

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2012-1774

MICHAEL LINGO; GREGORY B. WILLIAMS; WILLIAM GLICK
Plaintiff-Appellants

-vs-

STATE OF OHIO; RAYMOND J. WOHL, CLERK OF THE BEREA
MUNICIPAL COURT
Defendant-Appellees.

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

REPLY BRIEF OF
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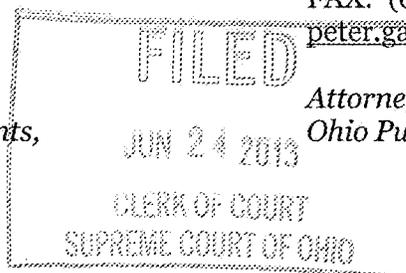
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REPLY

Most of the arguments that have been asserted in the Defendant-Appellee, Raymond J. Wohl, Clerk of the Berea Municipal Court's Merit Brief dated May 13, 2013 ("Defendant's Brief") were anticipated and addressed in the Merit Brief of Plaintiff-Appellants Michael A. Lingo, *et al.*, dated April 15, 2013 ("Plaintiffs' Brief"). In order to avoid needless repetition, those issues will not be revisited. A few final points must be made, however, at this juncture.

PROPOSITION OF LAW I: A VOID ORDER IS A LEGAL NULLITY AND MAY BE DISREGARDED BY ANY COURT

A. MANIPULATION OF THE EVIDENTIARY RECORD

While this Proposition of Law presents a straightforward issue of law, Defendant-Appellee, Clerk Raymond J. Wohl ("Clerk Wohl"), has persisted in playing fast-and-loose with the evidentiary record. During the course of roughly seven years of litigation, he was unable to produce a single sentencing entry or hearing transcript confirming that any class member had ever agreed to pay court costs beyond that established by law. He has nevertheless assured this Court that as part of his plea agreement, Plaintiff-Appellant, William Glick, "voluntarily paid" court costs on two counts, instead of just the one reckless operation charge that had concluded in a conviction. *Defendant's Brief*, p. 2. He appears to be relying upon a brief passage from Plaintiff's deposition, but all that the former traffic offender admitted was that he understood he had to pay "costs." *Deposition of Plaintiff William C. Glick taken January 12, 2007 ("Plaintiff Glick's Depo.")*, pp. 18-21. Plaintiff never conceded that he had been either aware of – or had agreed to – Clerk Wohl's legally impermissible practice of imposing them on charges that had not resulted in a conviction. *Id.* He actually did not understand why he was paying for a weaving/lanes violation count that had been dismissed. *Id.*, p.21.

Clerk Wohl has also attempted to confuse the issues of law with unsubstantiated assertions of fact. For instance, he has proclaimed without any citations to the record

that: "Basic court costs are published by the Clerk on a poster board which is maintained in a conspicuous location with the filing area of the Clerk of Courts and is viewable by the public." *Defendant's Brief*, p.3. Indeed, he insists that: "Basic court costs are also published on the Berea Municipal Court's website." *Id.* But Clerk Wohl never established below that any class member could have determined from either the poster or the website that once their misdemeanor/traffic case was concluded he would be imposing costs (1) upon charges that had been dismissed, (2) on a "per offense" instead of "per case" basis, and (3) for a "court processing fee" that was never authorized. Plaintiff Glick confirmed during his deposition that he received the itemization of the charges totaling \$910.00 (including the fine) only after the plea had been accepted and proceedings concluded, which was when he first learned that he would be paying costs on the weaving charge that had been dropped. *Plaintiff Glick's Depo.*, pp. 20-21.

Municipal court defendants routinely agree to pay costs as part of their plea agreements, and the obvious expectation is that they will only have to bear those costs authorized by law. As the Eighth District and other courts have recognized, additional charges can be imposed only if the municipality can demonstrate through the sentencing entry or perhaps the hearing transcript that the defendant knowingly agreed to accept costs that otherwise were not owed. *Cleveland Hts. v. Machlup*, 8th Dist. No. 93086, 2009-Ohio-6468, 2009 W.L. 4695440, ¶16-20; *State of Ohio v. Cochran*, 9th Dist. No. 19286, 1999 W.L. 241226 (April 14, 1999); *Willoughby v. Sapina*, 11th Dist. No. 2000-L-138, 2001-Ohio-8707, 2001 W.L. 1602651, *2 (December 14, 2001). No such proof has been cited in Defendant's Brief, because none exists. Plaintiff Glick and the class members only should have been assessed those costs allowed by statute.

B. THE EFFECT OF VOID ENTRIES

Once Clerk Wohl concedes that "a void order entered without subject matter

jurisdiction is in fact a nullity,” the fundamental flaw in the Eighth District’s decision is no longer debatable. *Defendant’s Brief*, p. 9. This Court has previously recognized that in such instances: “It is as though such proceedings had never occurred[.]” *Romito v. Maxwell*, 10 Ohio St. 2d 266, 267, 227 N.E. 2d 223, 224 (1967). The parties are returned to the position they would have held before the void ruling was issued. *State v. Thomas*, 8th Dist. No. 87201, 2006-Ohio-4750, 2006 W.L. 2627463, ¶9 (Sept. 14, 2006); *State v. Bridges*, 8th Dist. No., 94469, 2010-Ohio-6359, 2010 W.L. 5486840, ¶8 (Dec. 23, 2010).

