

ORIGINAL

IN THE SUPREME COURT OF OHIO

JANINE LYCAN, <i>et al.</i>	)	Case No. 2014 - 0358
	)	
Plaintiffs-Appellees,	)	
	)	
v.	)	On appeal from the Eighth District
	)	Court of Appeals of Ohio
CITY OF CLEVELAND	)	
	)	
Defendant-Appellant.	)	Eighth District Case Number 99698

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APPELLANT CITY OF CLEVELAND'S  
MERIT BRIEF

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## I. INTRODUCTION

Cleveland Codified Ordinance 413.031 (“CCO 413.031”) was enacted to authorize the use of automated-camera systems to impose civil penalties for speeding and red light traffic law violations. Plaintiffs-Appellees in this matter received notices of violation for moving violations captured by the City’s automated traffic cameras for motor vehicles each of them had leased. This Court has previously recognized that individuals receiving a notice of violation “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.

None of the Plaintiffs-Appellees in the instant class-action chose to exercise their adequate remedy at law by way of the administrative proceeding provided by CCO 413.031, either to challenge the legal basis for the issuance of the violations to them as lessees, or to dispute whether their vehicles were accurately captured in violation of the city’s traffic laws. Instead, each of them simply admitted the violations documented by the City’s automated camera system when they failed to appeal and voluntarily paid the civil fines assessed under the ordinance.<sup>1</sup>

In construing the facts and circumstances associated with the very similar class action litigation presented in *Carroll v. Cleveland*, 522 Fed.Appx. 299 (6th Cir.2013), the

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<sup>1</sup> Appellee Task admitted her violations by neither paying nor seeking to appeal as outlined in CCO 413.031. Appellee Murphy’s wife wrote a letter appealing to the traffic division explaining how she received five violation notices over a matter of minutes. A photo division hearing examiner waived three of the five violations notices. Murphy paid the remaining two violation notices. At no time did Murphy state she was a lessee in her letter.

Sixth Circuit Court of Appeals applied Ohio law and the principles of *res judicata* in holding that “[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 Eighth District’s summary refusal herein to apply *res judicata* to the purported equitable restitution claims of the Plaintiffs-Appellees under similar circumstances to *Carroll* is either ill-explained or inexplicable:

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.

*Lycan v. Cleveland*, 8<sup>th</sup> Dist. No. 99698, 2014 -Ohio- 203, 6 N.E.3d 91 (“*Lycan II*”) at ¶ 18. Clearly, the refusal to bind individuals to voluntary admissions of liability in a quasi-judicial administrative framework will create confusion, conflict with long standing legal principal regarding payment of infractions, and guarantee the opposite of expedited disposition in civil traffic cases regulated by CCO 413.031. Such result is plainly shown in the current matter where Plaintiff-Appellee Lycan initiated the lawsuit more than two years after she chose not to challenge the civil citation through payment of the \$100 civil fine assessed for the moving violation under CCO 413.031.

Moreover, there is a certain irony in Plaintiffs-Appellees’ reliance on *Dickson & Campbell, L.L.C. v. Cleveland*, 2009-Ohio-738, 181 Ohio App. 3d 238, 240, 908 N.E.2d 964, 965 (8<sup>th</sup> Dist. 2009) to support their equitable claims for restitution. *Dickson & Campbell, L.L.C.* as vehicle lessees had appealed two civil camera citations received pursuant to the administrative hearing process established in CCO 413.031. Following consideration of *Dickson & Campbell’s* R.C. Chapter 2506 appeal, the Eighth District

reversed the trial court's decision to uphold the civil penalty that had been confirmed by the administrative hearing officer at the initial administrative appeal allowed at CCO 413.031(h). The Eighth District reversed concluding that that the phrase "vehicle owner" as used in CCO 413.031 would not apply to vehicle lessees. *Id.* at ¶ 54. Each of the individual Plaintiffs-Appellees and the defined class they seek to represent were afforded but did not take the same opportunity of appeal under CCO 413.031 that was successfully undertaken by Dickson & Campbell.

All Plaintiffs-Appellees and the certified class have admitted the traffic violation captured by the City's automated traffic camera system, either through voluntary payment or willfully choosing to ignore the administrative appellate process that was available to them pursuant to CCO 413.031 and as was referenced to them on the back of the notices of violation each of them received. The City would not disagree with Plaintiffs-Appellees' characterization at page 11 of their "Memorandum Opposing Jurisdiction" that "the overwhelming majority of Named Plaintiffs and class members had indeed paid the civil penalty within 21 days." As this Court understands and previously recognized "the appeals authorized by CCO 413.031 are to be filed within twenty-one days from the date listed on the notice of violation." *Scott*, 112 Ohio St.3d 324, 2006 -Ohio- 6573, at ¶ 5.

It is obvious that Appellees, along with members of the class they seek to represent, after knowingly waiving their established right to appeal their camera violations, are now, in effect, seeking to revoke their decisions under the guise of "equity" by attempting to retroactively apply the R.C. Chapter 2506 appeal ruling in *Dickson & Campbell* in their favor. Because each Plaintiffs-Appellees surrendered their

established right to appeal, and voluntarily admitted the cited traffic violations, they do not now have standing to seek restitution under the claim preclusion principles inherent with the application of *res judicata*. The decision of the Eighth District Court of Appeals being appealed herein, denying the application of *res judicata* and allowing the Plaintiffs-Appellees to act as class representatives for those similarly situated should be reversed in accordance with the Sixth Circuit's *res judicata* analysis undertaken in the similar *Carroll* litigation.

## II. STATEMENT OF THE CASE

### A. *Lycan I*

Appellee Janine Lycan filed a class action complaint against the City of Cleveland on February 25, 2009, alleging that because she had leased the vehicle that was captured by the traffic camera for a speeding violation, the City of Cleveland did not possess the authority to assess her a civil penalty under Cleveland Codified Ordinance § 413.031. *Compl.* at ¶¶ 10-12. The City of Cleveland moved to dismiss the complaint on April 9, 2009. Appellee Lycan moved to certify a class on May 11, 2009.

On May 28, 2009, Appellee filed an amended complaint adding new party Plaintiffs Task, Charna, Murphy, Pavlish, and Fogle. An additional new party Plaintiff, ITW Hobart, was subsequently dismissed because its camera citations had been issued by the City of East Cleveland. On June 18, 2009, the Cuyahoga Common Pleas Court denied the City's Motion to Dismiss. The City filed its answer on June 11, 2009 and subsequently filed a Motion for Judgment on the Pleadings on July 14, 2009.

