

ORIGINAL

IN THE SUPREME COURT OF OHIO

14-0358

JANINE LYCAN, *et al.*

Plaintiffs-Appellees,

v.

CITY OF CLEVELAND

Defendant-Appellant.

) Case No. _____
)
)
)
) On appeal from the Eighth District
) Court of Appeals of Ohio
)
)
) Eighth District Case Number 99698

APPELLANT CITY OF CLEVELAND'S
MEMORANDUM IN SUPPORT OF JURISDICTION

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CERTIFICATE OF SERVICE

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Eighth District Case No. 99698

I. THE CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

This case addresses a significant and timely issue concerning claim preclusion and the finality of admissions of liability made by individuals who decline to pursue a recognized and available remedy at law such as that provided by Cleveland Codified Ordinance 413.031 (“CCO 413.031”). The opinion of the Eighth District Court of Appeals, if unchecked, in failing to apply *res judicata* to the purported equitable restitution claims of the individual Appellees in this litigation departs from accepted legal principles and would only serve to create uncertainty and confusion with regard to the presumptive finality of any number of long ended quasi-judicial administrative actions. Particularly, Appellees herein seek to re-litigate through purported “equity” their acknowledged abandonment of the adequate remedy at law previously available to them. The Eighth District’s opinion identifies Appellees as class representatives for a class defined as “[a]ll persons and entities who were not a ‘vehicle owner’ under CCO 413.031, but were issued a notice of citation and/or assessed a fine under that ordinance, prior to March 11, 2009, by/or on behalf of Defendant, City of Cleveland.” *Lycan v. Cleveland*, 8th Dist. No. 99698, 2014 -Ohio- 203, ¶ 24 (*Lycan II*). (Journal Entry and Opinion as issued attached at Appendix).

CCO 413.031 was adopted in 2005 and authorized the use of an automated-camera system to impose civil penalties for speeding and red light violations on the owners of vehicles that have been photographed by an automated-camera system. In an early jurisdictional challenge to the City’s ordinance the Eighth District Court of Appeals had recognized that a “party who receives a notice of liability may contest the ticket by

filing a notice of appeal within 21 days from the date listed on the ticket.” *State ex rel. Scott v. Cleveland*, 166 Ohio App.3d 293, 2006 -Ohio- 2062, 850 N.E.2d 747, ¶ 3 (emphasis added). The Supreme Court in considering relators’ subsequent appeal in *Scott* further recognized that “because the city does not patently and unambiguously lack jurisdiction, appellants have an adequate remedy in the ordinary course of law by way of the administrative proceedings set forth in Section 413.031 and by appeal of the city’s decision to the common pleas court.” *State ex rel. Scott v. Cleveland* 112 Ohio St.3d 324, 2006 -Ohio- 6573, 859 N.E.2d 923, ¶ 24. CCO 413.031 specifically provides in no uncertain terms that “failure to give notice of appeal or pay the civil penalty within this time period [21 days] shall constitute a waiver of the right to contest the ticket and shall be considered an admission.” CCO 413.031(k).

Each of the Appellees received notices of violations documented by the camera system for vehicles they were leasing. Each of the Appellees declined to challenge the civil citations issued to them, and instead, with a single exception, voluntarily paid the \$100 civil fines established for the documented violations. (*Lycan* at ¶ 6). Appellees now seek to act as class representatives in litigation against the City seeking the restitution of civil fines paid by lessees who received notices of liability for traffic offenses prior to amendment of the ordinance in March 2009 to clarify that “lessees” were to be included within the definition of “vehicle owners.”

Appellees have no claims as a matter of law and the Eighth District has grievously erred with its refusal to apply *res judicata*. “The Eighth District’s *Lycan* decision directly conflicts with an earlier opinion of the United States Sixth Circuit Court of Appeals on similar facts and also involving claims of unjust enrichment brought by lessees who had

received notices of liability under CCO 413.031. In *Carroll v. Cleveland*, 522 Fed.Appx. 299 (6th Cir.2013), the Sixth Circuit in considering a class action brought by lessees who had similarly received CCO 413.031 found the claims were precluded by *res judicata* “[b]ecause Appellants did not appeal through the administrative process that the ordinance offered, they lost the opportunity to make their claims.” *Id.* at *2.

The Ohio Supreme Court has already accepted for review the case of *Walker v. City of Toledo*, Ohio S. Ct. Case No. 2013-1277, where it will decide whether Toledo’s red light and speeding camera ordinance, which is similar to Cleveland’s, violates Art. I, § 4 of the Ohio Constitution. The standing of the appellee *Walker* is also presented as he sought restitution only after voluntarily paying his civil fine. In *Jodka v. Cleveland of Cleveland, et al.*, 8th Dist. No. 99951, 2014-Ohio-208 the Eighth District Court of Appeals recently certified sua sponte a conflict of its decision with *Walker* on the issues of standing and whether its opinion concerning constitutionality was merely advisory. The Eighth District in *Jodka*, citing *Carroll*, concluded concerning standing:

Jodka admitted in his complaint that he simply paid the citation the city issued to him. Thus, Jodka neither placed himself under the purported authority of the quasi-judicial process the city instituted in CCO 413.031 nor contested the ordinance’s constitutionality during such process. *Carroll*. This fact made Jodka an inappropriate person to assert a claim that provisions of CCO 413.031 unconstitutionally stripped the municipal court of jurisdiction over his offense.

Id. at ¶ 37.¹ Similarly, Appellees herein are inappropriate persons to assert any claims because they also did not contest application of the ordinance to them as lessees.

¹ Jodka filed a Motion for Reconsideration and En Banc Review with the 8th District Court of Appeals on February 3, 2014 challenging the portion of the appellate court’s ruling on standing.

