENT OF THE CASE AND OF THE FACTS

A. Rejected Renewal Hearing Process v. Administrative Citation Hearing Process

Appellants' plea for review and the reason that it should be rejected requires a brief background about liquor regulation. In Chapters 4301. and 4303., the Ohio General Assembly set up a system for regulating liquor permits issued in the state. Loss of a liquor permit may

result in several ways. In a rejected-renewal case (like this one) a local municipality objects to the annual renewal of a liquor license located in its jurisdiction pursuant to R.C. 4303.271(B). The Ohio Division of Liquor Control (“Division”) holds a hearing to determine whether the municipality’s objection should be sustained. The Division, not the Department of Public Safety-Investigative Unit (“OIU”) or the Ohio Liquor Control Commission (“Commission”), is given the sole statutory authority to decide whether or not to renew a permit based upon the parameters in R.C. 4303.292 that are applicable in this case. If the objection is sustained, the permit holder can then appeal to the Commission, an independent state agency, which holds a de-novo Chapter 119, evidentiary hearing. There the Commission can either sustain or reverse the Division’s decision to non-renew. Any appeal of the Commission’s Order proceeds through the state court system as an administrative appeal.

An administrative citation case is more akin to a civil complaint. A local police department can refer a violation to OIU—the agency that enforces Ohio’s liquor laws—or OIU can issue its own citation against an offending permit holder. A case is then brought before the Commission against the offending permit holder, whereby OIU must prove by a preponderance of the evidence that the offending permit holder did in fact commit the violations. In a citation hearing, the Commission is granted the sole authority pursuant to R.C. 4301.25, to the exclusion of the Division and OIU, to suspend or revoke a permit based upon the facts that occurred on the date in question.¹ Again, any appeal from the Commission’s decision as to whether a violation occurred on the alleged date would proceed through the state court system under R.C. 119.12.

¹ When the Commission, as the result of a citation case, finds that a violation of Ohio’s liquor laws occurred, it may suspend or revoke a permit. *See* R.C. 4301.25. However, R.C. 4301.252, which is not applicable in a non-renewal hearing, does permit the Commission in certain circumstances to allow the permit holder to avoid serving the suspension or revocation by paying a monetary fine.

This appeal stems from the non-renewal of Elhanise's liquor permit.

B. Statement of Facts

1. Non-renewal hearing

Elhanise filed its 2011-2012 and 2012-2013 renewal applications and the City of Cincinnati objected. The Division held two hearings and rejected Elhanise's renewal applications.

Elhanise appealed and the Commission held a Chapter 119. hearing on October 11, 2012. The evidence showed that the permit premise owner and his manager committed criminal acts—illegal use of food stamps— while working at the permit premise. (Comm. Hearing Tr. from Oct. 11 2012, pp.15-22). Both the owner and his manager were criminally convicted for the criminal acts that they committed inside of the store. (*Id.*). An OIU agent, who did not testify at the citation hearing, stated that he has previously participated in approximately 10 to 15 illegal food stamp investigations in his career. (Tr. 20-22). He indicated that the illegal use of food stamps at this location was among the worst that he has seen, although the owner's (Mr. Shteivi) other store, d.b.a. Sutton Pony Keg, was even worse. (Tr. 22-24). Further, the agent testified that the investigation at Elhanise also encompassed receiving stolen property. (Tr. 16). The agent confirmed that this was primarily a family run business and that on occasion people from Mr. Shteivi's other store, the Pony Keg, would be seen working at Elhanise. (Tr. 18). The Pony Keg was also cited for illegal use of food stamps and receiving stolen property, which resulted in a person being incarcerated. (Tr. 22).

The manager testified that he received stolen property and trafficked food stamps numerous times while working at Elhanise. (Tr. 27). The manager further acknowledged that he would purchase the informant's cards for cash by giving the informant a lesser amount than what

was on the card. (*Id.*). He admitted that his actions resulted in his felony conviction. (Tr. 29). Still, he remained employed as the manager until he quit a few months before the Commission hearing. (Tr. 30-31). Additionally, there were occasions when he committed crimes while the owner was present. (Tr. 32).

