

IN THE SUPREME COURT OF OHIO

CASE NO. 2012-1744

MICHAEL LINGO, et al.
Plaintiff-Appellants

-vs-

STATE OF OHIO, et al.
Defendant-Appellees.

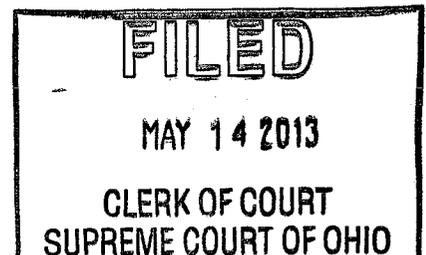
ON APPEAL FROM THE EIGHTH DISTRICT
COURT OF APPEALS CASE NO. 97537

MERIT BRIEF OF AMICUS CURIAE THOMAS E. DAY JR., CLERK
OF THE BEDFORD MUNICIPAL COURT, VICTORIA DAILEY, CLERK OF THE
CHARDON MUNICIPAL COURT, AND LISA MASTRANGELO, CLERK OF THE
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I. INTRODUCTION

A. This Court's Ruling Will Impact The Amicus Curiae Because Of Substantially Similar Pending Litigation.

The Clerks for the Bedford, Willoughby, and Chardon Municipal Courts (collectively the "Amicus Clerks") and more than 100 statutorily created courts throughout the State of Ohio are directly impacted by this litigation. The lawyers for Plaintiff-Appellants have initiated substantially similar litigation against the Amicus Clerks and 10 other municipal court clerks in *Gregory B. Williams, et al. v. Deborah F. Comery, Clerk of Courts, et al.*, Cuyahoga County Court of Common Pleas Case No. 768540, pending on the docket of the Honorable John J. Russo (the "Amicus Clerk Litigation"). Just as in the case *sub judice*, the Plaintiffs in the Amicus Clerk Litigation seek to certify a class of defendants that would include all municipal, county, and mayor's court clerks throughout the state who have allegedly overcharged court costs. If the defendant class were certified, it could be comprised of over 100 statutorily created courts, including the Amicus Clerks.

The crux of both this case and the Amicus Clerk Litigation is Plaintiff-Appellants' claim that they and others were overcharged court costs in various respects, including costs imposed upon offenses that had not resulted in convictions and costs calculated on a "per offense" instead of "per case" basis. (Amicus Clerk Complaint ¶27). Upon information and belief, none of the named Plaintiffs ever appealed their criminal convictions and sentences, including court costs, and the 30 day deadline for appealing has long since passed. Plaintiffs now attempt to bring a class action lawsuit challenging these court costs after the time for appealing has long since expired.

On March 22, 2012, the Amicus Clerk Litigation was stayed *sua sponte* pending the outcome of this case upon the following Order:

THIS MATTER IS STAYED PENDING THE OUTCOME OF THE APPEAL OF CASE NO. 564761 WHICH IS CURRENTLY BEFORE THE EIGHTH DISTRICT COURT OF APPEALS (CA-97537). **THE DECISION OF THE APPELLATE COURT(S) WILL BE DISPOSITIVE OF THE ISSUES INVOLVED IN THE PRESENT MATTER.** AS DUPLICITIOUS LITIGATION OF THE ISSUES DOES NOT SERVE JUDICIAL ECONOMY, THIS MATTER IS STAYED PENDING THE FINAL OUTCOME OF THE PREVIOUS CASE AND WILL ONLY BE RETURNED TO THIS COURT'S ACTIVE DOCKET UPON MOTION OF THE PARTIES. NOTICE ISSUED (EMPHASIS ADDED).¹

The legal issues in the Amicus Clerk Litigation that are also present in this case include, *inter alia*, immunity, subject matter jurisdiction, *res judicata*, statute of limitations, and various class action issues. All of Plaintiff-Appellants' claims are barred by the doctrine of *res judicata*; and Court of Common Pleas does not have subject matter jurisdiction to hear a class action appeal of municipal court criminal sentences. Further, the Amicus Clerks and other defendant municipal clerks of courts have immunity from liability pursuant to R.C. 2744.02. Lastly, the claim for court costs dating back ten years is clearly inappropriate because a two year statute of limitations applies to political subdivision pursuant to R.C. 2744.04.

B. The Plaintiff-Appellants and The Plaintiffs In The Amicus Clerk Litigation Are Seeking To Pass on the Costs of Their Criminal Convictions to Future Litigants.

Plaintiff-Appellants are seeking an order requiring the Berea Clerk of Courts to pay huge damages to the plaintiff class which can only be financed by higher court costs assessed on future criminal, traffic and civil litigants who utilize the court system.

¹ Given Judge Russo's stay order, the filing of an amicus brief is the only way for the Amicus Clerks to set forth their position on the issues that impact their case.

The Ohio legislature has given municipal courts the power to impose court costs to finance their operations. See, *City of Middleburg Heights v. Quinones*, 120 Ohio St. 3d 534, 2008-Ohio-6811, 900 N.E. 2d 1005. The expenses of court operations can be significant, including the need to pay for building operations; computers; furniture and fixtures; wages and salaries of judges, bailiffs, clerks, magistrates, and staff attorneys; and a myriad of other expenses associated with the operation of a political subdivision. Municipal courts have a mandatory obligation to impose court costs on those convicted of crimes, and the trial court cannot waive court costs when a defendant is convicted or pleads guilty unless the defendant is indigent. *City of Cleveland v. Tighe* (April 10, 2003) Eighth District Nos. 81767 and 81795, 2003-Ohio-1845.