While not meeting all the requirements of Rule 23 by a preponderance of the evidence, the appellate court has improperly approved an overly broad class certification that not only ignores the Rule 23 requirements, but because of misplaced and incorrect "fairness and justice" policy judgment ignores the fact that the class representatives lack standing due to res judicata and therefore, a class cannot be certified. This matter is of great interest for all municipalities in the consideration of administrative appeals and Cleveland requests the appeal be accepted to make clear that res judicata is to be applied where individuals forego adequate remedies of law and voluntarily admit violations of law.

II. STATEMENT OF THE CASE AND FACTS

A. CCO 413.031

Cleveland City Council recognized with its enactment of CCO 413.031 in 2005 that a fundamental purpose of local self-government is the protection of the health, safety, and welfare of its citizens, that red light crashing and speeding causes needless serious injuries and death, and that Codified Cleveland ordinance 413.031 ("CCO 413.031") would reduce red light running and speeding. A summary overview of CCO 413.031 was accomplished in *State ex rel. Scott v. Cleveland* 112 Ohio St.3d 324, 859 N.E.2d 923, 2006 -Ohio- 6573, wherein this Court provided at ¶ 2 :

In July 2005, the Cleveland City Council enacted Cleveland Codified Ordinances 413.031 ("Section 413.031"), which authorizes the use of automated-camera systems to impose civil penalties on the owners of cars that have been photographed by an automated-camera system. "This civil enforcement system imposes monetary liability on the owner of a vehicle for failure of an operator to stop at a traffic signal displaying a steady red light indication or for the failure of an operator to comply with a speed limitation." Section 413.031(a). The imposition of liability under Section 413.031 is not deemed a conviction and is not made a part of the car owner's driving record.

Section 413.031(d). In addition, no points are assessed against the owner or driver. Section 413.031(i).

CCO 413.031 provides for an administrative appeal process which this Court has summarized as follows:

“Appeals shall be heard by the Parking Violations Bureau through an administrative process established by the Clerk of the Cleveland Municipal Court. At hearings, the strict rules of evidence applicable to courts of law shall not apply. The contents of the ticket shall constitute a prima facie evidence of the facts it contains. Liability may be found by the hearing examiner based upon a preponderance of the evidence. If a finding of liability is appealed, the record of the case shall include the order of the Parking Violations Bureau, the Ticket, other evidence submitted by the respondent or the City of Cleveland, and a transcript or record of the hearing, in a written or electronic form acceptable to the court to which the case is appealed.”

Scott at ¶ 6. The appeals authorized by CCO 413.031 are to be filed within twenty-one days from the date listed on the notice of violation. *Id.* at ¶ 5. None of the Plaintiffs-Appellees ever filed an appeal, much less did they file any appeals within the 21 days authorized by the ordinance.

B. *Lycan I*

Plaintiff-Appellees Janine Lycan, Lindsey Charna, Jeanne Task, Ken Fogle, Thomas Pavlish, and John T. Murphy (“Appellees”) filed a class action complaint against the City of Cleveland (“Cleveland”) on February 25, 2009, alleging that the City had not possessed the authority to assess them notices of civil liability under Cleveland Codified Ordinance § 413.031 (“CCO 413.03”). The Appellees were leasing their vehicles at the time they received civil notices of liability pursuant to the ordinance for speeding violations that had been documented by the City’s civil camera enforcement system. Each of the Appellees chose to forego the appellate process that was established at CCO

413.031, as outlined above in *Scott*. Instead the Appellees voluntarily paid the \$100.00 fines established for each of their various speeding offenses.²

On November 25, 2009, the Common Pleas Court granted Cleveland's Motion for Judgment on the Pleadings and further denied Plaintiff-Appellees' first motion for class certification on the basis that the plaintiffs in this case had not pursued the available appeal process provided by CCO 413.031 and as a result had waived their right to contest the violation notices. Appellees filed a notice of appeal and the Eighth District Court of Appeals in considering the Civ.R. 12(C) dismissal held that the Appellees may have a possible unjust enrichment claim against the City. *Lycan v. City of Cleveland* (December 9, 2010), 8th District. No. 94353, 2010-Ohio-6021 at ¶ 8) ("*Lycan I*"). In reversing the dismissal at this early stage the appellate court simply raised the spectre of "unjust enrichment" but in so doing did not address the doctrine of *res judicata* and its impact on claims presented by individuals who had voluntarily paid their civil fines without taking advantage of the quasi-judicial administrative process provided by Cleveland's camera enforcement ordinance.

Cleveland's motion for *En Banc* review based upon conflicting prior opinions holding that unjust enrichment was not available against a municipality was denied by a slim 5-6 margin. The City then sought appellate review by this Court of the Eighth District's reversal of the trial court's grant of judgment on the pleadings. This Court did not accept jurisdiction of the appeal at that early stage. *Lycan v. City of Cleveland*, 128 Ohio St. 3d 1501 (2011).

² With one exception, Plaintiff-Appellee Trask received two tickets for speeding and chose not appeal, but to date she has not paid the one outstanding civil fine associated with her violations.

C. *Lycan II*

Subsequent to remand, discovery was undertaken by the parties. On July 25, 2012, Appellees filed for partial summary judgment claiming that the elements for their equitable unjust enrichment claim had been met. The City opposed Appellees' motion for partial summary judgment and requested summary judgment be entered on behalf of the City, in part, on the basis that Appellees' claims for unjust enrichment should be dismissed with prejudice on the basis of *res judicata*. The trial court granted Appellees' partial motion for summary judgment and after a subsequent hearing on February 19, 2013, the trial court granted Appellees' motion of class certification. The City filed an interlocutory notice of appeal contesting the grant of class certification on March 27, 2013 on the basis that (1) *res judicata* barred Appellees' claims as purported class representatives and (2) Appellees have failed to prove all the required elements under Civ. R 23. The Eighth District affirmed the lower court's class certification ruling on January 23, 2014. *Lycan v. Cleveland*, 8th Dist. No. 99698, 2014 -Ohio- 203 (*Lycan II*).