The owner admitted that he knew the law surrounding the proper use of food stamps. (Tr. 51). He acknowledged that he communicated this to his employees, including his manager. (*Id.*). He admitted that he committed a crime when he purchased the informant's food stamp cards while working at his store. (*Id.*). He also admitted that he was convicted for his actions. (Tr. 47).

A Sergeant of the Cincinnati Police Department also testified. (Tr. 7-9). As the neighborhood liaison where Elhanise is located, he works very closely with the community leaders to ensure that their concerns are addressed by the city. (Tr. 8). He testified that the local residents and city adamantly opposed the renewal of this permit. (Tr. 10).

2. Citation hearing

At the May 9, 2012, citation hearing, Elhanise was cited for violating Ohio Administrative Code 4301:1-1-52(B)(6) (illegal use of EBT/WIC) and (B)(7) (receiving stolen property). (R. 59-64). Elhanise stipulated to the facts contained in the agent's investigative reports; however an agent, who did not testify at the renewal hearing, summarized the reports concerning the criminal activity that occurred in the liquor permit premise from 2009-2010. (*Id.*). The owner's and his manager's criminal convictions were also proffered to further demonstrate that illegal criminal activity did occur on the dates in question. At the citation hearing, the agent did not provide testimony about the owner's other store, the Pony Keg, or the

numerous administrative violations that the Pony Keg accumulated. However, the Pony Keg's violation history was discussed during the non-renewal hearing. (R. 40-46).

C. Statement of Case

This appeal arises from a Commission Order affirming the Division's Order non-renewing Elhanise's liquor permit. The Franklin County Common Pleas Court affirmed the Commission's Order. The common pleas court held that the Commission's Order was supported by reliable, probative and substantial evidence as it pertained to R.C. 4303.292(A)(1)(b) (disregard of laws) and R.C. 4303.292(A)(1)(a) (conviction of manager or owner that relates to fitness to operate permit premise). The Tenth District Court of Appeals unanimously affirmed the common pleas court. Elhanise now requests further review.

III. THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION.

This case does not present any issue of public or great general interest, or any constitutional question. It does not concern a matter of statewide importance. It raises no novel or unsettled questions of law. It is instead an administrative appeal of the non-renewal of a single liquor permit after the criminal convictions of the permit holder's owner and manager. This case's applicability is confined to the parties. It will not have the drastic effects that Elhanise alleges.

Failure to comply with the prohibitions and restrictions governing a liquor permit may result in the loss of the privilege. The criminal acts that Elhanise's owner and his manager engaged in, resulting in their respective convictions, put Elhanise's liquor permit at risk. The Division, an independent state agency that deals with licensing, decided that Elhanise's liquor permit should not be renewed, per the objection from the City of Cincinnati. The Commission agreed.

Preclusion, particularly claim preclusion, does not apply. Statutorily, the citation and non-renewal hearings involve different issues requiring different legal determinations. Additionally, issue preclusion, to the extent it does apply, bars Elhanise from relitigating the facts that it stipulated to during the citation hearing—that over several months the owner and his manager committed criminal acts and administrative rule violations inside the permit premise. However, issue preclusion did not apply to the fact that the City of Cincinnati was opposed to the renewal of Elhanise's liquor permit. Nor would issue preclusion preclude the Commission from considering the fact that the owner's other store, the Pony Keg, also committed criminal and administrative rule violations for illegal food stamp trafficking inside that liquor permit premise as well. Chapters 4301. and 4303. set-up two separate hearing processes to address different legal concerns involving the permits that are regulated in this state. Elhanise wants this Court to ignore the statutory framework through the misapplication of preclusion principles. The courts below declined and so should this Court.

IV. CHAPTERS 4301. AND 4303. DO NOT BAR THE COMMISSION'S ACTION IN THIS CASE.

Appellees' Proposition of law:

A liquor permit may be non-renewed despite an earlier citation against the associated permittees, particularly when the non-renewal considered additional facts not considered in the citation proceedings.

Appellant seeks review in this Court on the theory that preclusion principles bar the non-renewal of the liquor permit. But no recognized theory of preclusion suggests that result. In *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St. 3d 59, 61; 2007-Ohio-1102, this Court defined claim and issue preclusion:

Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject

matter of a previous action. Where a claim could have been litigated in the previous suit, claim preclusion also bars subsequent actions on that matter.

