ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2012-1774

MICHAEL A. LINGO, *et al.*,

Plaintiff-Appellants,

-v-

STATE OF OHIO, *et al.*,

Defendant-Appellees.

FILED
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CLERK OF COURT
SUPREME COURT OF OHIO

ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT OF APPEALS CASE NO. 97537

DEFENDANT-APPELLEE, RAYMOND J. WOHL, CLERK OF THE BEREA MUNICIPAL COURT'S OPPOSITION TO JURISDICTIONAL MEMORANDUM

W. Craig Bashein (0034591)
Bashein & Bashein Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216
Telephone: 216-771-3239
Facsimile: 216-771-5876
cbashein@basheinlaw.com

Paul W. Flowers (0046625)
Paul W. Flowers Co., L.P.A.
[COUNSEL OF RECORD]
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216
T: 216-344-9393 // F: 216-344-9395
pwf@pwfco.com

Attorneys for Plaintiff-Appellants, Michael A. Lingo, et al.

David M. Cuppage (0047104)
[COUNSEL OF RECORD]
Scott D. Simpkins (0066775)
Climaco, Wilcox, Peca,
Tarantino & Garofoli Co., L.P.A.
55 Public Square, Suite 1950
Cleveland, Ohio 44115
T: (216) 621-8484 // F: (216) 771-1632
dmcupp@climacolaw.com
sdsimp@climacolaw.com

James N. Walters, III (0023298)
City of Berea, Director of Law
11 Berea Commons
Berea, Ohio 44017
Telephone: (440) 826-5831
jwalters@cityofberea.org

Attorneys for Defendant-Appellee Raymond J. Wohl, Clerk of the Berea Municipal Court

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CLERK OF COURT
SUPREME COURT OF OHIO

Frank Gallucci, III (0072680)
Plevin & Gallucci
55 Public Square, Suite 2222
Cleveland, Ohio 44113
T: 216-861-0804 // F: 216-861-5322
fgallucci@pglawyer.com

Patrick Perotti (0005481)
Dworken & Bernstein Co., L.P.A.
60 South Park Place
Painesville, Ohio 44077
T: 440-525-2763 // F: 440-352-3469
pperotti@dworkenlaw.com

Attorneys for Plaintiff-Appellants
Michael A. Lingo, et al.

TABLE OF CONTENTS

THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST 1

STATEMENT OF THE CASE AND FACTS 3

A. Municipal Court Proceedings 3

B. The Berea Municipal Court's Jurisdiction 3

C. The Class Action 4

D. The Supreme Court Proceedings 5

E. The Class Action Certification Process 5

F. The Common Pleas Court's Opinion and Appeal to the Court of Appeals 6

ARGUMENT 7

Appellant's Proposition of Law I: A Void Order Is a Legal Nullity and May Be Disregarded by Any Court 7

Appellant's Proposition of Law II: Any Attempt by a Municipal Court to Impose Additional Court Costs Beyond that which is Authorized by Statute is Void and Not Merely Voidable. 7

A. Summary of Argument 7

B. The Common Pleas Court Lacks Subject Matter Jurisdiction to Review the Municipal Court's Orders. 8

C. The Municipal Court Had Subject Matter Jurisdiction Over Appellant Glick's Traffic Violations. 9

D. The Municipal Court Retains Jurisdiction to Vacate a Void Sentence. 10

E. There Is Nothing Novel or Revolutionary About the Lingo Decision; Court Costs Are Not Punishment, But Are More Akin to a Civil Judgment 12

F. Absent a Direct Appeal, the Assessment of Court Costs Are Waived and the Issue Is Subject to the Doctrine of Res Judicata. 13

CONCLUSION 14

CERTIFICATE OF SERVICE 15

THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Because the decision of the Eighth District Court of Appeals is well grounded in law and fact, this Court should decline jurisdiction to hear this appeal. Plaintiffs-Appellants, Michael A. Lingo, Gregory B. Williams, and William C. Glick ("Appellants"), provide no compelling reason for this Court to expend further judicial resources to review this overly protracted, procedurally convoluted and time consuming purported class action. The Court of Appeals decision applies well-established legal principles and creates no conflict or any new rules of law. To the contrary, if the Common Pleas Court's decision were allowed to stand, a new revolutionary rule of law would be created in which common pleas courts are conferred jurisdiction to collaterally attack and overturn decisions of municipal courts.