III. ARGUMENT

The City of Cleveland's Proposition of Law:

Cleveland Codified Ordinance 413.031 provides an adequate remedy in the ordinary course of law to those receiving civil notices of liability by way of the administrative proceedings set forth in the ordinance. *State ex rel. Scott v. Cleveland* 112 Ohio St.3d 324, 2006 -Ohio- 6573, 859 N.E.2d 923. Individuals who receive a civil citation issued pursuant to a local ordinance and who knowingly decline to take advantage of the available adequate remedy at law provided by the ordinance are precluded by *res judicata* from subsequently acting as class representatives and presenting equitable restitution claims predicated in unjust enrichment. *Accord Carroll v. Cleveland*, 522 Fed.Appx. 299 (6th Cir. Ohio 2013).

- A. **The Eighth District recognizes that its decision in *Lycan I* did not constitute law of the case on the issue of *res judicata*.**

The Eighth District recognized that *res judicata* had not been addressed in *Lycan I* and

the court did not apply the law of the case argument advanced by the Appellees:

As a preliminary matter, the parties dispute whether *Lycan I* established the law of the case insofar as the court determined that the plaintiffs' failure to pursue administrative review before paying the fine "does not necessarily foreclose any right to equitable relief." However, *Lycan I* did not address the issue of res judicata.

B. Each Appellee and Purported Class Member Had Adequate Remedy at Law Available to Them Through Provision of CCO 413.031.

The administrative hearings authorized by CCO 413.031 involve the exercise of quasi-judicial authority. *State ex rel. Scott v. Cleveland* 112 Ohio St.3d 324, 2006 -Ohio- 6573, 859 N.E.2d 923, ¶ 15. This Court further recognized in *Scott* that "Section 413.031 authorizes an administrative proceeding that does not require compliance with statutes and rules that, by their own terms, are applicable only to courts." *Id.* at ¶ 21. There is no question but that those receiving notice of a civil violation under CCO 413.031 are provided "an adequate remedy in the ordinary course of law by way of the administrative proceedings set forth in Section 413.031 and by appeal of the city's decision to the common pleas court." *Id.* at ¶ 24 (emphasis added). Appellees voluntarily gave up their right to the recognized adequate remedy.

C. Res judicata bars Appellees attempt to circumvent their failure to contest the notice of liability through the available remedy at law provided by administrative appellate process provided by CCO 413.031.

It is well recognized that *res judicata* is to be applied in the context of administrative hearings. *Grava v. Parkman Twp.* 73 Ohio St.3d 379, 653 N.E.2d 226 (1995). The Eighth District's *res judicata* analysis in *Lycan II* evidences under the circumstances that the appellate court got seriously lost in considering the City's res judicata argument in incorrectly concluding that "fairness and justice would not support the application of res judicata in this case." *Lycan II* at ¶ 19. More on point under the

circumstances of Appellees' restitution argument - given the availability of an administrative hearing to each Appellee - was this Court's consideration in *Grava* that "[t]he 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." *Id.* at 383.

The Eighth District was well aware that the United States Sixth Circuit Court of Appeals had already considered and held that the claims of similarly situated plaintiffs ("copycat" or not) were barred by *res judicata*:

In *Carroll v. Cleveland*, 522 Fed.Appx. 299 (6th Cir.2013), a "copycat" lawsuit raising constitutional takings challenges, the federal court found that where the appellants paid their fines rather than contesting their citations through the administrative process provided under CCO 413.031, claim preclusion barred their claims. *See also Foor v. Cleveland*, N.D. Ohio No. 1:12 CV 1754, 2013 WL 4427432 (Aug. 14, 2013).

Lycan II at ¶ 14. The Sixth Circuit recognized CCO 413.031 afforded the similarly-situated plaintiffs therein the opportunity to avoid paying the established civil fine:

"the only damages that Appellants seek are the fines that they paid. Had they successfully contested their citations in the first instance, they would not have owed anything. Had they failed, they would have owed precisely what they paid. The administrative process, in other words, could have afforded Appellants the very monetary relief they demand, had they taken advantage of it."

Carroll at *5.

In seeking to justify its disagreement with the Sixth Circuit, the Eighth District mistakenly reasoned based on two dissimilar out of state decisions as follows:

While we have found no authority in Ohio on the issue, courts in other states have generally declined to apply *res judicata* or collateral estoppel with regard to traffic infractions. *State v. Walker*, 159 Ariz. 506, 768 P.2d 668, 671 (Ariz.App.1989); *Hadley v. Maxwell*, 144 Wash.2d 306, 312-313, 27 P.3d 600 (2001).

First, neither *Walker* or *Hadley* involve similar facts as in the present case where individuals who voluntarily gave up their adequate remedy at law are years later seeking to recover civil fine moneys they paid after Cleveland's camera enforcement system documented the violation of Ohio's speeding laws. The Arizona Supreme Court's decision in *State v. Walker* is very dissimilar to the facts before this Court as the decision upheld an appellate court's holding that a civil traffic violation adjudication would not be given collateral estoppel effect in a subsequent criminal prosecution of Walker. In *Hadley v. Maxwell*, the defendant Maxwell was sued in a personal injury case arising from a traffic collision. Maxwell paid a traffic fine (civil in Washington) and was thereafter sued by Hadley. The Washington court disallowed collateral estoppel based on the payment of her fine reasoning "[m]ost jurisdictions have refused to admit traffic misdemeanors in subsequent civil cases, let alone allow them to be the basis for collateral estoppel." Unlike *Hadley* there are no physical injuries or civil tort liability at issue. Rather as found in *Carroll* in considering unjust enrichment claims presented by lessees such as Appellees herein:

[Appellants'] claims are precluded by *res judicata*. " *McCarthy v. City of Cleveland*, No. 1:11-CV-1122, 2011 WL 4383206, at *1 (N.D.Ohio Sept.20, 2011). Had Appellants contested their citations, rather than paying their fines, the district court reasoned, they eventually could have presented all of the arguments that they pressed below. *Id.* at *2-*5. Because Appellants did not appeal through the administrative process that the ordinance offered, they lost the opportunity to make their claims.