Issue preclusion, on the other hand, serves to prevent relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous action between the same parties or their privies. Issue preclusion applies even if the causes of action differ.

(internal citations omitted). Neither theory prevents the Commission from not renewing Elhanise's liquor permit. Claim preclusion does not apply because the non-renewal process, as set-up by the legislature, involves different parties participating in a distinct hearing that is held for a different purpose than the citation process. By design, the two actions cannot involve the same legal theories. Issue preclusion does not apply as Elhanise attempts to use it because the non-renewal hearing contained additional facts that were important to the Commission's determination—that the illegal activity was not isolated to just Elhanise but the owner's other store, the Pony Keg. However, to the limited facts that issue preclusion could apply, preclusion would *harm* Elhanise because the fact that criminal activity occurred inside the permit premise was decided *against* Elhanise at the citation hearing (so it would need to be decided against it at the non-renewal hearing).

A. *Claim preclusion*

Fatal to Elhanise's assertion that claim preclusion applies is that Chapters 4301. and 4303. of the Revised Code does not provide the Commission the ability to join the citation and non-renewal hearings nor interplead the parties into one civil action. The Tenth District Court of Appeals in *Johns 3301 Toledo Café, Inc. v. Liquor Control Comm.*, Case No. 07AP-632; 2008-Ohio-394 (10th Dist.) ("*John's 3301 II*") addressed Elhanise's preclusion arguments in a very similar case involving a liquor permit. In 2004, OIU brought a citation case against a permit holder for a violation of Ohio Admin. Code 4301:1-1-52(B)(7) ("theft/receiving stolen property") and the Commission revoked the permit. *Johns 3301 II*, 2008-Ohio-394, at ¶¶ 2-5.

Thereafter, OIU brought another citation case pursuant to R.C. 4301.25(A) based upon the criminal conviction of the same person involved in the 2004 receiving stolen property case and the Commission again revoked the permit. *Id.* at ¶¶ 6-9. The *Johns 3301 II* court dismissed appellant's arguments of claim and issue preclusion and instead upheld the Commission's Order in the second citation hearing. *Id.* at ¶15. *Johns 3301 II* noted that "an existing final judgment or decree between the parties to the litigation is conclusive as to all claims which were *or might have been* litigated in a first lawsuit." *Id.* at ¶19 (emphasis in original). *John's 3301 II* held that since the two citations, both brought by OIU, could not be heard together, then claim preclusion did not apply. *Id.* at ¶¶35-36 (noting that unlike the Ohio Civil Rights Commission, nothing allows for the Commission to have joined the two cases at issue in *Johns 3301*).

Here, Elhanise's case involved the Division and OIU, two different statutorily created agencies that have different powers and roles in the liquor regulatory process. At the citation hearing, OIU's claim was whether Elhanise violated Ohio Admin. Code 4301:1-1-52(B)(6) (illegal use and trafficking of EBT/food stamps) and (B)(7) (receiving stolen property) when the owner and his manager illegally trafficked food stamp benefits inside Elhanise's liquor establishment on the specified dates. The Commission as the initial trier of fact decided that the events did occur and revoked the permit with the option to avoid revocation through payment of a financial forfeiture in the amount of \$12,000 pursuant to R.C. 4301.252.

Conversely, the renewal hearing required that the Division, independent of OIU or the Commission, first hold a hearing based upon the City of Cincinnati's objection. The Division upheld the city's objection and decided not to renew Elhanise's permit. On appeal, the Commission had to decide whether the Division's properly decided to reject the renewal of Elhanise's license was proper. Thus, the Commission was applying the facts established in a

new evidentiary hearing, including any duplicative facts that may have arisen during the citation hearing, to wholly separate legal questions. Thus, the Commission was statutorily required to make two separate determinations. If the same facts from the same agency can support two citations in different cases under different regulations, then partially overlapping facts certainly allow different proceedings for a citation and non-renewal stemming from different agencies. *Johns 3301 II*, 2008-Ohio-394, at ¶ 34 (even though the facts were identical, the “two administrative proceedings were not based on the same general cause of action” as different proof was required in each case.).