These precedents confirm that there is no merit to Clerk Wohl’s concerns with the “usurpation of jurisdiction by one common pleas court in Cuyahoga County over the Berea Municipal Court[.]” *Defendant’s Brief*, p. 1. He has not even mentioned, let alone attempted to refute, the controlling authorities Plaintiffs have cited establishing that any judge in any court is entitled to set aside any order that is entered without valid subject matter jurisdiction. *Plaintiff’s Brief*, pp. 10-11. “When the record discloses a want of jurisdiction, the judgment is, of course, void everywhere, and for every purpose.” *Kingsborough v. Tousley*, 56 Ohio St. 450, 455, 47 N.E.2d 541 (1897); see also, *State ex rel. Mayfield Hts. v. Bartunek*, 12 Ohio App. 2d 141, 145, 231 N.E. 2d 326 (8th Dist. 1967); *City of East Cleveland v. East Cleveland Firefighters Loc. 500, I.A.F.F.*, 8th Dist. No. 61942, 1993 W.L. 87780, *3 (March 25, 1993); *Department of Tax. V. Boury, Inc.*, 7th Dist. No. 82-J-11, 1983 W.L. 6638, *2 (May 13, 1983). Consequently, a collateral challenge is always permissible. *State v. Fischer*, 128 Ohio St.3d 92, 93, 2010-Ohio-6238, 942 N.E.2d 332, 336, ¶1; *Thiessen v. Moore*, 105 Ohio St. 401, 415, 137 N.E. 906, 909 (1922); *State v. W.U. Tel. Co.*, 154 Ohio St. 511, 519-520, 97 N.E.2d 2, 7. It is simply astounding that Clerk Wohl can continue to mindlessly assert that “if a municipal court’s judgment was taken in absence of jurisdiction, it might be considered void, but the remedy is patently not a collateral attack in the common pleas court which lacks

subject matter jurisdiction to review municipal court orders.” *Defendant’s Brief*, p. 18.

One can only wonder what Clerk Wohl and the Eighth District think the term “nullity” actually means. In their unprecedented view, nullities somehow acquire *res judicata* effect. *Defendant’s Brief*, pp. 1 & 8-9. Clerk Wohl further insists that a costly and time-consuming “direct appeal” is the most suitable mechanism for challenging an entry of court costs, yet offers no response to Plaintiffs’ observation that void entries are not even appealable. *Plaintiffs’ Brief*, p.3, citing *State ex rel. Carnail v. McCormick*, 126 Ohio St. 3d 124, 131, 2010-Ohio-2671, 931 N.E. 2d 110, 117, ¶36 . If he and the appellate panel are indeed correct that collateral challenges are impermissible, then the nullity remains binding upon all the world unless and until the judge who issued it grants a motion to vacate.

Conveniently enough for Clerk Wohl, this twisted understanding of the term “nullity” means that he can continue to collect excessive court costs and only has to tender reimbursement in the unlikely instance that a defendant possesses the financial means and motivation to retain an attorney who can convince the Berea Municipal Court to vacate the void entry. The citizens of this state deserve substantially more from their local officials than that. This court should therefore uphold this first Proposition of Law and reestablish that void entries are not entitled to any force or effect anywhere.

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

Clerk Wohl has been unable to convince any judge in these proceedings that the imposition of excessive court costs is merely voidable, and for good reason. Unable to avoid implications of R.C. 2947.23(A)(1), he has been forced to concede that “costs in criminal cases are assessed at sentencing and are included in the sentencing entry[.]” *Defendant’s Brief*, p. 17. And the “subject of costs is one entirely of statutory allowance and control.” *State ex rel. Michaels v. Morse*, 165 Ohio St. 599, 607, 138 N.E.2d 660,

666 (1956); see also, *Cave v. Conrad*, 94 Ohio St.3d 299, 2002-Ohio-793, 762 N.E.2d 991. Any part of the sentence imposed without lawful authority is void, and not just voidable. *Cincinnati v. Howard*, 179 Ohio App. 3d 60, 62, 2008-Ohio-5502, 900 N.E.2d 689, 690-691, ¶4 (1st Dist. 2008); *State v. Roach*, 4th Dist. No. 11 CA 12, 2012-Ohio-1295, 2012 W.L. 1030463 (March 15, 2012).

Clerk Wohl's description of Court costs as "more akin to a civil judgment for money" is simply immaterial. *Defendant's Brief*, p. 17. This Court referenced that distinction in *State v. Joseph*, 125 Ohio St.3d 76, 79-80, 926 N.E.2d 278, 282, only in holding that a failure to address costs during a hearing did not void the life sentence that was being collaterally attacked. The trial court's error still had to be corrected upon a limited remand, which is essentially all that Plaintiffs' are seeking with their claim for equitable disgorgement. *Id.* Despite their civil nature, the rule in Ohio remains that only those municipal court costs that are authorized by statute may be included in the sentence. *Middleburg Hts. v. Quinones*, 120 Ohio St. 3d 534, 537, 2008-Ohio-6811, 900 N.E. 2d 1005, 1008 ¶9; *State v. Jones*, 2nd Dist. No. 25315, 2013-Ohio-1925, 2013 W.L. 1944001, ¶13 (May 10, 2013).