Id. at *2.

There are however, out-of-state cases directly on point that the Eighth District decided to ignore; in *Kovach v. District of Columbia* (D.C. 2002) 805 A.2d 957 the appellant had paid without contest a civil traffic violation documented by an automated

camera system. The court concluded that “in failing to contest the infraction, appellant effectively acknowledged liability for running the red light. *Id.* at 962. In affirming the dismissal of plaintiff-appellant Kovach’s claims the appellate court recognized “[c]ollateral estoppel restricts a party in certain circumstances from relitigating issues or facts actually litigated and necessarily decided in an earlier proceeding.” *Id.* at 962 (Citations omitted).

In construing Ohio law, the Sixth Circuit in *Carroll* recognized, as held by this Court that “a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.” *Id.* at 303 quoting *Grava*, 73 Ohio St.3d at 382. From the holding in *Grava*, the Sixth Circuit distilled the four elements making up res judicata:

(1) a prior final, valid decision on the merits by a court of competent jurisdiction; (2) a second action involving the same parties, or their privies, as the first; (3) a second action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action.

Carroll at 302.

1. The First and Second Elements of Res Judicata are met.

The first element was found in *Carroll* as under the identical circumstances presented by the *Lycan* Appellees in this appeal as Appellees declined to appeal and paid their fines, admitting their vehicle had been captured violating the traffic laws:

“The citations that Appellants received clearly indicated that paying the fine, rather than contesting the citation, was an admission of liability. Thus, by paying, each Appellant admitted that he or she committed the alleged traffic violation, without asserting any defenses. Like a settlement decree in a civil case, this qualifies as a final disposition. Appellees satisfy the first prerequisite for the application of claim preclusion.

Carroll at 302. The Eighth District's attempt to disregard the admission of liability associated with payment and failure to appeal under the circumstances by claiming "Res judicata does not apply because there was never an actual "judgment" rendered by a court, or administrative tribunal, of competent jurisdiction" (*Lycan II* at ¶ 15) simply disregards the obvious. As clearly stated in CCO 413.031(k): "failure to give notice of appeal or pay the civil penalty within this time period [21 days] shall constitute a waiver of the right to contest the ticket and shall be considered an admission." Similarly, the second element is met as "[w]ithout question, this action involves the same parties as the earlier traffic-citation action." *Id.* at 303.

2. The third element is met as Appellees could have challenged the application of CCO 413.031 to them as lessees through the appellate process provided by the ordinance.

Appellees herein are challenging the application of the law, not the constitutionality of the ordinance and had recourse to the administrative appellate process. The Sixth Circuit thoroughly analyzed the third element, ultimately concluding this element was met, for the same reasons as should have been found by the Eighth District herein:

[Carroll's] arguments deal uniformly with the ordinance as applied to lessees, not its facial validity. Appellants could have pursued the arguments that they raise here in the appellate process that they waived.

Id. at 306. The *Carroll* conclusion is further buttressed by the Eighth District's earlier decision in *Dickson & Campbell, L.L.C. v. City of Cleveland*, 181 Ohio App.3d 238, 908 N.E.2d 964, 966 (2009), wherein the court in conducting an appellate review of a § 2506 decision issued by the court of common pleas reversed a holding in favor of the City, holding that the appellant as a vehicle lessee was not subject to the civil liability

authorized by CCO 413.031 as the appellant was not an owner under the ordinance. The Appellees declined the opportunity the challenge application of CCO 413.031 to them, the same adequate remedy at law as was presented to the *Dickson & Campbell* lessee appellant.

3. The fourth element is met as Appellees seek refund of the fine they paid.

The fourth element of res judicata was addresses in *Carroll* under the same circumstances presented by the *Lycan* Appellees:

“[A]s a matter of Ohio law. The facts that underlie this suit—the issuance of traffic citations to lessees, rather than owners, of vehicles—are identical to the facts that confronted the plaintiffs when they received their notices of liability. The City satisfies the fourth prerequisite for the application of claim preclusion.

Carroll at 307.

Contrary to the Eighth District’s comments concerning “fairness and justice” (*Lycan II* at ¶ 17), the same court had previously recognized “[i]f parties prosecute their challenges to Codified Ordinances 413.031 through an administrative appeal, they will then have an opportunity to challenge the ordinance.” *State, ex rel. Scott v. Cleveland*, 166 Ohio App.3d 293, 850 N.E.2d 747, 2006-Ohio-2062, ¶ 19. Appellees declined the opportunity. As was discussed in a prior appeal by the same lessees contesting in *Carroll* (the case was formerly identified under deceased plaintiff McCarthy’s name) the process is neither “unreasonable, onerous or coercive”:

For whatever reason, they chose to voluntarily pay the fines without challenging the tickets. The City did not garnish, attach, seize or otherwise “take” the fine monies from accounts or funds belonging to plaintiffs. As the citation provided an alternative to payment—an alternative not unreasonable, onerous or coercive—Plaintiffs’ payments of the fines were voluntary, not compelled. Indeed, this conclusion is corroborated by the experience of the plaintiffs in *Dickson & Campbell, LLC v. City of Cleveland*, 181 Ohio

App.3d 238, 908 N.E.2d 964 (2009), who successfully challenged this very ordinance on the very grounds now asserted without paying their fines.

McCarthy v. City of Cleveland, 626 F.3d 280, 288 (6th Cir. 2010) (J. McKeague, concurring). Claim preclusion “requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it.” *National Amusements, Inc. v. City of Springdale*, 53 Ohio St.3d 60, 558 N.E.2d 1178, 1180 (1990) (citations omitted). The *Lycan* Appellees did not prosecute any appeals of their civil citations and as in *Carroll* they are precluded from acting as class representatives under the claim preclusion principles inherent with *res judicata*.