The determination of court costs is a complex undertaking. The Report and Recommendations of the Joint Committee to Study Court Costs and Filing Fees (July 2008), created by the 127th General Assembly, has reported that there were 94 statutes pertaining to court costs in Ohio's statutory courts. A portion of the court costs collected by municipal clerks are remitted to state government; portions of the court costs remain with the municipal court to fund its operations; some court costs are paid to the county; and still other court costs stay with the municipal court for "special projects" as permitted under R.C. 1901.26(B). Further complicating calculations, some court costs are calculated "per case" while other costs are assessed "per charge". Plaintiff-Appellants hope to create a new cause of action which will permit class action litigation whenever a court clerk does not calculate court costs exactly as required by these numerous, and at times complex and ambiguous statutes.

Plaintiff-Appellants and the Plaintiffs in the Amicus Clerk Litigation argue that the municipal courts should have charged other offenders more so they could be

charged less. Prior to this Court's 2008 decision in *Middleburg Hts. v. Quinones*, *supra*, some municipal courts calculated court costs on a "per offense" basis, while other courts assessed costs on a "per case" basis. The effect of a policy of charging court costs "per offense" is that offenders who have multiple criminal charges pay more in court costs than do single-offense defendants. The rationale being that defendants with multiple charges utilize more of the court's time and resources than do single offense defendants. Conversely, when court costs are assessed once per case, every offender – no matter how many criminal charges convicted of – pays the same amount in court costs. *Quinones* clarified the confusion as how court costs were to be charged by ruling that court costs should be assessed once per case based on this Court's interpretation of R.C. 2747.23 and R.C. 1901.26. However, *Quinones* recognized that municipal court costs could still be charged "per offense" for court special projects under R.C. 1901.26(B).

Before *Quinones* was decided, the Berea Municipal Court, and many other Ohio Municipal Courts, made a policy decision to charge court costs "per offense" as opposed to "per case". This resulted in some criminal defendants (such as DUI defendants with multiple charges) paying more in court costs, with single charge offenders (such as those receiving only a speeding ticket) paying less. Seeking to profit from the *Quinones* decision, Plaintiff-Appellants and the Plaintiffs in the Amicus Clerk Litigation are seeking to force every municipal court that charged court costs "per offense" to return the funds collected over the past ten years. Presumably, if this Court had decided in *Quinones* that municipal courts should charge court costs "per charge" and not "per case" a class action lawsuit would have been filed against all Ohio municipal court clerks

who were charging court costs “per case” while sparing those such as the Berea Clerk who were charging costs “per charge”.

There is no mechanism in place for municipal courts to recoup additional costs from municipal court litigants who may have been “undercharged” court costs over the years. Those defendants - - rightfully so - - are protected from a re-opening of their criminal matters by *res judicata* and Double Jeopardy. Similarly, a class action lawsuit cannot be used to re-open hundreds of thousands of municipal court criminal and traffic cases that were decided years ago.

C. The Eighth District’s Ruling Does Not Negatively Impact Indigent Persons Convicted of Crimes

The Merit Brief of Amicus Curiae, Ohio Public Defender (“ODF”), argues that unless this Court permits this class action litigation to proceed, there will be a disproportionately negative impact on Ohio indigent criminal defendants. The ODF is mistaken.

While the assessment of court costs for those convicted of crimes is mandatory, trial courts have the power to waive court costs for those who are found to be indigent. R.C. 2949.14; R.C. 2949.15; R.C. 2949.092; *State v. Threatt*, 108 Ohio St. 3d 277, 2006-Ohio-905, 843 N.E. 2d 164 (2006); *City of Cleveland v. Tighe*, 2003 Ohio 1845 (8th District). Accordingly, indigent defendants who have had their court costs waived are not a part of the class that is seeking recovery in this suit, or in the Amicus Clerk Litigation.

However, if the Plaintiff-Appellants had their way - - and this Court would permit them to maintain class action litigation on behalf of hundreds of thousands of criminal defendants who paid court costs in numerous municipal courts throughout the State of

Ohio -- the court costs on future criminal defendants will need to be raised to pay any ordered refunds.

The existing system - - which permits courts to waive court costs for indigent defendants - - is more than adequate to protect the rights of indigent criminal defendants. Re-opening of court costs cases involving non-indigent defendants does not further the interests of the indigent.

II. LAW AND ARGUMENT

A. Introduction

The Amicus Clerks fully agree with the arguments set forth by Appellee, Raymond Wohl. The decision of the Eighth District Court of Appeals is entirely consistent with controlling Ohio Supreme Court precedent. Plaintiff-Appellants ignore well-established principals of subject matter jurisdiction, finality of judgments and the integrity of the appellate process. These principals are the bedrock of certainty, stability, and efficiency within our legal system. Plaintiffs-Appellants, should not be permitted to force the re-opening of hundreds of thousands of criminal and traffic violations up to 10 years after those convictions were finalized. This Court has previously stated, on multiple occasions, that "equitable principals" do not justify re-litigation of matters previously decided. This Court should affirm this long-standing principal.

Plaintiff-Appellants have twisted and distorted the well-reasoned decision issued by the Eighth District Court of Appeals in an effort to create a controversy where none should exist. The Eighth District did not create any novel new principal of law. Rather, the Eighth District Court of Appeals correctly determined that the claims of Plaintiffs-Appellants are barred by *res judicata* and a lack of subject matter jurisdiction. In

addition, although not addressed by the Eighth District, all of the claims of Plaintiffs-Appellants are barred by judicial and quasi-judicial immunity under R.C. 2744.

B. Response to Proposition of Law I – the Contention of Plaintiff-Appellants that the Eighth District Adopted a Revolutionary New Rule of Law Concerning Void Judgments

The Eighth District properly affirmed well-established principles of law that appellate remedies are available for the appeal of both void and voidable judgments.

Plaintiff-Appellants have twisted and distorted the following sentence in the Eighth District's opinion in an effort to create a controversy where none should exist:

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, citing *State ex rel Hamilton County Board of Commissioners v. Hamilton County Court of Common Pleas*, 126 Ohio St. 3d 111, 2010-Ohio-2467, 931 N.E.2d 98; *Keith v. Bobby*, 117 Ohio St. 3d 470, 2008-Ohio-1443, 884 N.E.2d 1067; *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, 885 N.E.2d 851.