Seemingly unconcerned with the overwhelming consensus of authority, Clerk Wohl has advocated the peculiar view that proper subject matter jurisdiction is acquired only at the beginning of the criminal case and anything and everything that follows is within the court's authority. *Defendant's Brief*, p. 13. But this frightening theory cannot be reconciled with numerous decisions recognizing that courts have no power to impose a sentence beyond that which is provided by law. *Colegrove v. Burns*, 175 Ohio St. 437, 438, 1995 N.E. 2d 811, 812 (1964); *State v. Beasley*, 14 Ohio St. 3d 74, 75, 471 N.E. 2d 774, 775 (1984). A municipal court's subject matter jurisdiction is therefore controlled by statute throughout the proceedings, which should be expected in a free society.

There can be no doubt that errors and irregularities arising in a particular case

that is otherwise properly before the court generally do not implicate subject matter jurisdiction. *Pratts v. Hurley*, 102 Ohio St. 3d 81, 2004-Ohio-1980, 806 N.E. 2d 992; *In re J.J.*, 111 Ohio St. 3d 205, 2006-Ohio-5484, 855 N.E. 2d 851, 854, ¶15. But when the trial court violates a legislative restriction upon authority then subject matter jurisdiction is implicated, as is often recognized when the sentence fails to include a mandatory penalty. *State v. Moore*, 135 Ohio St. 3d 151, 2012-Ohio-5479, 985 N.E. 2d 432 (failure to impose mandatory fine renders that part of the sentence void); *State v. Fischer*, 128 Ohio St. 3d 92, 2010-Ohio-6238, 942 N.E. 332 (failure to impose statutorily mandated post-release control voids that aspects of the sentence). The assessment of the court costs beyond that allowed by statute cannot logically be distinguished from a failure to include that which is legislatively required. Judicial authority has been exceeded in both instances, pure and simple.

For these reasons, Clerk Wohl's heavy reliance upon *State v. Threatt*, 108 Ohio St. 3d 277, 2006-Ohio-905, 843 N.E. 2d 164, remains seriously misplaced. *Defendant's Brief*, pp. 10, 17-43, 27, & 30. This Court had recognized, and the instant Plaintiffs have always acknowledged, that: "Costs assessed in a criminal case must be included in the sentencing entry." *Id.*, 108 Ohio St. 3d at 281, ¶17 (citation omitted). The majority then concluded that the exact amount did not have to be specified to finalize the proceedings, as that is purely a ministerial task. *Id.*, ¶21. There was no suggestion that the trial judge had either imposed excessive costs, or had failed to include some penalty that was statutorily required. *Threatt*, simply has nothing to do with subject matter jurisdiction.

Consistent with these authorities, this Court found in *Miller v. Nelson-Miller*, 132 Ohio, 3d 381, 2012-Ohio-2845, 972 N.E. 2d 568, the fact that the trial judge did not personally signed a final divorce entry was merely voidable. That was nothing more than a procedural transgression in that particular case. *Id.*, at 385-386, ¶17-20. The judge's noncompliance with Civ. R. 58(A) did not result in a violation of statutory

authority, and thus subject matter jurisdiction did not come into play.

Because the imposition of excessive court costs cannot be excused as merely avoidable given the controlling precedents that have been established, this second Proposition of Law should be sustained.

EXTRANEOUS ARGUMENTS: THIS COURT SHOULD REFUSE TO ENTERTAIN EXTRANEOUS ARGUMENTS THAT WERE NEVER PRESERVED WITH A PROPER NOTICE OF CROSS-APPEAL.

A. THE ABSENCE OF A CROSS-APPEAL

The remainder of Defendant's Brief is devoted to "CROSS-PROPOSITIONS OF LAW TO PRESERVE THE JUDGMENT BELOW[.]" *Defendant's Brief, pp. 22-42.* Clerk Wohl apparently expects this Court to adopt one or more of his seemingly endless alternative arguments for overturning Judge Ambrose's sound decisions to grant partial summary judgment in favor of Plaintiffs and approve a limited class. The Eighth District did not appear to be impressed with any of these specious contentions during the proceedings below.

But Clerk Wohl never filed a Cross-Appeal in this Court in accordance with Sup. Ct. Prac. R. 7.01(A)(2)(a). Had he done so, and had this Court agreed to accept jurisdiction over his cross-appeal, then additional briefing would have been allowed under Sup. Ct. Prac. R. 16.05. But now Plaintiffs are being forced to respond in a twenty page Reply to not only the defense opposition to the two Propositions of Law, but also to over twenty pages of new "Cross-Propositions of Law" that are completely extraneous to this Court's grant of jurisdictional review.

Because Clerk Wohl did not cross-appeal the Eighth District's refusal to adopt his alternative arguments for reversing the trial judge, they are not properly before this Court. *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors, Corp.*, 127 Ohio St. 3d 161, 164, 2010-Ohio-4469, 937 N.E. 2d 533, 537, ¶14. These long discredited contentions have not been preserved for further review. *Osai v. A&D Furniture Co.*, 68

Ohio St. 2d 99, 101, 428 N.E. 2d 857, 858 (1981); *Kostelnik v. Helper*, 96 Ohio St. 3d 1, 3, 2002-Ohio-2985, 770 N.E. 2d 58, 61, ¶14.