IV. CONCLUSION

Municipalities and towns across Ohio are now faced with these exact issues regarding their traffic camera enforcement programs. Plaintiffs who have paid their violation notices years and years ago are now demanding refunds of their voluntarily paid violations, while not denying that they have committed the traffic offenses. Ohio cities and towns should not fear financial threats brought by individuals who ran red lights or sped down city streets up to nine years ago. Allowing unjust enrichment claims from individuals who voluntarily paid their violation notices would be a great injustice under any application of the “equity” principles being espoused by Appellees in the *Lycan* litigation and contrary to the standing consideration given by the Eighth District to the purported class representative in *Jodka*.

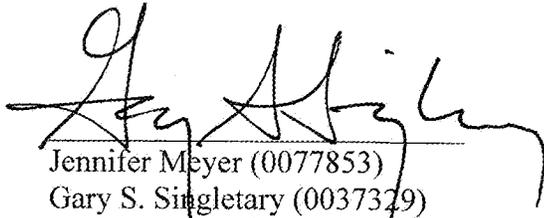
For the foregoing reasons, the City of Cleveland respectfully requests that this Honorable Court grant jurisdiction to hear this appeal of great public importance. Alternatively, the City requests that this Court grant jurisdiction and hold the case in abeyance until the standing issues in *Walker v. Toledo* and *Jodka v. City of Cleveland* are

determined. Disposition of the standing issues presented therein in light of the *res judicata* principles long recognized in quasi-judicial administrative hearings would be determinative of this appeal.

Respectfully Submitted,

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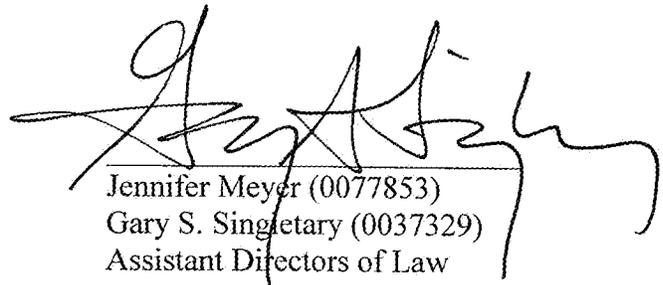
CERTIFICATE OF SERVICE

A true copy of the foregoing Jurisdictional memorandum of Appellee City of Cleveland was duly served by regular U.S. Mail, postage prepaid, this 10th day of March 2014 on the following:

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EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 99698

JANINE LYCAN, ET AL.

PLAINTIFFS-APPELLEES

vs.

CITY OF CLEVELAND

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-686044

BEFORE: S. Gallagher, P.J., Blackmon, J., and McCormack, J.

RELEASED AND JOURNALIZED: January 23, 2014

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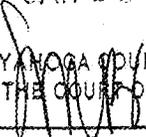
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FILED AND JOURNALIZED
PER APP.R. 22(C)

JAN 28 2014

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By  Deputy

SEAN C. GALLAGHER, P.J.:

{¶1} Defendant-appellant city of Cleveland appeals from the trial court's order granting class certification. For the reasons stated herein, we affirm.

{¶2} There has been considerable debate whether red-light cameras serve to make the roads safer or whether their use is about generating revenues for the cities that deploy them. Irrespective of that controversy, we are mindful that the imposition of a \$100 civil penalty resulting from a red-light camera violation has significant value to the individual. At issue in this case is whether the plaintiffs may maintain as a class action their claims for unjust enrichment and declaratory relief arising from the enforcement of a red-light camera ordinance against the individuals in the putative class.

{¶3} Former Cleveland Codified Ordinances ("CCO") 413.031 authorized the use of automated traffic cameras to impose civil penalties on "the owner of a vehicle" for red light and speeding offenses. Pursuant to former CCO 413.031(p)(3), a "vehicle owner" was defined as "the person or entity identified by the Ohio Bureau of Motor Vehicles, or registered with any other State vehicle registration office, as the registered owner of a vehicle."

{¶4} On February 25, 2009, plaintiff Janine Lycan filed a class action complaint against the city, alleging that the city unlawfully enforced former CCO 413.031 against her. The action arose following this court's decision in *Dickson & Campbell, L.L.C. v. Cleveland*, 181 Ohio App.3d 238, 2009-Ohio-738,

908 N.E.2d 964 (8th Dist.). In *Dickson*, this court found nothing ambiguous about the plain meaning of the word “vehicle owner” and determined that former CCO 413.031 does not impose liability on a lessee of a vehicle.¹

{¶5} Lycan claimed that she was not the owner of the vehicle depicted in the photograph taken by the automated traffic camera. Lycan sought equitable relief for unjust enrichment, as well as declaratory and injunctive relief against the city.² Lycan also filed a motion for class certification.

{¶6} Thereafter, a first amended class action complaint was filed, which in addition to Lycan included as named plaintiffs Thomas Pavlish, Jeane Task, Lindsey Charna, Ken Fogle, John T. Murphy, and ITW Hobart.³ The amended complaint alleged that none of the plaintiffs was a “registered owner” of the vehicle and that the city unlawfully collected the fines from those individuals. Each plaintiff except Task paid the \$100 civil fine without challenging it. Although Task did not pay the fine, she was assessed additional penalties as a result. The city filed an answer to the second amended complaint.

{¶7} The city then filed a motion for judgment on the pleadings. The trial court granted this motion on the basis that the plaintiffs had waived their right

¹ CCO 413.031 was amended effective March 11, 2009, to permit fines to be imposed against lessees as well as registered owners.

² The city filed a motion to dismiss the complaint that was later denied by the court.

³ ITW Hobart was later removed from the action through a notice of partial voluntary dismissal. The remaining plaintiffs are appellees herein.

to contest the citation by failing to appeal and paying the fines. Because of this determination, the trial court further denied the motion for class certification.