This Court, in the above-referenced cases cited by the Eighth District Court of Appeals, held that voidable judgments may be directly appealed. However, void judgments - - where the issuing court had no subject matter jurisdiction - - can be attacked through a writ of prohibition. In addition to a writ of prohibition, correctly pointed out by Clerk Wohl in his Merit Brief, a municipal court retains jurisdiction to vacate a void or voidable sentence. *State v. Simpkins*, 117 Ohio St. 3d 420, 2008-Ohio-1197, 884 N.E. 2d 568 (2008). A court of appeals has jurisdiction over a municipal court decision granting or denying a motion to vacate an allegedly void judgment. R.C. 2502.03.

Whether the judgment is voidable (subject to a direct appeal) or void (subject to a writ of prohibition or a motion to vacate followed by an appeal), the remedy is an action

in the court of appeals, NOT a class action collateral attack in the court of common pleas. The Eighth District Court of Appeals thus affirmed long-standing principles of law established by this Court.

It is the Plaintiff-Appellants who seek a revolutionary new mechanism in which they can re-open and re-litigate, en masse, hundreds of thousands of municipal criminal convictions dating back ten years. The Eighth District Court of Appeals correctly cited to this Court's decisions in *State ex rel Bell*, *State ex rel. Hamilton County Bd. of Commrs*, *Keith v. Bobby*, and *In re J.J.*, *supra* to point out that Ohio law provides for appellate options for both voidable judgments and void judgments.

Should this court find any ambiguity with the Eighth District's opinion concerning void and voidable judgments, it may clarify the procedure for appealing voidable and void judgments in its opinion. Regardless, whether a judgment is void or voidable, there is no support or basis for creating a new cause of action: a class action to re-open hundreds of thousands of traffic citations and other municipal court criminal matters that were decided years ago.

C. **Response to Proposition of Law No. II – the Contention that the Imposition of Court Costs by the Berea Municipal Court is Void.**

The Eighth District Court of Appeals correctly determined that the criminal court costs sentencing order was voidable, and not void, and that the Common Pleas Court thus lacked subject matter jurisdiction to re-hear and re-open the criminal cases:

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. 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. *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).

No common pleas court possesses "subject matter jurisdiction" to order a municipal court to change its cost assessment policies. Rather, if any municipal court defendant has been overcharged court costs in violation of the standards imposed by the General Assembly, they have a remedy: a direct appeal. Because Plaintiff-Appellants, and the class of hundreds of thousands of criminal and traffic offenders who have had cases in Ohio municipal courts over the past ten years, did not appeal their criminal convictions, including the assessment of court costs, their convictions are now *res judicata*, and a common pleas court does not have subject matter jurisdiction to re-open those convictions.

Res judicata "bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 1995-Ohio-331, 653 N.E. 2d 226 (1995). "A final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction ... is a complete bar to any subsequent action on the same claim or cause of action between the parties, or those in privity with them." *Norwood v. McDonald*, 142 Ohio St. 229, 52 N.E. 2d 67 (1943). "Equitable principles" do not justify re-litigation of matters previously decided:

Instead, by providing parties with an incentive to resolve conclusively an entire controversy involving the same core of facts, such refusal establishes certainty in legal relations and individual rights, accords stability to judgments, and promotes the efficient use of limited judicial or quasi-judicial time and resources. The instability that would follow the establishment of a precedent for disregarding the doctrine of *res judicata* for "equitable" reasons would be greater than the benefit that might result from relieving some cases of individual hardship.

Grava, 73 Ohio St. 3d at 383-384.

Closely intertwined with *res judicata* is the principle of subject matter jurisdiction, which refers to the Court's power to hear and decide a case on the merits. *Morrison v. Steiner* (1972), 32 Ohio St.2d 86, paragraph one of the syllabus. The issue in this case is whether a court of common pleas has subject matter jurisdiction to re-open municipal court matters which are barred by *res judicata*. Clearly, the answer is "No".

A judicial officer does not lose subject matter jurisdiction simply because he or she acted beyond his sentencing authority or in excess of jurisdiction. See, e.g., *Borkowski v. Abood*, 117 Ohio St.3d 347, 2008-Ohio-857, 884 N.E. 2d 7, ¶1 of syllabus; *Wilson v. Neu*, 12 Ohio St.3d 102 (1984), ¶1 of syllabus. The Berea Municipal Court has subject matter jurisdiction over the violation of any ordinance of any municipal corporation within its territory and the violation of any misdemeanor within its territory. R.C. 1901.20(A)(1). The assessment of court costs is inherently intertwined with municipal court criminal prosecutions. In *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393 (2004), this Court held, among other things, that R.C. 2947.23 requires a court to assess "costs of prosecution" against all convicted defendants.

In *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E. 2d 164, this Court held, at ¶3 of the syllabus: "**A sentencing entry is a final appealable order as to costs.**" (emphasis added). In *Threatt*, this Court was asked to examine the question of whether collection of costs is permitted against indigent defendants and, if so, what methods of collection are available. In answering the certified question, this Court held, at its syllabus:

(1) costs may be collected from indigent criminal defendants, (2) the state may use any method of collection that is available to collect a civil money judgment as well as the method provided in R.C. 5120.133, **and (3) the appeal time for costs begins to run on the date of the sentencing entry.**

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.**

Threatt at syllabus (emphasis added). As in *Threatt*, Plaintiff-Appellants could have appealed the imposition of court costs, but they chose not to do so. *Threatt* has established that failure to object at sentencing or to file a timely notice of appeal constitutes a waiver and, according to precedent, the costs are *res judicata*.