It is still worth noting within the space that remains available under the twenty page limit for reply briefs that Clerk Wohl's improper "cross-propositions of law" lack merit. A brief response to some of his contentions follows.

B. VALIDITY OF THE TRIAL COURT ENTRIES

Clerk Wohl has assured this Court that "all entries and case notations on the docket and case fully conform with applicable rules, statutes and case law." *Defendant's Brief*, p. 22 (citations and footnote omitted). No attempt has been made to explain, however, how that can be so when he has now admitted *sub silentio* that he never time-stamped Plaintiff Glick's final entry of conviction. *Plaintiffs' Brief*, pp. 12-13.

And perhaps more significantly, none of the municipal court entries in the record on appeal had ever authorized Clerk Wohl to impose costs (1) upon offenses that had not resulted in a conviction, (2) on a "per offense" instead of a "per case" bases, and (3) upon the puzzling "processing fee." By all accounts, the unlawful cost-inflating practices were adopted by Clerk Wohl alone.

The only municipal order that Plaintiff Glick could have possibly appealed was the one-page Journal Entry that Judge Comstock had written into the file jacket and signed on April 15, 2005. *Plaintiffs' Court of Appeals Brief*, Apx. 0006. Quite clearly, the judge had not instructed therein that costs were to be taxed upon dismissed charge of weaving. That offense is never mentioned in the one-page entry. *Id.* There is nothing in that order, moreover, directing that Plaintiff Glick was to pay all costs on a "per offense" basis or bear the mysterious "Court Processing Fee." *Id.* This is also the case with respect to each of the generic Journal Entries that Clerk Wohl has submitted that established only the basic amounts to be charged. *R. 77, Defendant's Motion for Summary Judgment, Exhibits A1-A11.* Likewise, the website that is now being touted

contains no warnings of the unorthodox cost-inflating practices. *Id.*, Exhibit B. By all appearances, Plaintiff Glick was ordered simply to pay “costs” upon the charge of reckless operation, and Clerk Wohl was left to determine what was owed under Ohio law. *Plaintiffs’ Court of Appeals Brief, Apx. 0006.*

Clerk Wohl relies upon the notes section of the file jacket, which does arguably address the dismissed weaving charge. *R. 91, Clerk Wohl Depo., p. 39.* The only meaningful information contained on that page were the following cryptic comments:

PT 10/14/04 8:30
TR 12-9-04 2:45
~~DEC 09 2004~~ DISM @ Δ's
Sent 2-25-05 1:30
Sent 4-15-05 1:30

Plaintiffs’ Court of Appeals Brief, Apx. 0007. This Court is apparently expected to recognize that the “c” (which is obscured by some scribbling which might be the judge’s initials) can only mean “costs,” thereby conveying that the weaving charge was to be “dismissed at defendant’s costs” on December 9, 2004. Even if such a generous indulgence was appropriate, for a sentencing entry to exist that can be appealed, a “signature” is required by Crim. R. 32(C). *Strongsville v. Feliciano*, 194 Ohio App. 3d 476, 2011-Ohio-3266, 956 N.E.2d 921, ¶3 (8th Dist. 2011). Simply initialing the file jacket does not suffice. *State v. Copenhaver*, 3rd Dist. No. 1-80-4, 1980 W.L. 351892 *1 (November 6, 1980); *State v. Matson*, 3rd Dist. No. 1-77-49, 1978 W.L. 215692 *1 (March 10, 1978).

Even if these notes somehow convey that the weaving charge was to be dismissed

at Plaintiff Glick's costs, they are of no legal significance.

“[H]andwritten ‘notations’ by a municipal judge on a case file-envelope or case jacket do not rise to the dignity and finality of a ‘judgment’ from which an appeal will lie, *in the absence of evidence that it has been filed with the clerk of the trial court.* [emphasis original].

State ex rel. White v. Junkin, 80 Ohio St.3d 335, 337, 1997-Ohio-340, 686 N.E.2d 267, 269 (1997), quoting *William Cherry Trust v. Hofmann*, 22 Ohio App.3d 100, 105, 489 N.E.2d 832, 836-837 (1985); see also *City of Akron v. Smith*, 9th Dist. No. 19517, 2000 W.L. 150771, p. *2 (Feb. 9, 2000). There is thus no merit to the dubious assertion that “all entries and case notations on the docket and case fully conform with applicable rules, statutes and case law.” *Defendant’s Brief*, p. 22 (citations and footnote omitted).

C. IMPOSITION OF COSTS WITHOUT CONVICTIONS

Once Plaintiffs were finally able to question Clerk Wohl on January 12, 2007, he openly conceded that court costs had been assessed against Plaintiff Glick upon the charge of weaving that had been dismissed on December 9, 2004. *R. 91, Clerk Wohl Depo.*, pp. 36, 41, & 43. He had publicly expressed the startling view that anyone who was merely “[c]harged” with an offense should have to pay court costs. *Id.*, p. 27; *Plaintiffs’ Court of Appeals Brief*, Apx. 00027.