{¶8} On appeal in *Lycan v. Cleveland*, 8th Dist. Cuyahoga No. 94353, 2010-Ohio-6021 ("*Lycan I*"), this court reversed the judgment on the pleadings on the claim for unjust enrichment and the claim for declaratory relief, but affirmed on the claim for injunctive relief. In that opinion, the court determined as follows:

While we recognize that [the plaintiffs] had the opportunity to challenge the imposition of the fines before they paid them, this opportunity does not necessarily foreclose any right to equitable relief. * * * We cannot say, on the face of the complaint, that [the plaintiffs] can prove no set of facts entitling them to relief. Among other things, the question of whether [the plaintiffs] were induced to pay the fines by a mistake of fact or law and whether they were coerced to pay by a threat of additional penalties may be relevant to this question.

Id. at ¶ 8. The court also reversed and remanded for further proceedings on the question of class certification. *Id.* at ¶ 11.

{¶9} Thereafter, the plaintiffs filed a motion for partial summary judgment, claiming all of the elements of their unjust enrichment claim were met. The city opposed the motion and filed its own motion for summary judgment. On February 8, 2013, the trial court granted the plaintiffs' motion for partial summary judgment.

{¶10} The trial court conducted a hearing on February 19, 2013. Thereafter, the trial court granted the plaintiffs' motion for class certification on

February 26, 2013. The trial court found that all of the requirements for class certification were met and certified the following class:

All persons and entities who were not a "vehicle owner" under CCO 413.031, but were issued a notice of citation and/or assessed a fine under that ordinance, prior to March 11, 2009, by/or on behalf of Defendant, City of Cleveland.

{¶11} Excluded from the class were the following:

- 1) Any of the above described class member[s] who filed a lawsuit involv[ing] any of the claims included in the class;
- 2) Immediate families of class counsel, the judge of this court, defendant's counsel of record and their immediate families; and
- 3) All persons who make a timely election to be excluded from the class for the 23(B)(3) claim.

{¶12} The city timely appealed the trial court's ruling on class certification. While the city's brief lists an assignment of error relating to the trial court's granting of partial summary judgment, this ruling is not yet appealable and is not addressed in the substance of appellant's brief. Rather, the issues raised on appeal pertain to whether the Civ.R. 23(A) class action requirements were met and whether the action is barred by res judicata.

I. Res Judicata

{¶13} We first address the issue of res judicata. As a preliminary matter, the parties dispute whether *Lycan I* established the law of the case insofar as the court determined that the plaintiffs' failure to pursue administrative review

before paying the fine “does not necessarily foreclose any right to equitable relief.” However, *Lycan I* did not address the issue of res judicata.

{¶14} In *Carroll v. Cleveland*, 6th Cir. No. 11-4025, 2013 U.S. App. LEXIS 7178 (Apr. 5, 2013), a “copycat” lawsuit raising constitutional takings challenges, the federal court found that where the appellants paid their fines rather than contesting their citations through the administrative process provided under CCO 413.031, claim preclusion barred their claims. *See also Foor v. Cleveland*, N.D. Ohio No. 1:12 CV 1754, 2013 U.S. Dist. LEXIS 115552 (Aug. 14, 2013). We are not inclined to follow such an expansive view of res judicata.

{¶15} The doctrine of res judicata provides that “a valid, final judgment rendered upon the merits 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, 653 N.E.2d 226 (1995), syllabus. The plaintiffs in this matter paid the civil fine assessed by the city for a red-light camera violation. Res judicata does not apply because there was never an actual “judgment” rendered by a court, or administrative tribunal, of competent jurisdiction.⁴ Even if an administrative decision had been

⁴ Not only was there no judgment when fines were paid, but also, when a citation was not paid, no reduction to judgment occurred. We question the city’s ability to collect upon fines that have not been converted to civil judgments in accordance with a defendant’s due process rights. CCO 413.031(k)(4) provides that “[a] decision in favor of the City of Cleveland may be enforced by means of a civil action or any other means provided by the Revised Code.”

rendered, the claims for unjust enrichment and declaratory judgment were not claims that could have been litigated or decided by the parking violations bureau.

{¶16} Finally, we recognize that the Ohio Supreme Court found the civil hearing process provided by CCO 413.031(k) to involve the exercise of quasi-judicial authority. *State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573, 859 N.E.2d 923, ¶ 15. We are also aware that in certain situations, res judicata has been found to apply to quasi-judicial decisions of administrative agencies. *See Grava*. However, “[t]he binding effect of res judicata has been held not to apply when fairness and justice would not support it.” *The State ex rel. Estate of Miles v. Piketon*, 121 Ohio St.3d 231, 2009-Ohio-786, 903 N.E.2d 311, ¶ 30.

{¶17} While we have found no authority in Ohio on the issue, courts in other states have generally declined to apply res judicata or collateral estoppel with regard to traffic infractions. *State v. Walker*, 159 Ariz. 506, 768 P.2d 668, 671 (Ariz.App.1989); *Hadley v. Maxwell*, 144 Wash.2d 306, 312-313, 27 P.3d 600 (2001). As a practical matter, traffic infractions tend to be minor in nature, are informally adjudicated, and are often uncontested. With limited civil sanctions, there is little incentive to contest a citation or to vigorously litigate the matter. Under CCO 413.031, the maximum penalty that may be imposed is \$200. Late penalties are authorized if the penalty is not paid within 20 days and 40 days

from the date the ticket is mailed to the offender. If the penalty is not timely paid, the recipient is subject to the additional penalties and collection efforts. There was evidence presented at the class certification hearing that the cost to exercise the right to appeal was as much as the \$100 fine itself.

{¶18} Further, the administrative procedure provided by CCO 413.031(k) is designed to provide a simple and expeditious means of disposing of literally thousands of such citations every year. To allow *res judicata* or collateral estoppel to apply to such proceedings would circumvent the purposes in creating the expedited dispositional procedures for civil traffic violations.

{¶19} For these reasons, we conclude fairness and justice would not support the application of *res judicata* in this case. We shall proceed to address the challenge to class certification.