Moreover, *State of Ohio v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006, 871 N.E. 2d 589 (2007), directly addresses the issues in the instant matter and provides further support that Plaintiff-Appellants' class action must be dismissed pursuant to the doctrine of *res judicata*. The defendant in *Clevenger* filed 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).

Additionally Ohio courts have also recognized that challenges on costs imposed at sentencing should be raised on direct appeals or such issues are barred by the doctrine of *res judicata*. See e.g. *State v. Pasqualone* (1999), 140 Ohio App.3d 650, 657; *State v.*

Loyer (Ohio App. 5th Dist. 2008), 2008-Ohio-5570; *State v. Zuranski* (Ohio App. 8th Dist. 2005), 2005-Ohio-3015. Based on the above, it is clear that an appeal from a sentencing entry is a final appealable order as to costs and only the court of appeals for the county in which the judgment was rendered has the jurisdiction to entertain an appeal from or review of such entry. R.C. 1907.30. A court of common pleas does not have such jurisdiction and cannot act as an appellate court for such review in a separately filed original action.

Furthermore, in the Court of Appeals proceedings, Plaintiffs-Appellants did not even bother to address the long line of cases on *res judicata* and court costs, including *Strongsville v. DeBolt*, 2009 Ohio 6650 (Ohio App.8th Dist. 2009); *State v. Brown*, 2011-Ohio-1096 (Ohio App. 8th Dist. 2011); *State v. Walker*, 2011-Ohio-5270 (Ohio App. 8th Dist. 2011); *State v. McDowell*, 2007-Ohio-5486 (Ohio App. 3rd Dist. 2007); *State v. Ybarra*, 2005-Ohio-4913 (Ohio App. 3rd Dist. 2005); *State ex rel Pless v. McMonagle*, 139 Ohio App.3d 503, 505-506 (Ohio App. 8th Dist. 2000); *State v. Hornacky*, 2011-Ohio-5821 (Ohio App. 8th Dist. 2011); *State v. Zuranski*, 2005-Ohio-3015 (Ohio App. 8th Dist. 2005); and *McCarthy v. City of Cleveland*, United States District Court, Northern District of Ohio, Case No. 1:11-CV-1122. Incredibly, Plaintiffs-Appellants continue to ignore this established authority, as no attempt was made to distinguish, or even cite these cases in their Merit Brief.

Plaintiff-Appellants try to side-step this jurisdictional defect by arguing that any municipal court order entered on costs without legislative authorization exceeds the statutory court's subject matter jurisdiction and is void *ab initio*. This position is misplaced. Ohio Courts recognize two different and distinct layers of subject matter jurisdiction applicable to cases. *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980,

806 N.E. 2nd 992 (2004). The first layer of subject matter jurisdiction is a court's power over a type of case. *Id.* This type of jurisdiction is determined as a matter of law and once conferred, it remains. *Id.* A lack of subject matter jurisdiction under this layer renders a trial court's judgment void *ab initio*. *Id.* The second layer of subject matter jurisdiction relates when a court improperly exercises its subject matter jurisdiction once conferred upon it. Here, any judgments resulting from the improper exercise of jurisdiction are voidable, not void, and properly challenged on direct appeal. *Id.* at 85.

In *Pratts v. Hurley, supra*, a defendant charged with a death penalty offense filed a petition for writ of habeas corpus after a court accepted his guilty plea without first convening a three judge panel as required under R.C. 2945.06. The defendant argued that the court's failure to convene a three-judge panel deprived the court of subject matter jurisdiction in his capital case, thereby rendering his sentencing entry void *ab initio*. *Id.* This Court rejected the defendant's arguments, holding:

Although R.C. 2945.06 mandates the use of a three-judge panel when a defendant is charged with a death-penalty offense and waives the right to a jury, the failure to convene such a panel does not divest a court of subject-matter jurisdiction so that a judgment rendered by a single judge is void *ab initio*. **Instead, it constitutes an error in the court's exercise of jurisdiction over a particular case, for which there is an adequate remedy at law by way of direct appeal.** 102 Ohio St.3d at 86 (emphasis added).

Pratts v. Hurley is directly on point with the facts in the case *sub judice*. The municipal court clerks named in both cases filed by counsel for Plaintiff-Appellants had the jurisdiction to preside over Plaintiff-Appellants' criminal offenses. As explained in *Pratts v. Hurley*, once subject matter jurisdiction is conferred, it remains. Thus, even if this Court assumes, for sake of argument only, that each of the allegations asserted against the municipal courts are true, these allegations describe nothing more than the

improper exercise of a court's subject matter jurisdiction and under *Pratts v. Hurley*, such decisions are voidable, not void, and properly challenged on direct appeal. *Id.* at 85.

This Court has stressed in two recent decisions the importance of following the appropriate procedures when seeking to obtain higher review of an issue. In *Nickelson v. Kanab*, 131 Ohio St. 3d 199, 2012-Ohio-579, 963 N.E. 2d 154 (2012), this Court held that a court of appeals appropriately dismissed a prisoner's writ of habeas corpus which was seeking to compel his release from prison. This Court found that *res judicata* barred the prisoner from using habeas corpus to obtain appellate review of his claim. Similarly, in *State of Ohio v. Carlisle*, 131 Ohio St. 3d 127, 2011-Ohio-6553, 961 N.E. 2d 671 (2011), this Court held that once a criminal sentence became final, the criminal defendant's means to obtain review of that criminal sentence is to file an appeal to the court of appeals, rather than a motion with the trial court to modify the sentence. This Court ruled that proper procedure needed to be followed and the trial court no longer had jurisdiction over the issue.