In this case, the Cuyahoga County Court of Common Pleas granted class certification in favor of the Appellants and actually overturned an order of the Berea Municipal Court in a traffic case. The Eighth District Court of Appeal's decision, in reversing and remanding the decision of the Common Pleas Court, is grounded on well-established principles of subject matter jurisdiction, *res judicata*, and mootness. First, and foremost, the controlling principle of law resolved in the present case concerns the lack of subject matter jurisdiction of a common pleas court to review the assessment of court costs contained within a judgment of conviction and sentence of a municipal court. Not a single court from any jurisdiction in Ohio has found that a common pleas court has subject matter jurisdiction to review a judgment of a statutory municipal court.

This principle holds true regardless of whether the Municipal Court's order assessing costs is void, voidable, or sustainable. The Common Pleas Court does not have any authority to collaterally attack and review a Municipal Court's order, whether void, voidable, final and

appealable or interlocutory. As a result, the Common Pleas Court is manifestly without jurisdiction over this purported class action.

With regard to the subject matter jurisdiction of the common pleas court below, the Eighth District Court of Appeals properly held:

> **{¶22}** Just as the common pleas court lacks jurisdiction to review its own final orders, it lacks jurisdiction to review orders from municipal courts. Judicial power is granted to Ohio courts in Section 1, Article IV of the Ohio Constitution. Section 4(B) of Article IV of the Ohio Constitution grants the common pleas court "original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law." Hence, the common pleas court's jurisdiction to act as a reviewing court is limited to administrative appeals. In contrast, Section 3(B)(2) of Article IV authorizes appellate courts "to review final orders or judgments of the inferior courts in their district."
>
> **{¶23}** Additionally, R.C. 1901.30(A), which governs appeals from municipal courts, provides that "appeals from the municipal court may be taken * * * [t]o the court of appeals in accordance with the Rules of Appellate Procedure and any relevant sections of the Revised Code." The statute does not permit appeals from a municipal court to a common pleas court. Therefore, the common pleas court is without jurisdiction to review the Berea Municipal Court's imposition of court costs. (Emphasis supplied.)

After finding that the Common Pleas Court subject matter lacked jurisdiction to review the orders of the Municipal Court, the Eighth District Court of Appeals properly concluded:

> **{¶25}** It is undisputed that the class representatives paid the costs associated with their municipal court cases and declined to file a direct appeal or seek a stay of their sentences. Consequently, their current attempt to collaterally challenge those costs is barred by res judicata and their claims are moot. Without a live case or controversy, the court lacks subject matter jurisdiction over the case. *Morrison v. Steiner,* 32 Ohio St.2d 86, 290 N.E.2d 841 (1972), paragraph one of the syllabus. If a court acts without jurisdiction, then any proclamation by that court is void. *Patton v. Diemer,* 35 Ohio St.3d 68, 518 N.E.2d 941 (1988). Therefore, the trial court's judgment granting class certification is void, and the trial court should have dismissed the case as barred by res judicata and for lack of subject matter jurisdiction. (Emphasis supplied.)

As a judicial officer carrying out the orders of the Berea Municipal Court, Defendant-Appellee, Raymond J. Wohl, Clerk of Court of the Berea Municipal Court ("Appellee") was

properly dismissed from this purported class action. The Eighth District Court of Appeals committed no error, much less reversible error, in ordering that the case be dismissed as barred by principles of *res judicata,* mootness and for lack of subject matter jurisdiction. This Court should, therefore, decline jurisdiction to hear this case.

STATEMENT OF THE CASE AND FACTS

A. Municipal Court Proceedings

On August 22, 2004, Appellant William Glick ("Mr. Glick") was pulled over by the Middleburg Heights police for suspicion of driving under the influence of alcohol. Mr. Glick was charged with two violations, DUI and a lanes violation. On December 9, 2004, Mr. Glick appeared before the Berea Municipal Court on those charges and, with assistance of defense counsel, entered into a plea agreement wherein the DUI was reduced to a reckless operation charge to which he pled guilty in open court and the lanes violation was dismissed at his cost. Pursuant to the Municipal Court order, the Clerk of Court calculated the court costs and presented an itemized statement to Mr. Glick who, on May 15, 2005, voluntarily paid the court costs assessed to him for both the reckless operation charge and lanes violation charge. As a result of the plea agreement, Mr. Glick avoided a trial on the merits of both charges and the potential jail time, penalties and license suspensions which come with a DUI conviction.