The City filed its opposition motion to class certification on August 6, 2009 and filed a supplemental brief in opposition of class certification on August 17, 2009. On

November 25, 2009, The Common Pleas Court granted the City's Motion for Judgment on the Pleadings and denied class certification because Appellees had not pursued the available appeal process provided by CCO 413.031. (Court's Order Nov. 25, 2009). Appellees herein filed a notice of appeal with the Eighth District Court of Appeals on December 8, 2009. The appellate court did not address any issues regarding the voluntary nature of the payments or the doctrine of *res judicata* barring Appellees' claims, but instead held only that the Appellees may have a possible unjust enrichment claim against the City. (*Lycan v. City of Cleveland*, 8<sup>th</sup> District. No. 94353, 2010 -Ohio-6021, at ¶ 8 ("*Lycan I*").

On December 20, 2010, the City filed a motion for En Banc review based upon conflicting previous Eighth District opinions holding that unjust enrichment was not available against a municipality. En banc review was denied on a narrow 5-6 vote. The City then filed a notice of appeal in the Ohio Supreme Court following reversal of the trial court's dismissal. This Court denied jurisdiction on May 25, 2011. *Lycan v. City of Cleveland*, 128 Ohio St. 3d 1501 (2011).

**B. *Lycan II***

Following remand to the trial court Appellees subsequently filed for partial summary judgment on July 25, 2012 claiming that all elements of their unjust enrichment claim had been met. On August 12, 2012, The City filed both an opposition to Appellees' motion for partial summary judgment and its own motion for summary judgment. On February 3, 2013 the trial court granted Appellees partial motion for summary judgment and after a class certification hearing on February 19, 2013 subsequently granted Appellees' motion of class certification.

The City appealed the class certification ruling to the Eighth District Court of Appeals on March 27, 2013. The court identified the issues before it on appeal as “whether the Civ.R. 23(A) class action requirements were met and whether the action is barred by *res judicata*.” *Lycan v. Cleveland*, 8<sup>th</sup> Dist. No. 99698, 2014 -Ohio- 203, 6 N.E.3d 91, ¶ 12 (“*Lycan II*”). The City argued that, unlike the appellant in *Dickson & Campbell*, the Plaintiffs-Appellees, and the putative class to be represented, had admitted the traffic violations and sidestepped the administrative appeal process that provided an adequate remedy at law through CCO 413.031. As a result Plaintiffs-Appellants lacked standing as class representatives to seek restitution of civil fines paid by themselves and the class of similarly situated individuals.<sup>2</sup> The Eighth District did not apply the principles of *res judicata* and overruled the City’s argument that Plaintiffs-Appellees lacked standing to proceed as class representatives in the litigation. The City thereafter filed a timely appeal.

### **III. STATEMENT OF THE FACTS**

#### **A. Cleveland Codified Ordinance 413.031**

Cleveland Codified Ordinance 413.031 (“CCO 413.031”) was enacted in 2005 to authorize the use of automated-camera systems to assist in the City’s regulation of traffic laws by authorizing civil penalties on the owners of motor vehicles for moving violations documented by the automated-camera system established with the ordinance. In *State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 859 N.E.2d 923, 2006 -Ohio- 6573 this Court

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<sup>2</sup> The City made additional arguments that include that Plaintiff-Appellee Task neither paid nor appealed her violation notices and thus is not similarly situated. Further, Plaintiff-Appellee Murphy already “appealed” to the violations bureau photo enforcement division and had three of the five violation notices waived, but failed to appeal the lessee argument. This is evidence that each Plaintiff-Appellee’s record would need to be scrutinized individually which negates this class action.

reviewed the City's automated - camera enforcement system following the dismissal by the Eighth District Court of Appeals of a writ of prohibition that challenged the legal basis for the City's camera ordinance. A concise and useful overview of the brief history and operation of the ordinance therein provides:

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).

Any ticket generated by an automated-camera system (1) is reviewed by a Cleveland police officer, (2) is sent by first-class mail to or is personally served at the address of the registered owner of the vehicle, and (3) specifies the manner in which the ticket may be appealed. Section 413.031(h).

*Id.* at ¶¶ 2-3. 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.

"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."

*Id.* at ¶ 6. Those receiving notices of violation would thereafter maintain further rights to appeal under R.C. 2506.01(A) which provides in pertinent part:

"[E]very final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in Chapter 2505 of the Revised Code, except as modified by this chapter."

This Court recognized the availability of further appeal to the court under CCO 413.031:

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. Plaintiffs-Appellees and the presumptive class members chose not to appeal through the administrative process established at CCO 413.031(h) the notices of liability they had received.

**B. In February 2009 the Eighth District Considered an Appeal Brought Pursuant to CCO 413.031(h) by a Vehicle Lessee and Held that Vehicle Lessees Were Not Subject to Notices of Liability Issued Under the Ordinance for Traffic Violations Documented by the City’s Automated Traffic Camera System. (*Dickson & Campell, L.L.C. v. City of Cleveland*)**

Prior to the *Lycan* litigation being initiated, the City’s authority to issue civil notices of violation to lessees of vehicles under the CCO 413.031 had been specifically challenged in an appeal brought pursuant to CCO 413.031(h) and was addressed in *Dickson & Campbell, L.L.C. v. Cleveland*, 181 Ohio App. 3d 238, 2009-Ohio-738, 908 N.E.2d 964, 965 (8<sup>th</sup> Dist. 2009). Dickson & Campbell, LLC had received two separate camera citations for speeding violations that had been documented by the City’s automated camera system for a car their firm had leased rather than owned. *Id.* at ¶ 2. The firm appealed the two violation notices to the Parking Violations Bureau. *Id.* at ¶ 3. “In separate administrative hearings, examiners found Dickson & Campbell liable for each speeding violation and imposed a \$100 fine. Dickson & Campbell appealed both decisions to the common pleas court (in a consolidated appeal) under R.C. Chapter 2506.” *Id.*<sup>3</sup> “The common pleas court upheld the decisions of both hearing officers,

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<sup>3</sup> Documents from the Ohio Bureau of Motor Vehicles had identified “VW Credit Leasing, Ltd” and “listed Dickson & Campbell under ‘additional owner name’ and gave

finding Dickson & Campbell liable for the two speeding violations under CCO 413.031.” *Id.* at ¶ 4. Dickson & Campbell then appealed arguing that as lessees the trial court had erred in holding them liable for the two speeding violations. *Id.* at ¶¶ 5, 37.

The Eight District Court in a 2-1 decision reversed the liability finding for both notices of violation after concluding that the phrase “vehicle owner” as used in CCO 413.031 would not apply to vehicle lessees. *Id.* at ¶ 54. The dissenting judge would have upheld the trial court “because Dickson & Campbell is registered as the owner of the vehicle pursuant to BMV records.” *Id.* at ¶ 56 (dissent). This Court did not accept jurisdiction of the City’s appeal following the Eighth District’s decision. *Dickson & Campbell, L.L.C. v. Cleveland*, 122 Ohio St.3d 1479, 2009-Ohio-3625, 910 N.E.2d 478. “CCO 413.031 was thereafter amended effective March 11, 2009, to permit fines to be imposed against lessees as well as registered owners” *Lycan II*, at ¶ 4, FN 1.