Plaintiff-Appellants in this case, like those in *Nickelson and Carlisle*, attempt to carve out a new cause of action to provide them a second bite at the proverbial apple -- their right to appeal their criminal sentences -- that they waived. Plaintiff-Appellants' attempts to do so in this case are improper because the General Assembly has prescribed that appeals from municipal courts be heard by the Court of Appeals. R.C. 1901.30. The Court of Common Pleas does not have such jurisdiction and cannot act as an appellate court for such review. See *State ex rel Bernges v. Court*, 23 Ohio App.2d 89, 90 (Ohio App. 1st Dist. 1970) (Common pleas court "has no jurisdiction to entertain an appeal from an order or judgment of a mayor's court."); *State ex rel Baker v. Hair*

(1986), 31 Ohio App.3d 141, 144 (Common pleas court did not have jurisdiction to issue a writ of mandamus to the municipal court compelling any duty).

The Eighth District correctly determined that issues related to the assessment of court costs was voidable, and not void, and that a common pleas court lacked subject matter jurisdiction to re-open criminal convictions that were never appealed. The Eighth District's decision is soundly based on this Court's decisions in *State v. Threatt*, *Pratts v. Hurley*, *Borkwoski v. Abood*, *State v. Clevenger*, and other decisions. The Eighth District's well-reasoned decision should be affirmed.

III. CROSS-PROPOSITIONS OF LAW TO PRESERVE THE JUDGMENT BELOW

The Amicus Clerks hereby adopt all of the cross-propositions of law articulated by Appellee Wohl in his Merit Brief. In addition, the Amicus Clerks set forth the following propositions of law for this Court's consideration.

A. Clerks Of Court Are Immune Pursuant to R.C. 2744.

The Eighth District of Appeals ruled in favor of the Berea Clerk of Courts on the grounds that all claims were barred by *res judicata* and a lack of subject matter jurisdiction. Accordingly, the Eighth District did not need to address the question of whether the claims were also barred by immunity under R.C. 2744. Immunity provides an additional defense to both the Berea Clerk and the Amicus Clerks and accordingly the Amicus Clerks respectfully request that this Court affirm on the basis of this additional defense.

The history and logic of the Political Subdivision Tort Liability Act, R.C. 2744, are well-known but bear repetition for the purpose of this brief. Prior to 1982, the doctrine of sovereign immunity was a judicially created doctrine under common law. See, *Agee v.*

Butler County, 72 Ohio App. 3d 481 (1991); *Haverlack v. Portage Homes, Inc.*, 2 Ohio St. 3d 26 (1982). In 1982, this Court abolished the doctrine of sovereign immunity as it had been judicially created. *Haverlack*, 2 Ohio St. 3d at 30. Acting in response to *Haverlack*, and the impact the loss of sovereign immunity would have upon the budgets of political subdivisions and their ability to service their communities, schools, and court systems, the legislature statutorily re-created municipal sovereign immunity with the adoption of R.C. 2744 in 1985. See *Agee*, 72 Ohio App. 3d 481. For a period of time between 1982 and 1985, sovereign immunity was virtually non-existent in Ohio.

The constitutionality of R.C. 2744 has been repeatedly upheld by this Court, which has noted that the enactment of R.C. 2744 flowed from the state's "valid interest in preserving the financial soundness of its political subdivisions." *Menefee v. Queens City Metro*, 49 Ohio St. 3d 27, 29 (1990). Determining whether a political subdivision such as a municipal clerk of courts² is immune from liability under R.C. 2744.02 involves a 3-tiered analysis. *Elston v. Howland Local Schools*, 113 Ohio St. 3d 314, 2007-Ohio-2070, 865 N.E. 2d 845 (2007).

A general grant of immunity is provided within the first tier, which states that "a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." R.C. 2744.02(A)(1).

The second tier in the immunity analysis focuses on the five exceptions to this immunity, which are listed in R.C. 2744.02(B). *Elston*, 113 Ohio St. 3d 314, 2007-Ohio-2070, 865 N.E. 2d 845, p. 11. If any of the

² Municipal courts meet the definition of a "political subdivision" under R.C. 2744.01(F) because they have been established as separate political entities and they govern an area smaller than the state. See, R.C. 1901.01; *State of Ohio/City of Akron v. Darulis* (June 23, 1999), 9th App. Dist. No. 19331. No Ohio decision has ever found that a municipal court or a municipal clerk of courts is not a political subdivision as defined under R.C. 2744.01(F).

exceptions to immunity are applicable, thereby exposing the political subdivision to liability, the third tier of the analysis assesses whether any of the defenses to immunity contained in R.C. 2744.03 apply to reinstate immunity. *Id.* at p. 12.

Lambert v. Clancy, 125 Ohio St. 3d 231, 2010-Ohio-1483, 927 N.E. 2d 585 (2010).

(Emphasis added).

Municipal clerks of court are entitled to immunity under R.C. 2744 for any “loss” claimed by Plaintiffs-Appellants because their actions are governmental functions which are immune from liability under R.C. 2744.01. None of the exceptions to immunity under R.C. 2744.02(B) apply. The functions of clerks of court are judicial and quasi-judicial in nature and as will be discussed, Ohio courts have repeatedly and consistently held that clerks of court have immunity for their official functions.

R.C. 2744.01, the definitional section of the act, classifies all functions of a political subdivision as being either “governmental” or “proprietary” in nature. Political subdivisions can be held liable for proprietary functions, however, immunity is provided for almost all governmental functions. Directly applicable to this case is R.C. 2744.01(C)(2), which states in pertinent part:

A “governmental function” includes, but is not limited to the following:

(f) judicial, quasi-judicial prosecutorial, legislative, and quasi-legislative functions;

(i) the enforcement or non performance of any law;

(x) a function that the general assembly mandates a political subdivision to perform.