B. The Berea Municipal Court's Jurisdiction

Appellee Wohl is the duly elected Clerk of Court for the Berea Municipal Court which has jurisdiction over the communities of Berea, Brook Park, Middleburg Heights, Olmsted Falls, Olmsted Township, Strongsville, the MetroParks, and the Ohio State Patrol. Basic court costs pursuant to Ohio R.C. §1901.26 are established on an annual basis pursuant to a Journal Entry and Court Order signed by the duly elected Berea Municipal Court Judge and the duly elected

Clerk of Court. Basic court costs are published by the Clerk on a poster board which is maintained in a conspicuous location within the filing area of the Clerk of Courts and is viewable by the public. Basic court costs are also published on the Berea Municipal Court's website.

C. The Class Action

Almost a year after Mr. Glick entered his plea agreement and voluntarily paid the duly-imposed fine and court costs, Appellants on June 8, 2005, filed a Class Action Complaint for Declaratory Judgment, Injunction and Other Equitable Relief against the State of Ohio. On September 13, 2006, Appellants amended their complaint by filing their First Amended Class Action Complaint for Declaratory Judgment, Injunction and Other Equitable Relief against the State of Ohio and new-party defendants, Department of Treasury and Raymond J. Wohl, Clerk of the Berea Municipal Court. In their Amended Complaint, Appellants sought a refund of what they alleged to be improperly assessed and collected court costs under R.C. §2743.70(A) and §2949.091(A) as well as other provisions of Ohio law.[1]

Appellee's answer was filed on November 8, 2006. Thereafter, cross motions for summary judgment were filed by all parties and extensive briefing followed. Appellee also filed his motion to dismiss for lack of subject matter jurisdiction which Appellants opposed.

---

[1]The Report and Recommendations of the Joint Committee to Study Court Costs and Filing Fees (July 2008), which was created by the 127th General Assembly, reported to the General Assembly, Governor and Supreme Court of Ohio that there were 94 statutes which provided for the assessment and collection of court costs in Ohio's "statutory courts" including Municipal Courts, County Courts and Mayors Courts. See Appendix A of the Study. The Study stated the obvious when it concluded that "[d]isbursements of costs under the Ohio Revised Code are complex and tax the time and resources of clerks." Study, page 5. Thus, Appellants' reference to "other provisions of Ohio law" hardly placed Appellee on notice of the claims attempted to be set forth in the Amended Complaint.

D. The Supreme Court Proceedings

Appellee also filed in this Court a complaint for a writ of prohibition which was denied in the case captioned *State ex rel. Raymond J. Wohl v. The Honorable Dick Ambrose,* Sup. Ct. 2008-0408. In deciding a prohibition case, this Court's review was "limited to whether jurisdiction is *patently and unambiguously lacking."* *State ex rel. Shimko v. McMonagle,* 92 Ohio St.3d 426, 431 (2001). "In absence of a patent and unambiguous lack of jurisdiction, a court having general subject matter jurisdiction can determine its own jurisdiction, and a party challenging that jurisdiction has an adequate remedy by appeal." *Dzina v. Celebrezze,* 108 Ohio St.3d 385, ¶12 (2006). "Prohibition will not issue as a substitute for appeal to review mere errors in judgment." *State ex rel. Nalls v. Russo,* 96 Ohio St.3d 410, ¶28 (2002). Thus, "[a]ppeal, not prohibition, is the remedy for the correction of errors or irregularities of a court having proper jurisdiction." *Smith v. Warren,* 89 Ohio St.3d 467, 468 (2000).

E. The Class Action Certification Process

Appellants filed numerous class action motions, supplements and amendments. Their initial Motion for Class Certification filed on August 25, 2005 was based on the allegations contained in Appellant's initial complaint. Appellant initially sought to certify a class defined as follows:

> All individuals who paid court costs on or after June 8, 1995 that were improperly calculated on the basis of the number of offenses charged in proceedings before any Ohio municipal court, county court, or mayor's court.