Imposing costs upon dismissed charges has long been prohibited in Ohio. *State of Ohio v. Powers*, 117 Ohio App.3d 124, 690 N.E.2d 32 (6th Dist. 1996); *City of Cleveland v. Tighe*, 8th Dist. No. 81767, 2003-Ohio-1845, 2003 W.L. 1849217, *1 (Apr. 10, 2003); *State of Ohio v. Brock*, 8th Dist. No. 75168, 1999 W.L. 1129583, p. *7 (Dec. 9, 1999); *City of Willoughby v. Sapina*, 11th Dist. No. 2000-L-138, 2001-Ohio-8707, 2001 W.L. 1602651 (Dec. 14, 2001); *State of Ohio v. Kortum*, 12th Dist. No. CA2001-04-034, 2002-Ohio-613, 2002 W.L. 237370, pp. *8-9 (Feb. 19, 2002). Any doubts that could have remained over this issue were laid to rest when this Court remarked that the legislature’s purpose was to impose “court costs on a defendant convicted of a crime – to

finance the court system, not to punish the defendant additionally on each charge.” *Quinones*, 120 Ohio St.3d at 537, ¶ 9, citing *Threatt*, 108 Ohio St.3d 277 (emphasis added). Judge Ambrose therefore properly ruled that, as a matter of law, Clerk Wohl had no authority to assess a Computer Maintenance Fee (\$7.00), Computer Research Fee (\$3.00), Construction Fund Charge (\$15.00), and Court Processing Fee (\$2.00) upon the charge of weaving that had been dismissed over four months earlier in the municipal court proceedings. *R. 141, Journal Entry & Opinion, p. 20 & 27.*

D. CHARGING COSTS ON A “PER OFFENSE” BASIS

The practice of multiplying court costs by each offense that had been charged within a single case was initially examined by the Eighth District in *Middleburg Hts. v. Quinones*, 8th Dist. No. 88242, 2007-Ohio-3643, 2007 W.L. 2051994. In an appeal of a conviction in the Berea Municipal Court for operating under the influence of alcohol, weaving, speeding, and failure to wear a seatbelt, the defendant challenged several aspects of the entry, including the court costs of over \$1,200.00 that had been imposed. In accordance with longstanding practice, Clerk Wohl had assessed costs against him on a “per offense” instead of a “per case” basis. Notably, the prosecution never filed a brief attempting to justify the astonishing charges.

Writing for the unanimous panel, Judge Mary Jane Boyle analyzed the same two Ohio Attorney General Opinions that Plaintiffs have been citing in the instant action. *R. 56, First Amended Complaint, Exhibits A and B; R. 93, Plaintiffs’ Memorandum, pp. 24-26.* She concluded that:

It is our view that the Attorney General’s reasoning with respect to assessing additional costs is instructive in the case at bar. When applying the plain language of the R.C. 2947.23, “[i]n all criminal cases[,]” it is our view that court costs should be assessed for each case and not for each offense. [emphasis added]

Quinones, 2007-Ohio-3643, ¶97.

In the instant action, Clerk Wohl assured Judge Ambrose that *Quinones* had a

“questionable future” and the Eighth District’s decision “is mistaken and subject to correction” through a pending Motion for Reconsideration. *R. 112, Response of Defendant Raymond J. Wohl, Clerk of Court to the Berea Municipal Court, to Plaintiffs’ Notice of Supplemental Authority of September 22, 2007, pp. 3-4.* After reconsideration was denied by the Eighth District, this Court accepted jurisdiction over the proceedings. *Middleburg Hts. v. Quinones*, 116 Ohio St. 3d 1474, 2008-Ohio-153, 879 N.E. 2d 782 (table). This time, the prosecution submitted a Brief arguing *inter alia* that the fees could be justified as “special project” costs. Clerk Wohl offered his own *amicus brief* supporting this contention. *Sup. Ct. No. 07-1863.*

This Court proceeded to forcefully dispel the notion that municipal court clerks are entitled to calculate general court costs under R.C. §2947.23(A)(1) in any manner as they see fit. *Quinones*, 120 Ohio St. 3d at 537, ¶8-9. The majority upheld the Eighth District’s determination that the statute does not permit the fees to be imposed on a “per offense” basis. *Id.*, 120 Ohio St. 3d at 536-537, ¶ 8-9. The opinion reasoned that:

*** R.C. 2947.23(A)(1) imposes a mandatory obligation on trial judges in all criminal cases to include in the sentence the costs of prosecution and to render a judgment therefore. It does not specifically authorize imposition of these costs for each offense committed. This interpretation conforms to the legislature’s purpose in imposing court costs on a defendant convicted of a crime – to finance the court system, not to punish the defendant additionally on each charge. ***
[citations omitted]

Id., at 537, ¶9.

Rather graciously, this Court agreed to entertain the “special project” costs rationalization that had been raised for the first time in the motion for reconsideration. *Quinones*, 120 Ohio St. 3d at 537, ¶10. The argument had been asserted that the multiple-billed charges could be justified under R.C. §1901.26(B)(1). This Court agreed, so long as the special projects costs were authorized by rule.