**C. Plaintiffs-Appellees herein did not Appeal or otherwise Contest the Automated Traffic Camera Citations Issued to Each of Them Under CCO 413.031.**

The Eighth District Court of Appeal noted in its opinion that “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.” *Lycan II* at ¶ 4. The lawsuit was filed less than a week after the *Dickson & Campbell, L.L.C. v. Cleveland* decision was released on February 19, 2009.

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Dickson & Campbell’s address.” *Id.* at ¶ 12. While Dickson argued there could not be two owners, “[t]he hearing examiner...disagreed and concluded that the BMV identified Dickson & Campbell as an additional owner, and under CCO 413.031, that was sufficient.” *Id.* at ¶ 13.

Appellee Janine Lycan<sup>4</sup> had received a civil traffic enforcement camera citation on or around September 12, 2006. (Amended Compl. at ¶ 3). Lycan's claim was, therefore, filed approximately two and a half years after her vehicle had been photographed on August 21, 2006 traveling in excess of 11 mph over the speed limit. (*Id.*, Ex. A). Lycan had opted to pay the \$100 fine for the infraction instead of appealing the violation notice. (*Id.* at ¶ 14).

Appellee Ken Fogle claims to have received a violation notice and then subsequently paid the ticket. (*Id.* at ¶¶ 7, 14.) He did not exercise his right to appeal the ticket. Neither the date of the violation nor a copy of the violation notice is included in the First Amended Class Action Complaint. Appellee Thomas Pavlish claims to have received a violation notice and subsequently paid the fine without appealing. (*Id.* at ¶¶ 4, 14.) His violation notice is not attached to the First Amended Complaint. Appellee John T. Murphy alleges he received five violation notices for speeding. (*Id.* at ¶ 8, Exhibits K-O.) Murphy paid two of the five notices after his wife wrote a letter appealing to the hearing examiner. (*Id.* at ¶ 14.)

Appellee Jeanne Task was issued two violation notices for speeding on August 17, 2007 and March 1, 2008. (*Id.* at ¶ 5). Task never paid nor appealed the violation notices. (*Id.* at ¶ 15). Appellee Lindsey Charna received a violation notice for traveling 39 mph in a 25 mph zone on March 13, 2009 and subsequently paid the violation notice without appealing. (*Id.* at ¶¶ 6, 14.)

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<sup>4</sup> There is no dispute among the parties that Ms. Lycan was and presumably still is employed as a paralegal for Bashein & Bashein Co., LPA, counsel for Plaintiffs-Appellees in this litigation, at the time she filed her lawsuit.

#### IV. LAW AND 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. Plaintiffs-Appellees Waived the Available Adequate Remedy at Law to Contest the Civil Citations Issued to Them for Violation of the City's Traffic Laws Through Provision of CCO 413.031.**

It has been long recognized that a state statute and a municipal ordinance have the same force and effect within city limits. *See Weir v. Rimmelin*, 15 Ohio St.3d 55, 57, 472 N.E.2d 341 (1984), citing *Schell v. DuBois*, 94 Ohio St. 93, 113 N.E. 664 (1916). With respect to the local civil enforcement of traffic law violations by automated camera enforcement this Court has held “that an Ohio municipality does not exceed its home rule authority when it creates an automated system for enforcement of traffic laws that imposes civil liability upon violators, provided that the municipality does not alter statewide traffic regulations. *Mendenhall v. Akron*, 117 Ohio St.3d 33, 881 N.E.2d 255, 2008 -Ohio- 270, ¶ 43 (emphasis added). “Section 413.031 represents Cleveland's attempt to regulate on the subject of local traffic.” *State ex rel. Scott v. Cleveland* 112 Ohio St.3d 324, 2006 -Ohio- 6573, 859 N.E.2d 923, ¶ 19. No issue is presented in this matter questioning whether CCO 413.031 alters statewide traffic regulations – it does not.

The administrative hearings authorized by CCO 413.031 involve the exercise of quasi-judicial authority. *Id.* at ¶ 15, citing *See, e.g., State ex rel. Chagrin Falls v. Geauga*

*Cty. Bd. of Commrs.*, 96 Ohio St.3d 400, 2002-Ohio-4906, 775 N.E.2d 512, ¶ 14.

Moreover, CCO 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.” *Scott* at ¶ 21. Plaintiffs-Appellees and members of the purported class, by virtue of the City’s ordinance, were 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).

The Eighth District Court of Appeals has also noted concerning the right to appeal established by CCO 413.03:

“The proposition that where a right of appeal exists there is an adequate remedy at law is too well established to require citation of authorities.” *State ex rel. Kendrick v. Masheter* (1964), 176 Ohio St. 232, 233, 27 O.O.2d 128, 199 N.E.2d 13. If 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, 2006 -Ohio- 2062, 850 N.E.2d 747, at ¶ 19. Plaintiffs-Appellees voluntarily gave up their right to the recognized adequate remedy and ability to challenge the ordinance.<sup>5</sup>

Plaintiffs-Appellees argument in their Memorandum Opposing Jurisdiction (at pp. 11-12) that each of them admitted nothing with their payment, or would have been led to believe “that an ‘admission’ preserves, and not ‘waives,’ rights to appeal” makes no

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<sup>5</sup> It is anticipated that Plaintiffs-Appellees will seek to implicate *Santos v. Ohio Bur. of Workers’ Comp.*, 101 Ohio St.3d 74, 2004 -Ohio- 28, 801 N.E.2d 441 and *Judy v. Ohio Bur. Of Motor Vehicles*, 100 Ohio St.3d 122, 2003 Ohio 5277, 797 N.E.2d 45 in arguing for restitution. The civil citation issues and the due process provided by the quasi-judicial appeals process provided to the Plaintiffs by CCO 413.031 distinguishes this matter from the administratively imposed charges in those cases. In *Judy* the issue related to the State’s overcharging for reinstatement of a license fee, while *Santos* involved the refund moneys the State had obtained through statutory subrogation – there was no issue of civil liability for violation of a law or quasi-judicial setting presented in these matters.

sense and defies both common sense and logic. In *McCarthy v. City of Cleveland*, 626 F.3d 280 (6<sup>th</sup> Cir. 2010), the appellants, as vehicle lessees, had filed a similar class action seeking restitution of their voluntary payment after choosing to waive their right to the appeal provided by CCO 413.031. As was summarized in the concurring opinion of Judge McKeague in *McCarthy*, when considering the same argument, it is clear that each individual with their payment voluntarily chose to waive their right to the appeal provided by CCO 413.031:

Here, too, the notice of violation received by Plaintiffs adequately advised them of their options. As the district court noted, the second page of the citation set out the instructions for answering the notice, providing: “*You must either admit or deny this infraction. If your admission or denial is not received within 21 calendar days of the notice date of the ticket, late penalties will be added and you will lose your rights to appeal.*” *McCarthy*, 2009 WL 2424296, at \*2, 2009 U.S. Dist. LEXIS 68651 at \*6. The citation informed Plaintiffs of four methods “to admit” the violation, all of which involved paying the fine. The instructions “to deny” permitted them to check a box to indicate whether they desired a hearing, wanted to demonstrate that the vehicle had been stolen, or wanted to demonstrate that the vehicle was not in their custody, care, or control at the time of the infraction. *Id.* at \*3, 2009 U.S. Dist. LEXIS 68651 at \*7.