After Appellee was added as a new party defendant, on January 3, 2007, Appellee filed his Memorandum in Opposition to Motion for Class Certification. On February 20, 2007, Appellant filed his Supplement to Motion for Class Certification seeking to modify its proposed class to include:

> All individuals who paid court costs on or after June 8, 1995 to an Ohio municipal court, county court, or mayor's court in excess of the amount specially permitted by a valid state statute.

Apparently recognizing the weakness of his modified class definition, Appellant stated in his Supplement "[i]n the event that this Court finds the foregoing definition to be unacceptable, then [Appellant] proposed [sic] the following alternative class definition":

> All individuals who paid court costs on or after June 8, 1995 to an Ohio municipal court, county court, or mayor's court under any of the following circumstance:
>
> A. For costs assessed under R.C. 2743.70(A) or 2949.091(A) which were computed on a "per offense" instead of a "per case" basis in violation of Ohio Attorney General Opinion Nos. 91-022 and 91-039.
>
> B. Upon or in connection with any offense that did not result in a conviction, except where the individual affirmatively agreed to accept such charges as part of a plea agreement memorialized in a valid journal entry.
>
> C. For "special project costs" pursuant to R.C. 1901.26(B)(1) where the necessity of such charges for the efficient operation of the court has not been previously established and publicized through a valid court rule.
>
> D. For "special project costs" under R.C. 1901.26(B)(1) that were not imposed upon the filing of each criminal cause.

On April 11, 2007, Appellee filed his Opposition to Appellee's Supplement.

On August 9, 2007, Appellant filed a Second Supplement to Motion for Class Certification seeking to amend subsection A of the "alternative" definition to be as follows;

> A. For costs assessed under R.C. 2743.70(A), 2949.091(A), and/or 2947.23(A) which were computed on a "per offense" instead of "per case" basis.

On August 22, 2007, Appellee filed his Opposition to the Second Supplement.

F. The Common Pleas Court's Opinion and Appeal to the Court of Appeals

On November 1, 2011, over seven years after Mr. Glick was first pulled over for suspicion of driving under the influence, the Trial Court issued its Opinion granting summary judgment on some of Appellants' claims and further granting class certification to Appellants

adopting its own alternative class definitions. Appellee timely appealed raising numerous assignments of error. The Eighth District Court of Appeals properly reversed the decision of the Common Pleas Court with instructions to grant summary judgment to Appellee. Because the Court of Appeals' determination that the Common Pleas Court lacked subject matter jurisdiction was dispositive of the entire case, the class action certification was reversed and the Court of Appeals had no reason to further address the substantive issues before it. Subsequently, Appellants moved the Court of Appeals to reconsider its decision and for en banc review. Appellants also moved the Court of Appeals to certify a conflict. Those motions were overruled by the Court of Appeals with the last en banc motion denied on September 6, 2012.

The instant notice of appeal and memorandum in support of jurisdiction follows.

ARGUMENT

Appellant's Proposition of Law I: A Void Order Is a Legal Nullity and May Be Disregarded by Any Court.

Appellant's Proposition of Law II: Any Attempt by a Municipal Court to Impose Additional Court Costs Beyond that which is Authorized by Statute is Void and Not Merely Voidable.

A. Summary of Argument

Both propositions of law should be rejected. While a void order entered without subject matter jurisdiction is in fact a nullity, there is no authority that it can be collaterally attacked by any court. Rather, a void order can always be vacated by the issuing court and any denial of a motion to vacate can be appealed to the proper court of appeals. Because the Common Pleas Court lacked subject matter jurisdiction to hear and decide an appeal from an order of the Municipal Court, the Court of Appeals properly reversed the decision below and ordered the purported class action dismissed on remand. In the event the Municipal Court, having subject matter jurisdiction, imposed court costs beyond that which is authorized by statute, such

unauthorized court costs are voidable and subject to a direct appeal. Absent a direct appeal, those court costs are waived and the issue of court costs is subject to the doctrine of res judicata in any subsequent proceedings.