Conversely, "proprietary functions" is defined under R.C. 2744.01(G)(1) as a function of a political subdivision as defined in R.C. 2744.01(G)(2) or which satisfies both of the following:

- (a) the function is not one described in Division (C)(1)(a) or (b) of this section and is not one specified in Division (C)(2) of this section;
- (b) the function is one that promotes or preserves the public peace, health, safety or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

Ohio courts have repeatedly and consistently held since the enactment of R.C. 2744 in 1985 that the activities of clerks of courts are governmental functions because their actions are judicial and quasi-judicial in nature. *Petho v. Cuyahoga County Court, Clerk's Office*, 2007-Ohio-5710 (Ohio App. 8th Dist. 2007); *Kinstle v. Jennison* (2008), 179 Ohio App. 3d 291, 2008-Ohio-5832 (2008); *Blankenship v. Enright*, 67 Ohio App. 3d 303 (1990); *Rieger v. Montgomery County Clerk of Courts*, 2009-Ohio-526 (Ohio App. 2nd Dist. 2009); *State of Ohio/City of Akron v. Darulis* (June 23, 1999), Ohio App. 9th Dist. Case No. CA 19331; *Harper v. New Philadelphia Municipal Court* (June 8, 1995), 10th App. Dist. Case No. 94APE12-1806; *Inghram v. City of Sheffield Lake* (March 7, 1996), 8th App. Dist. Case No. 69302. While the above-referenced cases were decided under R.C. 2744, other Ohio courts have also applied immunity to the actions of court clerks under common law judicial immunity; or the immunity afforded under 42 U.S.C. § 1983. See, *Baker v. Court of Common Pleas of Cuyahoga County*, 61 Ohio App. 3d 59 (1989)(finding that a court of common pleas and two deputy clerks had absolute judicial immunity); *Foster v. Walsh, Clerk, Akron Municipal Court*, 864 F. 2d 419 (6th Circuit 1988) (finding a municipal clerk to have absolutely immunity for suit under the

doctrine of absolute judicial immunity). See also, *Kelley v. Whiting*, 17 Ohio St. 3d 91, 471 N.E. 2d 1123 (1985), which found that a clerk of courts had absolute judicial immunity based on common law, even prior to the enactment of R.C. 2744. Other Ohio courts have held that the absolute judicial immunity under R.C. 2744.01 for judicial and quasi-judicial functions extends not only to clerks of courts, but to other court personnel such as municipal court judges and probation officers. See, *Borkowski v. Abood, supra*; *McCormick v. Honorable Judge Patrick Carrol*, 2004-Ohio-5969 (Ohio App. 8th Dist. 2004); *Planey v. Mahoning County Court of Common Pleas*, 154 Ohio Misc. 2d 1, 2009-Ohio-5684, 916 N.E. 2d 537 (2009).

It is also noteworthy that when Ohio municipal courts and court clerks have been sued in federal court, those decisions have uniformly held that actions against municipal court clerks are barred under federal law on the basis of judicial and quasi-judicial immunity. See, *Cochran v. Municipal Court of the City of Barberton*, 91 Fed. Appx. 365 (6th Circuit 2003); *Riser v. Schneider*, 37 Fed. Appx. 763 (6th Circuit 2002); *Mickey v. Phillips* (March 22, 1999), 6th Circuit Case No. 98-3568, 1999 U.S. App. LEXIS 5373; *Huffer v. Bogen* (October 24, 2011), United States District Court for the Seventh District of Ohio, Western Division Case No. 1:10-CV-312-HJW, 2011 U.S. Dist. LEXIS 122752; *Bey v. State of Ohio* (October 17, 2011), United States District Court for the Northern District of Ohio, Case No. 1:11 CV 1306, 2011 U.S. Dist. LEXIS 119867; *Murphy v. Koster* (Dec. 13, 2010), United States District Court for the Northern District of Ohio Case No. 5:10 CV 2095, 2010 U.S. Dist. LEXIS 131500; *Mason v. Powers* (July 30, 2010), United States District Court for the Northern District of Ohio Case No. 1:10 CV 884, 2010 U.S. Dist. LEXIS 77133; *Wise v. Steubenville Municipal Court* (Nov. 6, 2008), United States District Court for the Southern District of Ohio Case No. 2:08-CV-00577, 2008 U.S.

Dist. LEXIS 90181; *Jones v. Perrysburg Municipal Court* (August 10, 2007), United States District Court for the Northern District of Ohio Case No. 3:05 CV 7424, 2007 U.S. Dist. LEXIS 58584. These decisions illustrate that both Ohio and Federal courts have utilized multiple legal theories to bar litigants from bringing suit against municipal clerks under both federal and state law immunities.

Every Ohio court, and every Federal court applying Ohio law, has consistently determined that the actions of clerks of court are judicial and quasi-judicial in nature. Since the enactment of R.C. 2744 in 1985, there has never been an Ohio court that has determined that the functions of a clerk of courts are proprietary. Indeed, no reasonable argument can be made that the operation of a municipal clerk of courts is proprietary in nature because the operations of a court system is not “customarily engaged in by nongovernmental persons.” The functions of a municipal clerk of courts are uniquely and completely “governmental” involving civil and criminal justice activities that are not engaged in the private sector. In the proceedings before the Eighth District Court of Appeals, Plaintiffs-Appellants failed to cite any decision issued by any Ohio court since the enactment of R.C. 2744 in 1985 that has found that the actions of municipal and county clerks of court are not immune.

R.C. 2744.02(A)(1) “provides... a blanket immunity for a municipalities in the performance of governmental functions, subject to specifically delineated exceptions.” *Gould v. Britton* (January 30, 1990), Ohio App. 8th District Case No. 597, 91 citing *Rahn v. Whitehall* (1989), 62 Ohio App. 3d 62, 66. There are only five exceptions to immunity for political subdivisions under R.C. 2744.02(B). None of those exceptions to immunity apply here. Because none of the exceptions for political subdivision liability under R.C. 2744.02(B) apply in this case, the third tier of the analysis under R.C. 2744.03 - - which

provides additional defense to political subdivisions and their employees - - is not applicable. *Lambert v. Clancy*, 125 Ohio St. 3d 231.