*The citation thus clearly provided an option, permitting either payment or appeal. Plaintiffs had the option of challenging the charged violations without first paying the fines. 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.*

*Id.*, 626 F.3d at p. 288. (emphasis added).

For Plaintiff-Appellees to claim they believed they were somehow preserving a right to appeal through their voluntary payment flies in the face of reason, and begs the question, when were they planning to appeal? In *Kovach v. District of Columbia*, 805

A.2d 957 (D.C. 2002), the appellate court was faced with a similar camera ticket argument wherein the appellant after voluntarily paying his civil citation had argued “that he did not receive actual notice from the face of the citation he received that payment of the ticket was an admission of liability.” *Id.* at 962. The court was not persuaded:

The ticket stated in bold, large type: “Failure to remit payment or request a hearing within 15 calendar days is an admission of liability and will result in additional penalties and a default judgment. You will lose your right to a hearing.” Appellant’s argument is that because the ticket did not expressly state that payment of the fine was an admission of liability, he was not given notice of the legal effect of his payment. We think appellant’s reading is strained, to say the least.

*Id.* at 963, FN 5. While actually providing more time (21 days) for an appeal decision than the D.C. ordinance, CCO 413.031(k) similarly established in pertinent part:

(k) *Appeals.* A notice of appeal shall be filed with the Hearing Officer within twenty-one (21) days from the date listed on the ticket. The failure to give notice of appeal or pay the civil penalty within this time period shall constitute a waiver of the right to contest the ticket and shall be considered an admission.

Plaintiffs-Appellees’ attempts, after voluntarily paying their civil citations, to now characterize the City’s appellate process as a “game of legal ‘gotcha’ with its citizens” (Memorandum Opposing Jurisdiction at p. 10) or argue the purported difficulties of appeal is without foundation and not properly presented in this matter given their admissions of violation. Contrary to the insinuations of “legal gotcha” CCO 413.031 has been found to satisfy due process requirements under both the United States and Ohio Constitutions:

[T]he Court finds that the City’s substantial interests in public safety and administrative efficiency and the already-existing safeguards outweigh the low risk that [Plaintiff] will be erroneously deprived of \$100 per citation. The Court therefore holds that the Ordinance does not violate the due process guarantees of either the U.S. or Ohio Constitution.

*Balaban v. City of Cleveland*, N.D. Ohio No. 1:07–CV–1366, 2010 WL 481283

(Feb. 5, 2010), \*7; see also *Cleveland v. Posner*, 193 Ohio App.3d 211, 2011 -Ohio- 1370, 951 N.E.2d 476, ¶ 20 (The Eighth District recognized *Balaban's* holding concerning the ordinance's satisfaction of constitutional due process requirements).

Not one of the Plaintiffs-Appellees in framing their purported "equitable" claims has ever suggested that their vehicles were not breaking the City's traffic laws. Similar self-serving arguments concerning the administrative appeals process provided by CCO 413.031 were also raised and were properly discounted in *McCarthy*:

It follows that Plaintiffs in this case, too, are in no position to complain that the City's appeal process is so expensive or onerous as to effectively leave them no choice but to pay the traffic fines. Because they did not invoke the process, their claimed hardship is purely speculative. It follows, per *Williams*, that Plaintiffs' complaint, to the extent it could be liberally construed as alleging that their payment of the fines was involuntary because coerced by an unfair process, is still facially defective for their undisputed failure to have invoked and challenged the allegedly unfair process.  
*Id.*, 626 F.3d at 289 (J. McKeague concurring).<sup>6</sup>

**B. *Res judicata* bars Plaintiffs-Appellees' Attempt to Circumvent Their Failure to Contest the Notice of Liability Through the Available Remedy at Law Provided by the Administrative Appeals Process Provided by CCO 413.031.**

The doctrine of *res judicata* encompasses the two related concepts of claim preclusion, also known as *res judicata* or estoppel by judgment, and issue preclusion, also known as collateral estoppel. *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007 -Ohio- 1102, 862 N.E.2d 803, ¶ 6 citing *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381, 653 N.E.2d 226 (1995).

Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action. *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.* (1998), 81 Ohio St.3d 392, 395, 692 N.E.2d 140. Where a claim

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<sup>6</sup> The complete citation for the reference to *Williams* is *Williams v. Redflex Traffic Systems, Inc.*, 582 F.3d 617 (6th Cir.2009).

could have been litigated in the previous suit, claim preclusion also bars subsequent actions on that matter. *Grava*, 73 Ohio St.3d at 382, 653 N.E.2d 226. Issue preclusion, on the other hand, serves to prevent relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous action between the same parties or their privies. *Fort Frye*, 81 Ohio St.3d at 395, 692 N.E.2d 140. Issue preclusion applies even if the causes of action differ. *Id.*

*Onesti*, at ¶¶ 6-7. “Generally, a change in decisional law which might arguably reverse the outcome in a prior civil action does not bar the application of the doctrine of *res judicata*. Since the doctrine of *res judicata* serves important public and private interests, exceptions to the doctrine's application should be narrowly construed.” *National Amusements, Inc. v. City of Springdale* 53 Ohio St.3d 60, 558 N.E.2d 1178 (1990) Syllabus of Court, citing *LaBarbera v. Batsch*, 10 Ohio St.2d 106, 227 N.E.2d 55 (1967); *Berkey Farmers' Mut. Tel. Co. v. Sylvania Home Tel. Co.*, 97 Ohio St. 67, 119 N.E. 140 (1917); *Michael v. American Natl. Bank*, 84 Ohio St. 370, 95 N.E. 905 (1911), approved and followed.

**1. *Res Judicata* Applies to Administrative hearings and is to be applied where a plaintiff does not take advantage of the available appellate process.**

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). In *Grava* the Court was dealing with the preclusive effects of quasi-judicial administrative proceedings, with the Court making clear that a valid, final judgment would arise in the context of administrative proceedings. The township board of zoning appeals in *Grava* had denied plaintiff's request for a variance, which plaintiff did not appeal. *Grava*, 73 Ohio St.3d at 379. The plaintiff, instead, subsequently submitted a second application for variance that was, however, based on a different reason. *Id.* After his second requested variance had been denied plaintiff filed an appeal under R. C.