B. The Common Pleas Court Lacks Subject Matter Jurisdiction to Review the Municipal Court's Orders.

The Ohio Constitution vests the courts of common pleas with their jurisdiction. Section 4, Article IV, Ohio Constitution. Section 4, Article IV provides:

> The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

The Ohio General Assembly does not have the power to enlarge the jurisdiction of the courts of common pleas beyond the jurisdiction provided in Section 4, Article IV of the Ohio Constitution. *Schario v. State*, 105 Ohio St. 535 (1922). The language of Section 4(B) does not confer upon the General Assembly any power to provide Courts of Common Pleas with jurisdiction to decide appeals from statutory courts. See *Village of Monroeville v. Ward*, 27 Ohio St.2d 179, 181 (1971), *reversed on other grounds,* 409 U.S. 57; *State ex rel Bernges v. Court*, 23 Ohio App.2d 89, 90 (Ohio App. 1st Dist. 1970); *State ex rel Baker v. Hair*, 31 Ohio App.3d 141, 144 (Ohio App. 1st Dist. 1986); and *Citibank S. Dakota v. Woods*, 169 Ohio App.3d 269, 277 (Ohio App. 2nd Dist. 2006). Instead, The General Assembly has prescribed that appeals from municipal courts be heard by the court of appeals. R.C. §1901.30.

In *State v. Threatt* (2006), 108 Ohio St.3d 277, this Court held, at ¶3 of the syllabus: "A sentencing entry is a final appealable order as to costs." (emphasis added). Thus, the General Assembly has prescribed that an appeal from a sentencing entry is a final appealable order as to costs and only the court of appeals has jurisdiction to entertain an appeal from or review such entry. The court of common pleas does not have such jurisdiction and cannot act as an appellate

court for such review. In the present case, the Common Pleas Court simply did not have jurisdiction to collaterally attack or disregard the judgment of the Municipal Court.

C. The Municipal Court Had Subject Matter Jurisdiction Over Appellant Glick's Traffic Violations.

Subject matter jurisdiction refers to the court's power to hear and decide a case on the merits. *Morrison v. Steiner*, 32 Ohio St.2d 86 (1972), paragraph one of the syllabus. The term "jurisdiction" tends to be quite liberally applied, and as a result the term "subject-matter jurisdiction" can often be misconstrued. *Cheap Escape Co., Inc. v. Haddox, L.L.C.,* 120 Ohio St.3d 493, 2008-Ohio-6323 ¶ 5; *Pratts v. Hurley,* 102 Ohio St.3d 81, 2004-Ohio-1980, at ¶ 12. Subject-matter jurisdiction relates to the proper forum for an entire class of cases, not the particular facts of an individual case. *In re Ohio Bur. of Support,* 7th Dist. No. 00AP0742, citing *State v. Swiger*, 125 Ohio App.3d 456, 462 (1998).

Though the term "jurisdiction" is often used in reference to a court's subject-matter jurisdiction, it is also used in reference to a court's jurisdiction over a particular case. *Pratts,* 102 Ohio St.3d 81, 2004-Ohio-1980, at ¶ 12; *Fifth Third Bank, N.A. v. Maple Leaf Expansion, Inc.*, 188 Ohio App.3d 27 (Ohio App. 7 Dist. 2010). "There is a distinction between a court that lacks subject-matter jurisdiction over a case and a court that improperly exercises that subject-matter jurisdiction once conferred upon it." *Id* . at ¶ 10. The term "jurisdiction" is commonly used when a court makes an unauthorized ruling in a case that is otherwise within that court's subject-matter jurisdiction. *Id.* at ¶ 19-21. This latter use of "jurisdiction" does not relate to subject-matter jurisdiction and would not render a judgment void *ab initio*. *State ex rel. Beil v. Dota*, 168 Ohio St. 315, 321 (1958), quoting *Cline v. Whitaker*, 144 Wis. 439, 129 N.W. 400 (1911), at paragraph three of the syllabus.