Thus, the plain language of R.C. 1901.26(B) specifies that if a municipal court determines that for the efficient operation of

the court, additional funds are necessary to acquire and pay for special projects of the court, it may by rule charge a fee in addition to other court costs on the filing of each criminal cause, civil action or proceeding, or confession of judgment. [emphasis added]

Quinones, 120 Ohio St. 3d at 538, ¶14. Because the new “special projects” argument could not be resolved from the record that had been developed during the appeal, the case was remanded for further proceedings. *Id.*, at 538, ¶15. In all other respects, the Eighth District’s decision was left intact. *Id.*

In the case *sub judice*, the common pleas court’s analysis of the per offense/per case debate was based entirely upon the *Quinones* rulings. *R. 141, Journal Entry and Opinion*, pp. 23-24, ¶50. As both the Eighth District and the Supreme Court had directed, Judge Ambrose determined from the undisputed evidentiary record that Plaintiff Glick should not have been charged “General Court Costs” a second time. *Id.* The “Special Projects” costs, which were found to include the Computer Maintenance Fund, Computer Research Fund, Construction Fund, and Processing Fee, could be imposed on each offense. *Id.* Plaintiff Glick was thus overcharged \$56.00 in double-bill General Court Costs. *R. 141, Journal Entry and Opinion*, pp. 20 & 27.

E. THE PROCESSING FEE

Summary judgment was also justifiably granted in favor of Plaintiff with regard to the “Court Processing Fee” of \$2.00 that had been imposed. *R. 141, Judgment Entry and Opinion*, p. 25, ¶52. Clerk Wohl’s initial explanation for this puzzling assessment was as follows:

Q. And what does that mean?

A. That’s the processing fee that people use Visa or Master Card, that we’re allowed and been authorized by the legislature to charge a reasonable fee to offset our banking costs. That’s what that is.

R. 91, Clerk Wohl Depo., p. 51. He then acknowledged that even though Plaintiff Glick had been charged these computer processing fees, the receipt he received from the

Clerk's office reflected that \$910.00 had been paid in "cash."¹ *Id.*, p. 52. Clerk Wohl then insisted that "cash" could mean "credit card." *Id.* He eventually conceded: "I don't know." *Id.* It is now apparent that defendants in the Berea Municipal Court system are being regularly charged fees that not even the Clerk can explain.

In his Brief to the Court of Appeals, Clerk Wohl has retorted that the trial court's analysis "misses the mark" because the "processing fee is paid by everyone paying court costs in order to offset the Municipal Court's banking costs." *Defendant's Court of Appeals Brief*, p. 23. As has been his penchant, he has failed to cite any admissible evidence that supports this unlikely contention. *Id.* The two affidavits that he submitted were conspicuously silent on this point. *R. 77, Defendant's Motion for Summary Judgment, Exhibits 1 & 2.* After Plaintiff specifically challenged the validity of the Court Processing Fee in the Cross-Motion for Summary Judgment (p. 13) on February 20, 2007, the Clerk had over four years in which to furnish a properly supported justification for the charges that had perplexed even him during his deposition. *R. 93.* When he was unable to do so, the common pleas judge properly proceeded to enter summary judgment with respect to the unauthorized \$2.00 fee.

F. CLERK IMMUNITY

Notwithstanding the numerous authorities recognizing that instrumentalities of the state can be forced to return unlawfully collected funds, Clerk Wohl continues to insist that he is completely "immune" from any such actions. *Defendants' Brief*, pp. 27-28. While Clerks do perform many functions that are deserving of judicial immunity, "the billing and attempted collection of costs" are purely administrative and entitled to no such protection. *State of Ohio ex rel. Dayton Law Library Assn. v. White*, 163 Ohio App.3d 118, 129, 2005-Ohio-4520, 836 N.E.2d 1232, 1240-1241 (2nd Dist. 2005). Because equitable relief, as opposed to the legal remedy of "damages," has been sought

¹ Plaintiff Glick testified in his own deposition that he had paid cash. *R. 93, Plaintiffs' Memorandum and Cross-Motion, Exhibit 4, p. 20.*

against Clerk Wohl, the authorities he has cited in support of his immunity argument have no application. See, e.g., *Inghram v. City of Sheffield Lake*, 8th Dist. No. 69302, 1996 W.L. 100843 (Mar. 7, 1996) (involving lawsuit against, numerous local officials, including the clerk of a municipal court, had been sued for “liable, slander, malicious prosecution, false arrest, abuse of process, and negligence [arising] out of [the plaintiff’s] arrest on a mistaken identification.”). No “damages” are being sought in the case *sub judice* precisely because immunity would be available on a number of levels.