2506.01. *Id.* at 380. This Court affirmed judgment against the plaintiff on the basis of *res judicata* holding:

Today, we expressly adhere to the modern application of the doctrine of *res judicata*, as stated in 1 Restatement of the Law 2d, Judgments (1982), Sections 24-25, and hold 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. Therefore, we overrule the second paragraph of the syllabus in *Norwood, supra*, and overrule the second paragraph of the syllabus in *Whitehead, supra*, to the extent it is inconsistent with today's holding.

*Id.* at 386.<sup>7</sup> The Court addressed the fairness of its ruling and makes quite clear even in the context of equity that its holding arises in the context of quasi-judicial proceedings where a plaintiff does not take advantage of the available appellate process and fails to avail himself of all available grounds for relief:

Grava argues that barring the present action would be unfair. However, he had a full and fair opportunity to present his case and obtain a zoning certificate during the proceedings involving his first application and did not appeal the zoning board's denial of his request. Grava simply failed to avail himself of all available grounds for relief in the first proceeding. Absent changed circumstances, refusing to allow Grava to use an alternate legal theory overlooked in the previous proceedings does not work an injustice. Instead, by providing parties with an incentive to resolve conclusively an entire controversy involving the same core of facts, such refusal establishes certainty in legal relations and individual rights, accords stability to judgments, and promotes the efficient use of limited judicial or quasi-judicial time and resources. *The instability that would follow the establishment of a precedent for disregarding the doctrine of res judicata for "equitable" reasons would be greater than the benefit that might result from relieving some cases of individual hardship.*

*Grava, supra* 73 Ohio St.3d. at 382-383 (emphasis added). Plaintiffs-Appellees failed to avail themselves of appeals that were readily available to them.

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<sup>7</sup> Full citations for the overruled decisions: of *Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E.2d 67 (1943), and *Whitehead v. Gen. Tel. Co.*, 20 Ohio St.2d 108, 254 N.E.2d 10 (1969).

**2. The Sixth Circuit Court of Appeals Properly Applied *Res Judicata* in Dismissing Similar Restitution Claims in *Carroll v. Cleveland*, 522 Fed.Appx. 299 (6th Cir.2013).**

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.<sup>8</sup> In analyzing the *res judicata* issue and summarily disagreeing with the Sixth Circuit’s application in *Carroll* the Eighth District did little more than declare that no judgment had actually been “rendered” and that “[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”. *Lycan II* at ¶¶ 15-16.<sup>9</sup>

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<sup>8</sup> It should be noted that the claims in *Carroll* were not limited only to takings claims noted above by the court of appeals in *Lycan II*. *Carroll* also included similar equitable allegations that “the fines levied against them...constituted unjust enrichment under Ohio law.” *Carroll*, 522 Fed.Appx at 301.

<sup>9</sup> It must be noted that the Eighth District on the same day it released its *Lycan II* decision also released an automated traffic camera decision in *Jodka v. Cleveland*, 2014 -Ohio-208, 6 N.E.2d 1208 wherein it relied upon *Carroll*. *Jodka* had also filed a class action lawsuit seeking restitution of the civil fine he had paid alleging that CCO 413.031 unconstitutionally stripped the municipal court of jurisdiction over his offense. The Court citing to *Carroll* found that *Jodka* was an inappropriate person to assert restitution claims under the same circumstances herein – *Jodka* had admitted to the violation by paying the citation without contesting the matter through the quasi-judicial appeals process:

In *Carroll v. Cleveland*, 522 Fed.Appx. 299 (6th Cir.2013), the court made the following pertinent observation:

In seeking to justify its disagreement with the Sixth Circuit, the Eighth District relied on two dissimilar out of state decisions that are simply not equivalent or applicable to the facts presented in this case.

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).

*Lycan II* at ¶ 17. Neither *Walker* or *Hadley* involve similar facts and the *res judicata* principles applied in *Carroll* are not implicated in either case.

The Arizona Supreme Court's decision in *State v. Walker* upheld an appellate court's holding that a civil traffic violation adjudication would not be given collateral estoppel effect in the subsequent prosecution of Walker as a criminal defendant.

In light of the legislative scheme adopted for the informal disposition of civil traffic violations, and, giving due regard to the vastly different policy considerations in the prosecution of felonies as distinguished from the informal handling of civil traffic matters, we must conclude that the application of the

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\* \* \* 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*. \* \* \*

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.

*Jodka* at ¶¶ 36-37 (emphasis in original). *Jodka* is currently accepted on appeal before this Court in the following two matters: Oh. Sup. Ct. Case No. 2014-0636 (Appeal and Cross-Appeal) and Oh. Sup. Ct. Case No. 2014-0480 (Notice of certified Conflict). Briefing has been stayed in both cases pending resolution of *Walker v. Toledo*, Oh. Sup. Ct. No. 2013-1277.

doctrine of collateral estoppel to the civil traffic judgment in this case is clearly unwarranted. We hold that a criminal defendant may not raise collateral estoppel as a bar to prosecution of a criminal felony offense when preclusion is alleged to result from a judgment of acquittal following a civil traffic hearing authorized under A.R.S. §§ 28-1071 *et seq.*

*Id.*, 159 Ariz. At 510-511. *Walker* has no application to the facts herein as no issue of criminal prosecution is implicated. Plaintiffs-Appellees herein seek the return of the very civil fine they paid in the course of admitting the traffic violation. Walker presents criminal prosecution issues that are not presented in the quasi-judicial civil traffic process established at CCO 413.031. Moreover, unlike the separate criminal issue presented in *Walker*, the Court in *Carroll* identified under the similar circumstances in *Lycan*:

First, 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. ... True, Appellants hope to proceed as a class, and therefore seek the return of *many* motorists' money. But aggregation changes only the scope, not the nature, of Appellants' claims. At bottom, Appellants could have obtained precisely the "damages" they request had they availed themselves of the ordinance's appellate procedure.

*Id.* at 305.

In *Hadley v. Maxwell*, the State of Washington defendant was sued in a personal injury case arising from a traffic collision. Maxwell had 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." *Id.* at 313. Unlike *Hadley* there are no physical injuries or civil tort liability issues presented in this matter, rather Plaintiffs-Appellees

themselves seek restitution of a fine they paid in the course of admitting a traffic violation.

A more equivalent collateral estoppel analysis given the present circumstances is that accomplished by the District of Columbia court of appeals in *Kovach v. District of Columbia*, 805 A.2d 957 (D.C. 2002) where the court applied collateral estoppel against the plaintiff who was similarly seeking the return of a voluntarily paid civil camera fine:

“[N]or is there “manifest injustice” which calls for an exception to the collateral estoppel doctrine where the relief appellant requests for himself is the return of the \$75 fine he chose to pay.” *Id.*, 805 A.2d at 963.