In a case that is strikingly on point, this Court has ruled that a clerk of courts has absolute immunity as it relates to the manner in which court costs are determined. In *Fischer v. Burkhardt*, 66 Ohio St. 3d 189, 1993-Ohio-187, 610 N.E. 2d 999 (1993) this Court was presented with the issue of whether judicial immunity applied to a situation in which a mayor's court was not collecting court costs in the manner required by statute. The mayor's court had adopted a court cost schedule which was based on an erroneous interpretation of Ohio law. This Court held that all persons who were involved in the process of collecting or not collecting court costs (the mayor, the mayor's court judge and the court clerk) had absolute judicial immunity. Immunity was found even though this Court found that the mayor's court erroneously interpreted what costs needed to be collected. To the extent that the defendant court and defendant clerk of courts misinterpreted the pertinent Ohio Revised Code provisions governing court costs, this Court ruled that the defendants "cannot be held civilly liable because the court and its personnel" have the duty to interpret the statutes and establish court cost schedules for traffic offenses. *Fischer* recognized the doctrine of judicial immunity and ruled that no civil liability could be imposed for losses caused by the failure to collect court costs.

Just as a mayor's court and all of its personnel were found to be judicially immune in *Fischer* for not collecting court costs as required by statute, the same reasoning applies to Plaintiff-Appellants' claims here. Even assuming, *arguendo* that the Berea Clerk of Courts collected court costs from certain defendants in excess of what was allowed by statute, while under-charging other criminal defendants, the same doctrine of judicial immunity recognized in *Fischer* applies because the actions of a municipal

clerk of courts in calculating court costs are judicial and/or quasi judicial functions as defined under R.C. 2744.01. No exception to immunity under R.C. 2744.02(B) applies.

In the case *sub judice*, the Trial Court did not address the applicability of Ohio Revised Code Chapter 2744. Indeed, the Trial Court's decision does not give any consideration whatsoever to the issue of political subdivision immunity under R.C. 2744. Rather, the Trial Court erroneously concluded that immunity did not apply because "judicial immunity only protects a clerk of courts to the extent that the clerk is acting at the court's directive". To support this erroneous conclusion, the Trial Court relied upon the case of *Kelley v. Whiting*, 17 Ohio St. 3d 91 (1985), which was based on the law that existed prior to the enactment of R.C. 2744 in 1985. To the extent that the Trial Court relied upon a decision that was decided before the enactment of R.C. Chapter 2744, while ignoring the statute and this Court's decision in *Fischer v. Burkhardt*, *supra*, the Trial Court's ruling is erroneous. R.C. Chapter 2744 does not make any distinction between the actions of a clerk of courts that are done pursuant to the clerk's own powers or at the direction of a judge. Rather, R.C. 2744.01 makes it clear that judicial and quasi-judicial functions are governmental functions; and there is absolutely no provision in the statute which would suggest that the actions of a clerk of courts in determining court costs is a non-immune function.

Plaintiff-Appellants have argued previously, but not in their Merit Brief, that the Berea Clerk of Courts is not entitled to immunity because equitable relief, as opposed to the legal remedy of "damages", has been sought. See Eighth District *Answer Brief of Plaintiff-Appellees/Cross-Appellants, Michael A. Lingo, et al.* at 25. Indeed, this characterization of damages is critical because Plaintiff-Appellants have acknowledged that "No 'damages' are being sought in the case *subjudice*

precisely because immunity would be available on a number of levels.” Id. at 26 (emphasis added).

But, what Plaintiff-Appellants seek by way of “restitution” and “disgorgement” is not equitable in nature. An equitable remedy is defined as a “non-monetary remedy, such as injunction or specific performance, obtained when monetary damages cannot adequately redress the injury.” *Black’s Law Dictionary*, 7 Ed., West Group (1999). Plaintiff-Appellants characterize the damages sought as “restitution” or “disgorgement” to avoid immunity arguments. But what they really seek are money damages. Indeed, restitution damages are defined as “damages awarded to a plaintiff when the defendant has been unjustly enriched at the plaintiff’s expense.” *Black’s Law Dictionary*, 7 Ed., West Group (1999).

However, even if Plaintiff-Appellants’ suggestion that they are not really seeking “damages” was accurate, R.C. Chapter 2744 does not apply solely to “damages”. Rather, R.C. 2744.02(A)(1) specifically provides that it applies not only to damages, but more broadly to all types of “loss” claimed to have been “caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.” Plainly, the legislature did not intend for immunity to apply only to “damages” because the statute is broadly written to cover all types of “loss” arising out of the actions of political subdivisions.

Essentially, Plaintiffs-Appellants claim that municipal court clerks negligently, erroneously and/or otherwise incorrectly calculated the amount of court costs that were due and owing on their criminal matters. This Court held in *Fischer v. Burkhardt*, *supra* that municipal court clerks have immunity under R.C. Chapter 2744 for their activities

in connection with the collection of court costs. Accordingly, any argument that Plaintiff-Appellants might make that R.C. 2744 does not apply in this case has no merit.

The cases cited by Plaintiff-Appellants in the briefing in the Court of Appeals do not support an argument that R.C. 2744 judicial immunity does not apply. The case of *State of Ohio ex rel Dayton Law Library Association v. White*, 163 Ohio App. 3d 118, 2005-Ohio-4520 (2005) did not address the issue of municipal immunity under R.C. 2744. The issue in that case was whether Montgomery County could obtain a writ of prohibition against Kettering Municipal Court. The three requirements for obtaining a writ of prohibition include: (1) the respondent is about to exercise judicial or quasi judicial power; (2) the exercise of that power is unauthorized by law; and (3) denial of the writ will cause injury for which no other adequate remedy in the ordinary course of law exists. *Henry v. McMonagle*, 87 Ohio St. 3d 543, 544, 2000-Ohio-477; 721 N.E. 2d 1051 (2000). The court in *Dayton Law Library Association* was faced with the question of determining whether a municipal clerk was exercising “judicial or quasi judicial power” for purposes of a writ of prohibition, and not whether the actions of a municipal clerk constituted a governmental function under R.C. 2744. Judicial immunity was not addressed in the *Dayton Law Library Association* decision and accordingly the case is wholly inapplicable.