For the first time in the proceedings, Clerk Wohl has attempted to establish during his appeal that he is entitled to political subdivision immunity under R.C. §2744.02. *Defendants’ Court of Appeals Brief*, pp. 25-26. No such contention had been raised, let alone established, in his initial demand for summary judgment. R. 77. New arguments cannot be considered for the first time on appeal. *Scott v. East Cleveland*, 16 Ohio App. 3d 429, 431, 476 N.E. 2d 710, 713-714 (8th Dist. 1984). As Clerk Wohl undoubtedly recognized during the proceedings below, political subdivision immunity bars only claims for tort damages. *Big Springs Golf Club v. Donofrio*, 74 Ohio App. 3d 1, 598 N.E. 2d 14 (9th Dist. 1991). A complaint seeking “restitution” is not the equivalent of an action for money damages. See generally, *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250-251, 120 S. Ct. 2180, 2189-2190, 147 L.Ed.2d 187(2000); *Santos v. Ohio Bur. of Workers’ Comp.*, 101 Ohio St.3d 74, 78, 2004-Ohio-28, 801 N.E.2d 441.

As Clerk Wohl has succinctly observed: “The office of a clerk of court is a function mandated by the General Assembly.” R. 77, *Defendant’s Motion for Summary Judgment*, p. 20 (citation omitted). Just as with state institutions, aggrieved individuals are entitled to invoke equitable remedies to secure “the return of specific funds wrongfully collected or held by” a governmental official. *Santos*, 101 Ohio St.3d 74, syllabus; see also, *Flanagan v. Ohio Victims of Crime Fund*, Ct. Claims No. 2003-

08193-AD, 2004-Ohio-1842, 2004 W.L. 766414, p. *1 (Mar. 25, 2004); *Johnson v. Trumbull Corr. Inst.*, Ct. Claims No. 2004-08375-AD, 2005-Ohio-1241, 2005 W.L. 638698, p. *1 (Mar. 10, 2005); *Kraft Constr. Co. v. Cuyahoga Cty. Bd. of Commrs.*, 128 Ohio App.3d 33, 48, 713 N.E.2d 1075, 1085 (8th Dist. 1998); *Blue Ribbon Remodeling Co. v. Meistrich*, 97 Ohio Misc.2d 8, 14, 709 N.E.2d 1261, 1265-1266 (Hamilton Muni. Ct. 1999). Municipalities are not somehow excused from having to furnish restitution when they have been unjustly enriched. See, e.g., *Lycan v. Cleveland*, 8th Dist. No. 94353, 2010-Ohio-6021, 2010 W.L. 5075520 (Dec. 9, 2010), ¶5-8.

G. THE VOLUNTARY PAYMENT DEFENSE

Clerk Wohl further maintains that he is entitled to keep unlawfully collected funds because Plaintiffs “claims are barred by their voluntary payment of the court costs in satisfaction of the individual plea agreements.” *Defendant’s Brief*, p. 31. No explanation has been offered for how this position can be consistent with *Santos*, 101 Ohio St.3d 74, and *Judy v. Ohio Bur. of Motor Vehs.*, 100 Ohio St.3d 122, 2003-Ohio-5277, 797 N.E.2d 45. both of which resulted in government agencies being forced to return millions of dollars of “voluntarily paid” funds. Subrogation claims had been paid by injured workers in *Santos* while double-billed license reinstatement fees were the object of *Judy*. Likewise, the Eighth District acknowledged an Estate’s entitlement to seek the recovery of funds which had been voluntarily paid in error to the state in *Oakar v. Ohio Dept. of Mental Ret.*, 88 Ohio App. 3d 332, 337-338, 623 N.E. 2d 1296, 1299-1300 (8th Dist. 1993). With regard to a municipality in particular, the court held that civil fines that had been “voluntarily” paid could potentially be recovered if unjust enrichment was established. *Lycan*, 2010-Ohio-6021, ¶7-9.

Governmental entities are rarely allowed to keep unlawfully collected funds because the voluntary payment defense is lost once there is any element of coercion or compulsion. *Ward v. Board of County Commrs. of Love County, Okl.*, 253 U.S. 17, 24,

40 S.Ct. 419, 422, 64 L. Ed. 751 (1920); *Union Pac. R. Co. v. Public Serv. Commn.*, 248 U.S. 67, 69-70, 39 S.Ct. 24, 25, 63 L.Ed. 131 (1918). There can be no disagreement in this case that Plaintiff Glick would have been subject to onerous enforcement efforts to collect the overcharged court costs totaling \$85.00 unless he spent even more money hiring a lawyer to contest the unlawful assessments. Clerk Wohl has plainly failed to establish, in compliance with Civ.R. 56(C), that anything was “voluntarily” paid by any of the class members.

H. THE ADEQUATE REMEDY AT LAW

Count II of the First Amended Complaint seeks permanent injunctive relief to prohibit the municipal court clerk from continuing to overcharge court costs. As a general rule, such a remedy is appropriate upon a demonstration “that the injunction is necessary to prevent irreparable harm and that the party does not have an adequate remedy at law.” *Proctor & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267, 747 N.E.2d 268, 273 (1st Dist. 2000) (footnote omitted); *see also Fletcher v. Coney Island, Inc*, 69 Ohio Law Abs. 264, 121 N.E.2d 574, 582-583 (Ct. Com. Pl., Hamilton Cty 1954).

Clerk Wohl maintains that an “adequate remedy at law” is available through a direct appeal. *Defendant’s Brief*, p. 32. As previously established, this contention is incorrect. Setting aside for a moment the issue of subject matter jurisdiction, there was nothing for Plaintiff Glick to “appeal” because the one-page Journal Entry that Judge Comstock entered is missing the Clerk’s time-stamp and is silent with regard to whether costs were to be (1) imposed upon the dismissed weaving charge, (2) inflated on a “per offense” basis, and (3) bolstered with the unexplained Court Processing Fee.