Illustrative of this point is Elhanise’s claim regarding the use of the convictions of Elhanise’s owner and his manager. At the citation hearing OIU did **not** need the owner’s and/or his manager’s convictions to prove the citation case; instead the convictions were proffered as a piece of evidence to supplement the agent’s investigative report that illegal food stamp trafficking occurred on the dates in question. However, at the non-renewal hearing the Division needed the owner’s and his manager’s convictions because the convictions were an essential element to prove R.C. 4303.292(A)(1)(a)—the statute requires the Division to show that the affected party was: (1) convicted of a crime and (2) that the conviction relates to the affected party’s fitness to operate a liquor establishment. Any facts that may have overlapped between the citation and non-renewal hearings were used in the context of different legal theories. The General Assembly created the two separate processes for a reason and there is no ability to hear these matters in one action. Claim preclusion simply does not apply to this case.

Elhanise cites an unreported, common pleas case *Gehad & Mandi, Inc. v Liquor Control Commission* that was decided prior to the Tenth District’s decision in *Johns 3301 II*. However, *Gehad* involved OIU bringing both actions against the permit holder, which is not the case here.

Whether OIU should or even could have heard the *Gehad & Mandi* cases together is not relevant here because, as explained, the concept of “joinder” or “interpleading” citation and renewal cases, as explained in *Johns 3301 II*, is not contemplated by rule or statute. *Gehad* does little to advance Elhanise’s argument in this case.

Claim preclusion does not apply.

B. Issue preclusion

Elhanise also asserts that issue preclusion should have barred the Commission from affirming the Division’s decision not to renew Elhanise’s liquor permit; however, Elhanise misapplies issue preclusion. A citation hearing litigates whether a permit holder, irrespective of past bad acts, violated a specific law on a specified date, it is finite in nature. A non-renewal hearing litigates whether a permit holder, based on their cumulative actions within the past year (or sometimes beyond that period), which can include citation issues, deserves to keep the privilege to sell alcohol. It is broader and more encompassing in nature.

To the extent that issue preclusion applies to some facts, it would simply bar relitigating the fact that Elhanise’s owner and manager committed crimes inside of the permit premise, a fact which Elhanise does not dispute. *Elhanise, Inc. v. Liquor Control Comm.*, 13AP-937, 2014-Ohio-2243, ¶ 16 (10th Dist.) (“Issue preclusion [. . .] does not support Elhanise’s argument.”). That hardly helps Elhanise. Instead, if issue preclusion applies, it would mean that the non-renewal hearing *must* have concluded that these crimes occurred. That would have been reason alone to deny the renewal. Nonetheless, despite Elhanise’s assertions, the facts in the rejected renewal were not identical to those in the citation hearing. First, additional witnesses, a Cincinnati police officer and local residents, who were not involved in the citation matter, testified at the non-renewal hearing. Second, the Commission was now cognizant about illegal

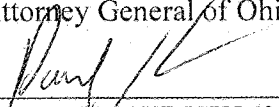
acts at the Elhanise's owner's other store, the Pony Keg, which the Commission did not learn about during the citation hearing. However, even if the facts were identical, issue preclusion would not apply as a bar to the Commission affirming the non-renewal of Elhanise's liquor permit. Therefore, true application of issue preclusion to the limited applicable facts, harms rather than helps Elhanise and here there were several new facts that remained undecided. Regardless, any facts that were previously decided in the citation hearing did not preclude the Commission from applying those facts to unresolved claims in the non-renewal hearing.

V. CONCLUSION

For the above stated reasons, this case does not raise a question of public or great general interest or a substantial constitutional question. This case is simply one of many that applies the facts of the case to the law. Therefore, the Commission respectfully requests this Court decline jurisdiction.

Respectfully submitted,

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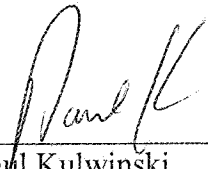
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Memorandum Opposing Jurisdiction of Appellee Ohio Liquor Control Commission has been served via U.S. Mail, this 6th day of August, 2014, upon:

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