The Municipal Court had subject matter jurisdiction over the underlying traffic citation. As a result, the Court of Appeals quite properly found that the allegations of this class action constitute an impermissible collateral attack alleging that the Municipal Court made an unauthorized ruling or otherwise acted "in excess" of the court's jurisdiction. The Court of Appeals properly found:

> **{¶18}** Appellees assert their claims are not barred by res judicata because their judgments of conviction were not final, appealable orders. They claim that Wohl exceeded his jurisdiction by imposing unlawful court costs and that, as a result, the judgments imposing court costs are void. **<u>However, it is well settled that when a judge or judicial officer acts "in excess" of the court's jurisdiction, as opposed to in the absence of all jurisdiction, the act, which is not authorized by law, is voidable, not void</u>**. *Wilson v. Neu,* 12 Ohio St.3d 102, 104, 465 N.E.2d 854 (1984), citing *Wade v. Bethesda Hosp.,* 337 F.Supp. 671 (S.D.Ohio 1971). Moreover, whether void or voidable, the remedy lies in a direct appeal, not a collateral attack on the judgment in a different court. *State ex rel Bell v. Pfeiffer,* 131 Ohio St.3d 114, 2012-Ohio-54, 961 N.E.2d 181, ¶ 20, citing *State ex rel. Hamilton Cty. Bd of Commrs. v. Hamilton Cty. Court of Common Pleas,* 126 Ohio St.3d 111, 2010-Ohio-2467, 931 N.E.2d 98, ¶ 36; *Keith v. Bobby, 117* Ohio St.3d 470, 2008-Ohio-1443, 884 N.E.2d 1067, ¶ 14; *In re J.J.,* 111 Ohio St.3d 205, 2006-Ohio-5484, 855 N.E.2d 851, ¶ 10-16. (Emphasis supplied.)

As stated above, an unauthorized ruling or one made in excess of jurisdiction does not render the judgment void *ab initio*.

D. The Municipal Court Retains Jurisdiction to Vacate a Void Sentence.

A trial court always retains jurisdiction to vacate a void sentence. *State v. Simpkins,* 117 Ohio St.3d 420, 2008-Ohio-1197, at ¶ 23 (2008). And, the court of appeals has jurisdiction over a decision granting or denying a motion to vacate an alleged void judgment of the trial court. Ohio Rev. Code §2502.03. In *Simpkins, supra*, the state moved for resentencing of the defendant before he was released from prison in order to impose statutorily mandated post-release controls. This Court discussed the general rule:

> {¶ 12} In general, a void judgment is one that has been imposed by a court that lacks subject-matter jurisdiction over the case or the authority to act. *State v.*

Payne, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 27. Unlike a void judgment, a voidable judgment is one rendered by a court that has both jurisdiction and authority to act, but the court's judgment is invalid, irregular, or erroneous. Id.

{¶ 13} Although we commonly hold that sentencing errors are not jurisdictional and do not necessarily render a judgment void, see *State ex rel.Massie v. Rogers* (1997), 77 Ohio St.3d 449, 450, 674 N.E.2d 1383; *Johnson v. Sacks* (1962), 173 Ohio St. 452, 454, 20 O.O.2d 76, 184 N.E.2d 96 ("The imposition of an erroneous sentence does not deprive the trial court of jurisdiction"), there are exceptions to that general rule. The circumstances in this case-a court's failure to impose a sentence as required by law-present one such exception. (Emphasis supplied.)

The *Simpkins* Court discussed further "exceptions to that general rule," then held, at ¶ 23:

{¶ 23} A trial court's jurisdiction over a criminal case is limited after it renders judgment, but it retains jurisdiction to correct a void sentence and is authorized to do so. *Cruzado,* 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, at ¶ 19; *Jordan,* 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, at ¶ 23. Indeed, it has an obligation to do so when its error is apparent. (Emphasis supplied.)

The distinction between sentencing errors and court costs, however, received attention by this Court in *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954 (2010). In *Joseph,* this Court considered whether a trial court's failure to inform an offender in open court of mandatory court costs rendered the offender's sentence void. This Court held that it did not, explaining that there were significant differences between postrelease control and court costs. Specifically, this Court found that a trial court has a statutory duty to impose postrelease control, while an order to require payment of court costs is discretionary. *Id.* at ¶ 14-18. Moreover, this Court noted that the civil nature of court costs distinguished it from the criminal punishment of postrelease control. *Id.* at ¶ 20-22.