As displayed in *Kovach* and by the result achieved by the appellant in *Dickson & Campbell*, there is no issue of fairness and justice presented when Plaintiffs-Appellees and members of the purported class voluntarily eschewed the recognized adequate remedy at law and did not challenge the notices of liability each of them received.

Plaintiffs-Appellees’ attempt, in effect, to seek retroactive application of *Dickson & Campbell* for purposes of equitable restitution would be disfavored. See *Cleveland Parking Violations Bur. v. Barnes*, 8<sup>th</sup> Dist. No. 94502, 2010 -Ohio- 6164. Similar to the decision in *Dickson & Campbell* the Eighth District in *Barnes* had considered and upheld a CCO 413.031 challenge on appeal from a finding of liability based on the language of the ordinance requiring markings on the City’s mobile cameras. The Eighth District, after finding the City’s mobile speed unit that issued the ticket did not comport with the signage requirements set forth in C.C.O. 413. 031(g), held that the appellant “should not have been found liable.” *Barnes* at ¶ 30. The court of appeals further instructed in the same matter that “absent a showing by those who have previously received notices of liability from mobile camera units of some loss of civil rights or some collateral

disability, those who have paid their fines cannot challenge their finding of liability because such an appeal is moot.” *Barnes* at ¶ 33, FN 2, citing *In re B.G.*, Summit App. No. 24428, 2009-Ohio-1493. Plaintiffs-Appellees have made no civil rights claim and Plaintiffs-Appellees have suffered no collateral disability. Collateral disability is defined as “an adverse legal consequence of a conviction or judgment that survives despite the court’s sentence having been satisfied or served.” *In re S.J.K.*, 114 Ohio St.3d 23, 2007-Ohio-2621, 867 N.E.2d 408, ¶ 10. As this Court has well noted: “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).” *State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 859 N.E.2d 923, 2006 -Ohio- 6573, ¶ 2.

The introductory framework for considering the appeal in *Carroll* establishes the similar or purported “copycat”<sup>10</sup> nature of the claims that were reviewed by the Sixth Circuit Court of Appeals:

In 2005, the City of Cleveland began using automated cameras to photograph vehicles that were speeding or running a red light. The owner of the vehicle photographed would receive a notice of liability,<sup>FNI</sup> and could choose either to pay a fine or to file an appeal. Paying the fine constituted an admission of liability. Likewise, failure to indicate an intent to appeal within twenty-one days “constitute[d] a waiver of the right to contest the ticket and [was] considered an admission [of liability].” CCO 413.031(k). The ordinance provided that appeals would “be heard by the Parking Violations Bureau through an administrative process established by the Clerk of the Cleveland Municipal Court.” *Ibid.* An owner unsatisfied with the outcome could pursue the matter further in the Court of Common Pleas. Ohio Rev.Code 2506.01(A). When reviewing an administrative decision under § 2506, that court has the power to “determine[ ] whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence.” *Dickson & Campbell, L.L.C. v. City of Cleveland*, 181 Ohio App.3d 238, 908 N.E.2d 964, 966 (2009) (quoting

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<sup>10</sup> See *Lycan II* at ¶ 14

*Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 735 N.E.2d 433, 438 (2000)).

FN1. The implementing ordinance provided: “This civil enforcement system imposes monetary liability.” CLEVELAND CODIFIED ORDINANCE 413.031(a) [hereinafter CCO]. By its terms, liability for a traffic violation under the ordinance “shall not be deemed a conviction for any purpose and shall not be made part of the operating record of any person on whom the liability is imposed.” *Id.* at 413.031(d).

In February 2009, a panel of the Ohio Court of Appeals held that the City could not issue a notice of liability to a lessee, as the ordinance dealt only with vehicle owners. *Id.* at 968–71. Three months later, Appellants Daniel McCarthy and Colleen Carroll filed this class-action lawsuit in state court. Like the *Dickson & Campbell* plaintiffs, McCarthy and Carroll had both received notices of liability from the City for traffic violations photographed by an automated camera.<sup>FN2</sup> Like the *Dickson & Campbell* plaintiffs, McCarthy and Carroll were lessees, not owners, of their vehicles. But unlike the *Dickson & Campbell* plaintiffs, McCarthy and Carroll paid their fines, rather than contesting their citations through the appellate process that the ordinance provided.

*Carroll*, 522 Fed.Appx. at 301. The appeal was pending because the district court had:

“determine[d] that [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.

*Carroll* at 302.<sup>11</sup>

### 3. **The Sixth Circuit Applied Ohio Law in Analyzing and Applying *Res Judicata* to the Similar Restitution Claims Presented In *Carroll*.**

The Sixth Circuit Court of Appeals well recognizes that “[s]tate-court judgments are given the same preclusive effect under the doctrines of *res judicata* and collateral estoppel as they would receive in courts of the rendering state.” *State ex rel. Boggs v. City of Cleveland*, 655 F.3d 516, 519, (6th Cir. Aug.25, 2011) citing *ABS Indus., Inc. ex*

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<sup>11</sup> Plaintiff McCarthy had died during the pendency of the case and the name of the case on appeal was changed to that of the surviving appellant Carroll.

*rel. ABS Litig. Trust v. Fifth Third Bank*, 333 Fed.Appx. 994, 998 (6th Cir.2009). “The doctrine bars subsequent actions whose claims ‘could have been litigated in the previous suit[.]’ ” *Id.* The Sixth Circuit was clearly construing Ohio law in deciding the *res judicata* issue placed before them in *Carroll*:

Although the parties discuss both species of *res judicata*, claim preclusion is the linchpin of this case. Under Ohio law, “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*, 653 N.E.2d at 229. From this holding, we have distilled four elements:

(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.

*Id.* at 302.

**4. Plaintiffs-Appellees Decision to Forego the Available Appeal Constituted a Final Valid Decision on the Merits of Their Claim for Restitution.**

The Eighth District Court of Appeals in *Scott v. City of East Cleveland*, 16 Ohio App.3d 429, 431, 476 N.E.2d 710 (8<sup>th</sup> Dist. 1984) has recognized:

“The doctrines of *res judicata* and collateral estoppel apply to quasi-judicial decisions made by administrative agencies from which no appeal has been taken. *Wade v. Cleveland* (1982), 8 Ohio App.3d 176, 177, 456 N.E.2d 829. Their dispositive effect does not change simply because the parties resolved the claim without vigorously controverted proceedings before the agency. Consent decrees have the same *res judicata* and collateral estoppel effects as judgments resolving disputed issues. *Horne v. Woolever* (1959), 170 Ohio St. 178, 182, 163 N.E.2d 378 [10 O.O.2d 114].”