II. Class Action Certification

{¶20} A trial court has broad discretion in determining whether to certify a class action, and a reviewing court will not disturb the determination absent an abuse of discretion. *Cullen v. State Farm Mut. Auto. Ins. Co.*, Slip Opinion No. 2013-Ohio-4733, ¶ 19. An abuse of discretion occurs when a trial court's decision is unreasonable, arbitrary, or unconscionable. *Id.*

{¶21} In order to maintain a class action, the plaintiff must provide evidence to establish by a preponderance of the evidence each of the seven

requirements for maintaining a class action under Civ.R. 23. *Id.* at ¶ 15. Those requirements are as follows:

(1) an identifiable class must exist and the definition of the class must be unambiguous; (2) the named representatives must be members of the class; (3) the class must be so numerous that joinder of all members is impracticable; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three Civ.R. 23(B) requirements must be met.

Id. at ¶ 12, quoting *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 125 Ohio St.3d 91, 2010-Ohio-1042, 926 N.E.2d 292, ¶ 6; and *Hamilton v. Ohio Savs. Bank*, 82 Ohio St.3d 67, 71, 694 N.E.2d 442 (1998).

{¶22} “[A] trial court must conduct a rigorous analysis when determining whether to certify a class pursuant to Civ.R. 23 and may grant certification only after finding that all of the requirements of the rule are satisfied[.]” *Cullen* at ¶ 16. When conducting this analysis, the trial court is required “to resolve factual disputes relative to each requirement and to find, based upon those determinations, other relevant facts, and the applicable legal standard, that the requirement is met.” *Id.*

(1) Identifiable Class

{¶23} The first requirement of an identifiable class requires that the class definition be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member. *Hamilton* at

71-72. In other words, “the class definition must be precise enough ‘to permit identification within a reasonable effort.’” *Id.* at 72, quoting *Warner v. Waste Mgt., Inc.*, 36 Ohio St.3d 91, 96, 521 N.E.2d 1091 (1988).

{¶24} In this matter, the class definition was limited to “[a]ll persons and entities who were not a ‘vehicle owner’ under CCO 413.031, but were issued a notice of citation and/or assessed a fine under that ordinance, prior to March 11, 2009, by/or on behalf of Defendant, City of Cleveland.” The trial court determined that the class definition “leaves no room for ambiguity.” The city argues that the class definition is overbroad.

{¶25} Contrary to the city’s assertion, the class definition does not attempt to encompass “anyone and everyone.” Quite simply, the class is defined to include persons who were not a “vehicle owner” under former CCO 413.032. Former CCO 413.031(p)(3) defined a vehicle owner in terms of the vehicle’s registered owner. Thus, a non-vehicle owner is in the class regardless of whether he or she leased the vehicle or not.

{¶26} Also, the class definition is not rendered overbroad by this court’s decision in *Dickson*, 181 Ohio App.3d 238, 2009-Ohio-738, 908 N.E.2d 964, or by the fact that the class definition encompasses potential plaintiffs beyond the scope of lessees. Although *Dickson* involved an adjudicated lessee, the court found no ambiguity in the ordinance and recognized that there is “nothing ambiguous about the plain meaning of the words ‘vehicle owner.’” *Id.* at ¶ 34-39.

{¶27} Insofar as the city maintains that the class definition encompasses individuals who may have been identified as the driver of the vehicle by an affidavit from the owner filed under CCO 413.031(k), these individuals nonetheless fall within the class of individuals who plaintiffs maintain did not qualify as a "vehicle owner" under CCO 413.031.

{¶28} Finally, although appellee Task did not pay the fine for the violation notices she received, she was assessed nonpayment penalties and subjected to collection efforts and has a valid claim for declaratory relief. Further, a subclass could be created for Task and similarly situated class members who were charged under the former ordinance but did not pay the fine. See Civ.R. 23(C)(4)(a).⁵

{¶29} Our review reflects that the class definition herein is precise enough to permit identification of citation recipients who were not a "vehicle owner" under former CCO 413.031 within a reasonable effort.

(2) Class Membership

{¶30} The second requirement for class certification is that the class representative must have proper standing, which requires that "the plaintiff must possess the same interest and suffer the same injury shared by all

⁵ That rule provides, "When appropriate (a) an action may be brought or maintained as a class action with respect to particular issues, or (b) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

members of the class that he or she seeks to represent.” *Hamilton*, 82 Ohio St.3d at 74, 694 N.E.2d 442. There is competent evidence in the record that each of the appellees received a notice of liability from the city’s parking violations bureau that asserted a violation photographed by an automatic traffic enforcement system, and that each of the appellees was not the “vehicle owner.” Each appellee, with the exception of Task, paid the civil fine. The appellees possess the same interest and suffer the same injury as the class they seek to represent.

{¶31} The city argues that appellee Task does not have standing because she did not pay the fine. However, Task was assessed additional penalties for not paying the fine; she received collection notices; and she has not been released of the debt. As such, she has standing to pursue the claim for declaratory relief. As noted above, a subclass may be created for those class members who are similarly situated to Task. *See* Civ.R. 23(C)(4)(a).

(3) Numerosity

{¶32} Civ.R. 23(A)(1) requires that the class be “so numerous that joinder of all members is impracticable.” In finding this requirement was met, the trial court considered the following evidence:

The City of Cleveland has issued more than 357,000 total citations while [former] CCO 413.031 was in effect (December 2005 until March 11, 2009). During the period the ordinance was in effect, 8.4% of the total vehicles registered in Cuyahoga County were leased vehicles. Based on statistical probability, the total class

members in this case is likely in excess of 30,000 notice recipients. According to Dr. Jim Nieberding there is a 99% statistical probability that the number of notice of violations issued to lessees is at 23,000.

{¶33} At the class certification hearing, the parties stipulated that numerosity was not an issue in the case.