Thus, as is evident from *Simpkins* and *Joseph,* the trial court retains jurisdiction to correct void sentences which are then reviewable on direct appeal by the court of appeals. There is no conflict between *Simpkins* and *Fischer,* as the Court of Appeals confirmed, at ¶ 18, that the trial court retains jurisdiction to vacate a void sentencing entry when it stated that "whether void or

voidable, the remedy lies in a direct appeal, not a collateral attack on the judgment in a different court." (Opinion, ¶18, emphasis supplied).

E. There Is Nothing Novel or Revolutionary About the Lingo Decision; Court Costs Are Not Punishment, But Are More Akin to a Civil Judgment.

The dispositive question resolved by the Court of Appeals is whether a common pleas court has subject matter jurisdiction to review the assessment of court costs contained within a judgment of conviction and sentence of a municipal court. Further to the point, the cases relied upon by Appellees all considered sentencing errors and not the assessment of court costs. See *Joseph, supra*. In this regard, it is well settled that although costs in criminal cases are assessed at sentencing and are included in the sentencing entry, costs are not punishment, but are more akin to a civil judgment for money. *State v. Threatt,* 108 Ohio St.3d 277, ¶ 15 (2006). As being more akin to a civil judgment for money, it becomes evident that Appellants' allegations that court costs were not properly assessed (which allegations were and are denied) addresses whether the municipal court's order exceeded statutory authority, but not the municipal court's subject matter jurisdiction.

The Court of Appeals clearly recognized the proposition that a municipal court's judgment might be voidable on direct appeal if an act with respect to court costs was taken in excess of jurisdiction. The failure to challenge a "voidable" judgment, such as a judgment of sentence and conviction, including the imposition of court costs, on direct appeal constitutes *res judicata.* See *State v. Threatt,* 108 Ohio St.3d 277 (2006); *State of Ohio v. Clevenger*, 114 Ohio St.3d 258 (2007); *Strongsville v. DeBolt,* 2009 Ohio 6650 (Ohio App.8th Dist. 2009).

Even if a municipal court's judgment was taken in absence of subject matter jurisdiction, and therefore void *ab initio*, the remedy is patently not a collateral attack in the common pleas court which lacks subject matter jurisdiction to review municipal court orders. As stated

previously, the remedy is through a motion to vacate in the trial court followed by a direct appeal of the decision granting or denying the motion to vacate. In fact, Appellants fail to cite a single case allowing for a collateral attack of a municipal court's judgment of conviction and sentence, including the assessment of court costs, in common pleas court.

Contrary to Appellants' contention, the decision below will not have "profound implications upon further proceedings in Cuyahoga County." Criminal defendants will still be able to set aside "void" sentences through the filing of a motion to vacate or a motion to correct a sentence and civil litigants will still be able to set aside void judgments through the filing of Civ. R. 60(b) motions to vacate or common law motions to vacate in the court that issued the allegedly "void" order. This case merely resolves the issue that Appellants, former criminal defendants and traffic offenders (now masquerading as civil litigants) cannot collaterally attack a municipal court's judgment of conviction and sentence, including the imposition of court costs, in common pleas court through the use of a purported class action.

F. Absent a Direct Appeal, the Assessment of Court Costs Are Waived and the Issue Is Subject to the Doctrine of Res Judicata.

In *State v. Threatt,* 108 Ohio St.3d 277 (2006), this Court held, at ¶3 of the syllabus: "A sentencing entry is a final appealable order as to costs" and that the failure to specify the amount of costs does not defeat the finality of the order as to costs. Because the sentencing entry constitutes a final appealable order, this Court held further "an indigent defendant must move a trial court to waive payment of costs at the time of sentencing. If the defendant makes such a motion, then the issue is preserved for appeal and will be reviewed under an abuse-of-discretion standard. *Otherwise, the issue is waived and costs are res judicata.*" *Id.* Failure to object at sentencing or to file a timely notice of appeal constitutes waiver and, according to this Court, the costs are *res judicata.*