The Sixth Circuit directly addressed and analyzed the first issue of there being a “final judgment” for purposes of applying *res judicata* under the same circumstances that are presented by the Plaintiffs-Appellees in the matter before this Court:

Our first question is whether there is a final judgment when a litigant admits liability by paying his traffic fine, and the City accepts his payment. There is:

“Generally, a consent judgment operates as *res adjudicata* to the same extent as a judgment on the merits.” *Horne v. Woolever*, 170 Ohio St. 178, 163 N.E.2d 378, 382 (1959). The preclusive effect of a final judgment, in other words, “does not change simply because the parties resolved the claim without vigorously controverted proceedings.” *Scott v. City of East Cleveland*, 16 Ohio App.3d 429, 476 N.E.2d 710, 713 (1984). This is so both when the prior proceeding was in court, *see generally Woolever*, 163 N.E.2d 378, and when the prior proceeding was a quasi-judicial administrative process, *see generally Scott*, 476 N.E.2d at 713.

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 304.

The Sixth Circuit in concluding that payment of the fine and acceptance of the fine by the City qualified as a final judgment, rejected argument that there was no valid decision by a court of competent jurisdiction under circumstances where a voluntary payment had been made:

This argument ignores the nature of Appellants' admission. Had they chosen to contest the citations, Appellants would have received ample opportunity to develop the facts surrounding their citations and to present their arguments about the statute's constitutionality, first in an administrative proceeding, then in the Ohio court system. Instead of chancing litigation, Appellants admitted liability and paid their fines. They may not escape claim preclusion now ‘simply because the[y]... resolved the claim without vigorously controverted proceedings.’ *Scott*, 476 N.E.2d at 713. ***Payment of the fines, and acceptance of that payment by the City, qualifies as a final judgment.***

*Id.* at 304 (emphasis added). As in *Carroll* the first element of the *res judicata* is met.

##### **5. The Remaining Three Elements for *Res Judicata* Are Met.**

As noted above the remaining three elements (2-4) under Ohio law applied in *Carroll* in finding *res judicata* included (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. *Id.* at 302.

The second element is obviously met in this matter as in *Carroll* as “[w]ithout question, this action involves the same parties as the earlier traffic-citation action.” *Id.* at 303. The third element is similarly met herein for the reasons that were addressed in *Carroll*:

We therefore proceed to the third element of the claim-preclusion analysis: whether this case raises claims that were, or could have been, litigated earlier. In Ohio, an administrative-hearing officer has somewhat limited powers. *See Evans v. Bd. Of Educ. Southwestern City Sch. Dist.*, 425 Fed.Appx. 432, 439 (6<sup>th</sup> Cir.2011) (“[T]he ... hearing officer was not empowered to consider L.E.’s constitutional or statutory claims.”). Under § 2506.01, however, a party may appeal a quasi-judicial administrative determination to the court of common pleas, as a matter of right. That court, during the course of its review, “determines whether the administrative order [was] unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence.” *Dickson & Campbell, L.L.C.*, 908 N.E.2d at 966 (internal quotation marks omitted).

*Id.* at 304-305. After extensive analysis the *Carroll* court found that the “Appellants could have pursued the arguments that they raise here in the appellate process that they waived” *Id.* at 306, citing, in part, “*Dickson & Campbell, L.L.C.*, 908 N.E.2d at 969–71 (holding that vehicle lessee could not be liable under CCO 413.031 on review of § 2506 decision by district court). The City meets the third prerequisite for the application of claim preclusion.” *Id.*

Likewise, as in *Carroll*, the fourth element is met for the same exact reason presented in that litigation: “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.” *Id.* at 307.

In summary, the Sixth Circuit's upheld dismissal of the "copycat" lessee's claims for equitable restitution on the basis of *res judicata* in *Carroll* identifying:

Because payment of the fines levied in Appellants' citations, and acceptance of that payment by the City, was a final decision, the parties here are the same as the parties to the original citation, Appellants could have litigated all of the claims they raise here in an appeal to the Court of Common Pleas, and this suit arises out of the same common nucleus of operative fact as the traffic citations, the district court's decision to dismiss was correct.

*Id.* at 307.

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*, *supra* 53 Ohio St.3d at 62, citing *Rogers v. Whitehall*, 25 Ohio St.3d 67, 69, 494 N.E.2d 1387, 1388 (1986); *Anderson v. Richards*, 173 Ohio St. 50, 53, 179 N.E.2d 918, 921(1962); *Stratford Place Corp. v. Capalino*, 574 F.Supp. 52 (S.D.N.Y.1983).

Unlike the appellants in *Dickson & Campbell*, Plaintiffs-Appellees herein chose not to present any grounds for relief in their first action, which was to participate in the administrative appeal process provided by CCO 413.031. As in *Carroll* they are precluded from acting as class representatives under the claim preclusion principles inherent with *res judicata*.

**C. Plaintiffs-Appellees Claims Would Also Be Precluded By Collateral Estoppel.**

While not directly implicated in the City's proposition of law, it is evident that Plaintiffs-Appellees claims for restitution would, alternatively, be subject to dismissal under collateral estoppel. In *Kovach v. District of Columbia*, 805 A.2d 957 (D.C. 2002) the court of appeals was faced with an analogous circumstance involving payment of civil camera fines and an attempted class action seeking restitution of the fines:

According to the complaint, this action arose “out of the installation of an automatic red light camera... In mid-May of 2000, the Metropolitan Police Department decided to remove the camera because it was observing an inordinate number of people running the light, which was confusing to motorists. [FN omitted] Approximately 20,000 motorists had been issued tickets totaling \$1.5 million in fines at the time the camera was removed. The District agreed to dismiss outstanding fines assessed to some three thousand motorists whose infractions were recorded by the H Street bridge camera, but determined that those who had already paid the tickets would not be reimbursed.

Appellant, who had paid the \$75 fine on a traffic ticket issued for a red light violation recorded by the H Street bridge camera approximately five months before the District decided to remove the camera, filed an action in Superior Court on his own behalf and on behalf of “some 20,000 similarly situated motorists” against the District and Lockheed as its contracting agent. His complaint claimed that the District's decision to forgive some fines and enforce others of “similarly situated” motorists who were “unfairly and confusingly” entrapped by the camera was facially discriminatory...

*Id.* at 959-960. The court concluded in *Kovach* 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 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). The *Kovach* decision makes clear that claim preclusion under *res judicata* principles [as accomplished in *Carroll*] was not applied because Kovach’s basis for seeking restitution - the alleged unfairness of the Bureau of Traffic Adjudication’s subsequent decision to forgive outstanding tickets, but not to forgive and refund payments for those tickets that had already been paid, was not presented and would not have been available at the time he had paid his civil citation. See *Kovach* at 960-962. No such distinction is presented in the present appeal.