(4) Commonality

{¶34} The commonality requirement of Civ.R.(A)(2) requires the presence of “questions of law or fact common to the class.” This requirement generally is given a permissive application, and if there is common nucleus of operative facts or a common liability issue, the rule is satisfied. *Hamilton*, 82 Ohio St.3d at 77, 694 N.E.2d 442.

{¶35} Here, the putative class presents common legal claims for unjust enrichment and/or declaratory relief. All claims arise from the city’s common practices and procedures in enforcing traffic citations and/or assessing fines under former CCO 413.031 against persons or entities who were not “vehicle owners.” Despite the city’s assertion of a defense of unclean hands against individuals who admitted committing the traffic offense, the plaintiffs’ claims arise from the same common nucleus of operative facts, and the questions concerning the city’s liability are common to the class.

(5) Typicality

{¶36} The typicality requirement is met “where there is no express conflict between the class representatives and the class.” *Hamilton* at 77. The trial court found no issue with the typicality requirement. The court further found no unique defenses to the claims of the named class members and that the named class members’ interests are aligned with all putative class members’ claims.

{¶37} Our review reflects that the claims of the class representatives involve the same legal theories as those of the putative class and arise from the same practices and procedures of the city in enforcing former CCO 413.031. While the city attempts to draw out distinguishing facts, “when it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.” *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 485, 727 N.E.2d 1265 (2000), quoting 1 Newberg on Class Actions (3 Ed.1992) 3-74 to 3-77, Section 3.13. In this instance, the claims of the class representatives are typical of the claims of all class members.

(6) Adequacy

{¶38} Adequacy in class actions looks to both the class representative and counsel. *Warner*, 36 Ohio St.3d at 98, 521 N.E.2d 1091. A class representative

is deemed adequate "so long as his or her interest is not antagonistic to that of other class members." *Hamilton*, 82 Ohio St.3d at 78, 694 N.E.2d 442.

{¶39} The record reflects that the class representatives possess the same interest in the outcome of the litigation as each of the class members. There is nothing indicative of any conflict or antagonistic interest between the representatives and the class. Further, the trial court found class counsel is experienced with this type of litigation. While the city takes issue with Lycan's employment with class counsel, there is no evidence to suggest that this would impair her ability to represent the class.

(7) Civ.R. 23(B)(3)

{¶40} The trial court found that the requirements of Civ.R. 23(B)(3) were met. Civ.R. 23(B)(3) requires the court to find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and "that a class action is the superior method superior to other available methods for the fair and efficient adjudication of the controversy." "For common questions of law or fact to predominate, it is not sufficient that such questions merely exist; rather, they must present a significant aspect of the case. Furthermore, they must be capable of resolution for all members in a single adjudication." *Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St.3d 200, 204, 509 N.E.2d 1249 (1987).

{¶41} The trial court found, “[a]ll the claims arise from [the city’s] common practices and procedures in enforcing [former] CCO 413.031.” The city argues individual determinations will be required as to which class members were lessees or someone other than the owner of the vehicle. However, the predominant issues relate to the lawfulness of the city’s enforcement of former CCO 413.031 against persons and entities who were not “vehicle owners.”

{¶42} Former CCO 413.031 defined a “vehicle owner” as “the person identified by the Ohio Bureau of Motor Vehicles, or registered with any other State vehicle registration office, as the registered owner of a vehicle.” The ordinance also indicated that such identification is “prima facie evidence” of ownership.

{¶43} Maria Vargas, the administrator of the Cleveland Parking Violations Bureau, Photo Safety Division, indicated in her deposition that a committee decision had been made to include lessees within the definition of “owners” and that a business rule was adopted to that effect. While Vargas indicated there was a lack of information to identify leased vehicles, a representative for ACS explained that the file returned from the Ohio Bureau of Motor Vehicles would plainly indicate whether the vehicle was “leased” and would identify the leaseholder. In any event, such file would be useful for determining whether the person was a registered owner of the vehicle.

{¶44} The city also argues that individual determinations will be required as to which notices were paid, ignored, or waived. Administrator Vargas stated in her deposition that delinquency notices were sent to individuals who ignored the notices and that the Affiliated Computer Services (“ACS”) system was updated to reflect payment information. Violations that remained unpaid were turned over to a collection agency. Vargas conceded that there is an electronic record of everyone who received a notice, payment information, and delinquency and collection data. Vargas also confirmed that notices were issued to nonowner drivers who were identified on notices issued to vehicle owners and that this information was kept in the ACS system. There is also evidence that collection efforts were made against persons who did not pay the fine, as was the case with Task.

{¶45} Insofar as some members paid the fine and others did not, and with respect to nonowner drivers, we have already recognized that subclasses may be created. While differences may exist as to the particularized fact patterns, “[t]he mere existence of different facts associated with the various members of a proposed class is not by itself a bar to certification of that class.” *In re Consol. Mtge. Satisfaction Cases*, 97 Ohio St.3d 465, 2002-Ohio-6720, 780 N.E.2d 556, ¶ 10.

{¶46} Here, each class member presents common questions concerning their requests for equitable and/or declaratory relief that may be resolved on a

class-wide basis. Our review reflects that common proof exists concerning their claims and that common questions predominate over questions affecting only individual members.

{¶47} The trial court also found that a class action is the superior method to other available methods for the fair and efficient adjudication of the controversy. The superiority of the class action is evident. Because certification was appropriate under Civ.R. 23(B)(3), we need not consider whether certification would also have been appropriate under Civ.R. 23(B)(2).

{¶48} Upon our review, we find no abuse of discretion by the trial court in its certification of the class.

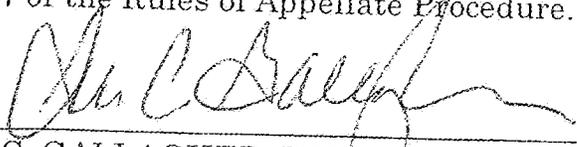
{¶49} Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



SEAN C. GALLAGHER, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
TIM McCORMACK, J., CONCUR