Even if there had been a properly journalized order authorizing the abusive cost collection practices that Plaintiff could have appealed, the mere theoretical availability of a remedy at law does not preclude a court from issuing injunctive relief. The Ohio Supreme Court recognized long ago that:

“It is not enough that there is a remedy at law; it must be plain, adequate and complete; or in other words, as practical, and as efficient to the ends of justice and its prompt administration, as the remedy in equity.” *Boyce, Ex’r v. Grundy*, 3 Peters, 210, 215.

Culver v. Rogers, 33 Ohio St. 537, 545, 1878 W.L. 23v(1878); see also *Mid-America Tire, Inc. v. PTZ Trading Ltd.*, 95 Ohio St.3d 367, 380, 2002-Ohio-2427, 768 N.E.2d 619, 632. In this instance, the expense associated with appealing a sentencing order would dwarf the costs to be recovered and there would be at least a one to two year delay until the proceedings were concluded.

Additionally, the “adequate remedy at law” defense is not available when “a multiplicity of suits would be required at law to obtain redress.” *Salem Iron Co. v. Hyland* (1906), 74 Ohio St. 160, 167, 77 N.E. 751, 752; see also *Mid-America Tire*, 95 Ohio St.3d at 619. Here, the Clerk’s violations of the court costs statutes could only be rectified if every aggrieved defendant filed a direct appeal, which would result in thousands of separate proceedings. Granting an injunction against him would be the far more sensible solution to the problem.

Notably, Clerk Wohl acknowledged during his deposition that nothing in his office has changed since the instant complaint was filed. *R. 91, Clerk Wohl Depo., p. 58*. When he secured a stay of execution in accordance with Civ.R. 62(B) on November 14, 2011, he forcefully confirmed that he intends to continue the violations for as long as the appeal remains pending. It is well-recognized that injunctions may be issued against governmental officials to ensure compliance with the law. See e.g., *Anderson v. Brown*, 13 Ohio St.2d 53, 56-57, 233 N.E.2d 584, 587 (1968) (injunction against village prohibiting enforcement of invalid ordinances was proper); *Vedder v. City of Warrensville Hts.*, 8th Dist. No. 81005, 2002-Ohio-5567, 2002 W.L. 31320350, pp. *5-6 (Oct. 17, 2002) (injunctive relief issued in favor of female firefighter). Since the facts pertinent to Count II of the First Amended Complaint are not in dispute, the common

pleas judge properly issued the injunction against Clerk Wohl. *R. 141, Journal Entry and Opinion, pp. 25-26, ¶ 53-55.*

I. APPROPRIATENESS OF CLASS CERTIFICATION

Finally, there is no justifiable reason for this Court to be the first to hold that Judge Ambrose abused his discretion in certifying a class of similarly situated individuals. Class actions are “an invention of equity, designed to facilitate adjudication of disputes involving common issues between multiple parties in a single action.” *Beder vs. Cleveland Browns, Inc.*, 129 Ohio App.3d 188, 199, 717 N.E.2d 716, 723 (8th Dist. 1998). Civ. R. 23 enhances judicial administration by eliminating duplicative litigation and promoting uniformity of decision as to persons similarly situated, without sacrificing procedural fairness. *Cope vs. Metropolitan Life Ins. Co.*, 82 Ohio St.3d 426, 430, 1998-Ohio-405, 696 N.E.2d 1001, 1004. Class certification is particularly appropriate in cases such as that presently at bar, as explained by the United States Supreme Court:

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.

Amchem Products v. Windsor, 521 U.S. 591, 617, 117 S.Ct. 2231, 2246, 138 L.Ed.2d 689, (1997) quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997); see also *Blumenthal v. Medina Supply Co.*, 139 Ohio App.3d 283, 294, 743 N.E.2d 923, 931 (8th Dist. 2000). This Court has further explained that:

***[A]ny doubts about adequate representation, potential conflicts, or class affiliation should be resolved in favor of upholding the class, subject to the trial court’s authority to amend or adjust its certification order as developing circumstances demand, including the augmentation or substitution of representative parties. [citations omitted].

Baughman vs. State Farm Mut. Auto. Ins. Co., 88 Ohio St.3d 480, 487, 2000-Ohio-397

Resolving the class members' largely identical claims against Clerk Wohl in a single proceeding will be far more expedient and efficient than forcing them to be pursued one-by-one. Because the overcharges are relatively modest, individual direct appeals simply are not financially practical. And substantial judicial resources would be wasted if such a cumbersome approach were followed. As previously established, the legal standards will be the same for each class member with respect to their requests for equitable and declaratory relief. The fact patterns will all be identical, given that each class member – by definition – was systematically overcharged by Clerk Wohl in the same manner. Certification was thus properly granted under both Civ. R. 23(B)(2) and (3).

CONCLUSION

This Court should reverse the Eighth District's legally flawed decision and remand this action to the trial court for administration of the class recovery.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Reply Brief** has been sent by

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