Moreover; the other decisions cited by Plaintiff-Appellants in the Court of Appeals Brief do not apply. The decisions in *Santos v. Ohio Bureau of Workers’ Compensation*, 101 Ohio St. 3d 74, 2004-Ohio-28, 801 N.E. 2d 441 (2004); *Flannigan v. Ohio Victims of Crime Fund* (March 25, 2004), Court of Claims No. 2003-08193-AD, 2004-Ohio-1842, and *Johnson v. Trumbull Correctional Institute* (March 10, 2005), Court of Claims No. 2004-08375-AD, 2005-Ohio-1241, involve claims against the State

of Ohio and thus have no applicability to the question of political subdivision liability under R.C. 2744. *Lycan v. City of Cleveland* (December 9, 2010), 8th District No. 94353, 2001-Ohio-6021, contains no discussion whatsoever as to the applicability of governmental immunity. *Blue Ribbon Remodeling Company v. Meistrich*, 97 Ohio Misc. 2d 8, 14; 709 N.E. 2d 1261 (1999), does not address the issue of statutory immunity under R.C. 2744. Finally, *Kraft Construction Company v. Cuyahoga County Board of Commissioners*, 128 Ohio App. 3d 33, 48, 713 N.E. 2d 1075 (1998), similarly does not address the issue of the immunity for governmental functions under R.C. 2744.

The calculation of court costs by a municipal court clerk is a “governmental function” as defined under R.C. 2744.01. Municipal court clerks are accordingly immune from liability for any “loss” under R.C. 2744.02 caused by the performance of these governmental functions. None of the five exceptions to immunity under R.C. 2744.02(B) apply. Accordingly, all claims against the Berea Clerk of Courts and all other municipal court clerks are barred on the grounds of immunity.

B. Claims That Accrued More Than Two Years Prior To Filing Of The Complaint Are Barred By The Applicable Statute of Limitations, R.C. 2744.04(A).

Even if a class action lawsuit was the proper procedure for appealing municipal criminal judgments, the vast majority of allegations asserted against the Berea Clerk and the Amicus Clerks are barred by the statute of limitations. The statute of limitations for suing a political subdivision is two years under R.C. 2744.04(A). *Gnezda v. City of N. Royalton*, Eighth District App. No. 83268, 2004-Ohio-1678, at *15; Specifically, 2744.04(A) provides:

(A) An action against a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, . . . shall be brought within two years after the cause of action

accrues, or within any applicable shorter period of time for bringing the action provided by the Revised Code.

The two-year statute of limitations under R.C. 2744.04(A) applies to both political subdivisions and their employees. *Gnezda*, at *15; *Villa v. Vill. of Elmore*, 6th Dist. No. L-05-1058, 2005-Ohio-6649, at *25; See R.C. 2744.04; *Read v. Fairview Park*, 146 Ohio App. 3d 15, 764 N.E. 2d 1079 (2001).

In this case, Plaintiffs-Appellants have argued that a longer statute of limitations should apply. Specifically, they assert the 10-year statute of limitations under R.C.2305.14 which applies to "other relief" not provided for under R.C. 2305.04-2305.31 applies. However, the longstanding rule of statutory construction provides that a special statutory provision prevails as an exception to a conflicting general statute. This rule is codified at R.C. 1.51, which provides that "[i]f a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail." See also, *Dominion Resources Servs, Inc. v. Division of Water City of Cleveland* (2008) 8th Dist. App. No. 90641, 2008 Ohio 4855 * P5 citing *Village Condominiums Owners Assn. v. Montgomery Cry. Bd. Of Revision*, 106 Ohio St.3d 223, 2005-Ohio-4631, 833 N.E. 2d 1230 (2005).

Under R.C. 2305.03, the limitations periods prescribed in R.C. 2305.04 to 2305.22 govern "unless a different limitation applies by statute." *Dominion Res. Servs.* 2008-Ohio-4855 *P6. In this case, a different limitation applies by statute, namely, R.C. 2744.04(A). Indeed, 2744.04(A) has been determined by our court of appeals to

be a "special" provision governing the statute of limitations in cases against political subdivisions and it prevails over any general statutes of limitations contained in R.C. Chapter 2305. Id. citing *Abdalla v. Olexia*, 113 Ohio App.3d 756, 682 N.E. 2d 18 (1996); *West 11th Street Partnership v. Cleveland*, Eighth District App. No. 77327, 2001-Ohio-4233; see also, *Gnezda*, at *15. Based upon the foregoing, even if Ohio did permit the re-opening of criminal convictions via class action litigation, the two year statute of limitations under R.C. 2744.04(A) would apply.

IV. CONCLUSION

Ohio Municipal Courts are charged by law with the obligation of funding their operations through the collection of court costs from the criminal, traffic and civil litigants who appear in their courts. Municipal court clerks are provided with immunity under R.C. 2744 for claims of "loss" which are caused in connection with the performance of governmental functions, such as the judicial and quasi-judicial functions of municipal court clerks. Moreover, Plaintiffs-Appellants are barred from proceeding with their claims in this lawsuit because they did not appeal their criminal convictions and/or the assessment of court costs and fines by the court clerks within thirty days. Accordingly, the claims are barred by the doctrine of *res judicata*. Moreover, a court of common pleas is not the proper jurisdiction to hear issues related to the assessment of court costs in Ohio municipal courts. Accordingly, this court lacks subject matter jurisdiction to hear these claims. For all of these reasons, all claims which have been asserted by Plaintiffs-Appellants were properly dismissed by the Eighth District Court of Appeals.

Respectfully submitted,

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