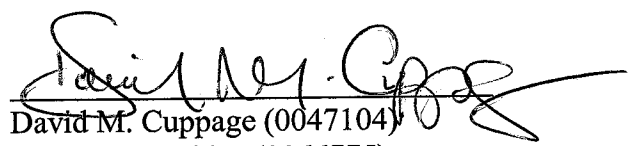
Moreover, *State of Ohio v. Clevenger*, 114 Ohio St.3d 258 (2007), this Court reaffirmed the principal that a defendant may move to waive court costs before a trial court and preserve the issue for appeal. *Clevenger*, at ¶5, quoting *Threatt*, *supra* at ¶23. The defendant in *Clevenger* did file a motion to suspend payment of costs and attached an affidavit attesting to his financial status. *Clevenger*, at ¶2. However, this was not done either at the time of original sentencing or at the subsequent hearing on a probation violation. *Id.*, at ¶6. This Court concluded "The costs assessed against him, therefore, are res judicata." *Id.*, at ¶6 (emphasis added).

The Municipal Court's order assessing court costs are not properly challenged in the Common Pleas Court, which lacks subject matter jurisdiction, and the failure to challenge the assessment of court costs through the appeal process constitutes *res judicata* and prevents this class action collateral attack.

CONCLUSION

Based on the foregoing, Appellants' memorandum in support of jurisdiction should be denied. The Court of Appeals decision applies well-established legal principles and creates no conflict or any new rules of law.

Respectfully submitted,



David M. Cuppage (0047104)
Scott D. Simpkins (0066775)
55 Public Square, Suite 1950
Cleveland, Ohio 44113
T: (216) 621-8484 // F: (216) 771-1632

James N. Walters, III (0023298)
City of Berea, Director of Law
11 Berea Commons
Berea, Ohio 44017

Attorneys for Defendant Raymond J. Wohl, Clerk of Court of the Berea Municipal Court

Of Counsel:
Climaco, Wilcox, Peca, Tarantino
& Garofoli Co., L.P.A.

CERTIFICATE OF SERVICE

A copy of the foregoing Defendant-Appellee, Raymond J. Wohl, Clerk of the Berea Municipal Court's Opposition to Jurisdictional Memorandum has been served via regular U.S. mail, this 15th day of November 2012, upon the following parties:

W. Craig Bashein, Esq.
Bashein & Bashein Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216

Attorneys for Plaintiff-Appellants

Paul W. Flowers, Esq.
Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216

Attorneys for Plaintiff-Appellants

Frank Gallucci, III, Esq.
Plevin & Gallucci
55 Public Square, Suite 2222
Cleveland, Ohio 44113

Attorneys for Plaintiff-Appellants

Patrick Perotti, Esq.
Dworken & Bernstein Co., L.P.A.
60 South Park Place
Painesville, Ohio 44077

Attorneys for Plaintiff-Appellants

Holly J. Hunt, Esq.
Frank M. Strigari, Esq.
Assistant Attorney General
Constitutional Offices Section
30 East Broad Street, 16th floor
Columbus, Ohio 43215-3428

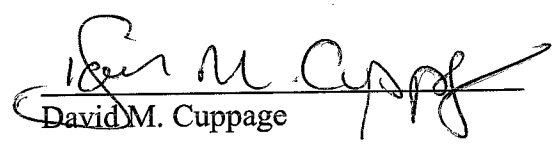
Attorneys for Defendant-Appellee State of Ohio

Pearl M. Chin, Esq.
Damian W. Sikora, Esq.
Assistant Attorney General
Constitutional Offices Section
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428

Attorneys for Defendant-Appellee State of Ohio

Colleen M. O'Neil, Esq.
Calfee, Halter & Griswold, LLP
The Calfee Bldg.
1405 East Sixth Street
Cleveland, Ohio 44114
Attorney for Amicus Curiae Lindsay P. Jones, Former Clerk of the South Euclid Municipal Court, the Clerk of Bryan Municipal Court and Betty Marihugh, Clerk of the Napoleon Municipal Court

Ronald A. Mingus, Esq.
Reminger Co., L.P.A.
101 Prospect Avenue, West
1400 Midland Building
Cleveland, Ohio 44115
Attorney for Amicus Curiae Thomas E. Day, Jr., Clerk of Courts Bedford Municipal Court, Victoria Dailey, Clerk of Courts, Chardon Municipal Court and Lisa Mastrangelo, Clerk of Courts, Willoughby Municipal Court



David M. Cuppage