[A]ppellant's payment of the fine and failure to raise any previous challenge to the issued ticket leads us to conclude that there is no “manifest error” in the prior proceeding; nor is there “manifest injustice” which calls for an exception

to the collateral estoppel doctrine where the relief appellant requests for himself is the return of the \$75 fine he chose to pay.[FN omitted] Thus, because principles of collateral estoppel preclude appellant from alleging a fact necessary to stating a claim, the trial court correctly granted appellees' motions to dismiss. [FN omitted]

*Kovach* at 963.

Unlike the circumstances alleged in *Kovach*, where collateral estoppel was applied instead of claim preclusion, the appellants in *Carroll* and the Plaintiffs-Appellees in the present matter were not faced with any changed circumstances when they filed their claims for restitution based on unjust enrichment, as CCO 413.031 afforded lessees as well as owners the opportunity to avoid paying the established civil fine.

**D. Plaintiffs-Appellees lack Standing to bring this Class Action.**

Previously alluded to above, Plaintiffs-Appellees lack standing to bring and maintain this suit due to payment of their violation notices. “Lack of standing challenges the capacity of a party to bring an action...”<sup>12</sup> Plaintiffs-Appellees waived their right to appeal under C.C.O. 413.031 by paying the fine and not following the appeal process, therefore, yielding them without standing. Here, Appellees admit that they paid their violation notices, except for Appellee Task. This is an admission and constitutes a waiver of their right to further appeal the violation notices. Appellee Task’s admission is by operation of C.C.O. 413.031 that if you fail to pay or appeal within 21 days, such inaction is deemed an admission of liability.

Plaintiffs-Appellees seek to circumvent the appeals process clearly outlined within C.C.O. 413.031(k), and instead filed a class action lawsuit in the court of common

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<sup>12</sup> *State ex rel Butler Tp. Bd. Of Trustees v. Montgomery County Bd. Of County Com'rs*, 2008 WL 5196445 at \*2 citing *State ex rel. Ralkers, Inc. v. Liquor Control Comm.*, Franklin App. No. 04AP-779, 2004-Ohio-6606, ¶35.

pleas. This is in violation of the ordinance, and without merit, because Appellees have already waived their right to appeal.

Although Appellees repeatedly cite the difficulty and economic inefficiency of retaining legal counsel as their argument against adhering to the appeals procedure clearly outlined by the ordinance,<sup>13</sup> this is unpersuasive. Appellees have already paid the fine, yet are now directly suing the City with the aid of counsel, a much more expensive endeavor than pursuing their individual appeals in the Parking Violations Bureau as mandated by the ordinance. Because Appellees have waived their right to appeal, they lack standing to bring this suit. This exact issue was addressed in *Jodka v. City of Cleveland* and is currently pending before this Court. The Eighth District Court of Appeals citing to *Carroll* found that Jodka was an inappropriate person to assert restitution claims under the same circumstances herein – Jodka had admitted to the violation by paying the citation without contesting the matter through the quasi-judicial appeals process. *Jodka v. Cleveland*, 2014 -Ohio- 208, 6 N.E.2d 1208, ¶¶ 36-37. Jodka lacked standing to bring the class action lawsuit. Similarly to Jodka, Plaintiffs-Appellees lack standing to maintain this class action.

## V. CONCLUSION

Plaintiffs-Appellees and the putative class certified in this matter did not participate in the adequate remedy at law provided to each of them by CCO 413.031 and have no standing to proceed. As was found by the Sixth Circuit Court of Appeals in *Carroll v. Cleveland*, 522 Fed.Appx. 299 (6th Cir. Ohio 2013) unjust enrichment claims

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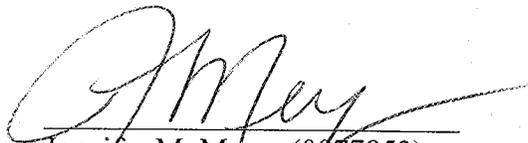
<sup>13</sup> Amend. Compl. at ¶ 4.

from similarly situated individuals who voluntarily paid their violation notices are subject to *res judicata* and claim preclusion. Plaintiffs-Appellees have no viable claims based on the choices each of them made. The City of Cleveland requests, therefore, that the decision of the Eighth District Court of Appeals upholding class certification be reversed and that the claims presented in this matter be dismissed with finality.

Respectfully Submitted,

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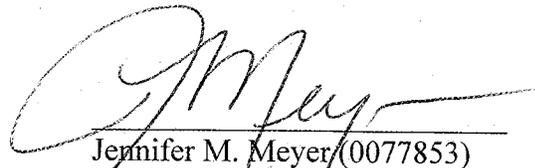
**CERTIFICATE OF SERVICE**

A true copy of the foregoing Appellant City of Cleveland's Merit Brief was duly served by regular U.S. Mail, postage prepaid, this 22<sup>nd</sup> day of August 2014 on the following:

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## **APPENDIX**

JAN 23 2014

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 99698

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**JANINE LYCAN, ET AL.**

PLAINTIFFS-APPELLEES

vs.

**CITY OF CLEVELAND**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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

JAN 23 2014

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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.<sup>1</sup>

{¶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.<sup>2</sup> 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.<sup>3</sup> 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

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

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

<sup>3</sup> 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.<sup>4</sup> Even if an administrative decision had been

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<sup>4</sup> 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).<sup>5</sup>

{¶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

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<sup>5</sup> 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.

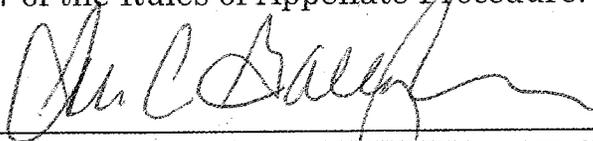
{¶49} Judgment affirmed.

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.



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SEAN C. GALLAGHER, PRESIDING JUDGE

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

### **413.031 Use of Automated Cameras to Impose Civil Penalties upon Red Light and Speeding Violators**

(a) *Civil enforcement system established.* The City of Cleveland hereby adopts a civil enforcement system for red light and speeding offenders photographed by means of an "automated traffic enforcement camera system" as defined in division (m). 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.

(b) *Red light offense – liability imposed.* The owner of a vehicle shall be liable for the penalty imposed under this section if the vehicle crosses a marked stop line or the intersection plane at a system location when the traffic signal for that vehicle's direction is emitting a steady red light.

(c) *Speeding offense – liability imposed.* The owner of a vehicle shall be liable for the penalty imposed under this section if the vehicle is operated at a speed in excess of the limitations set forth in Section 433.03.

(d) *Liability does not constitute a conviction.* The imposition of liability under this section shall not be deemed a conviction for any purpose and shall not be made part of the operating record of any person on whom the liability is imposed.

(e) *Other offenses and penalties not abrogated.* Nothing in this section shall be construed as altering or limiting Sections 433.03 or 413.03 of these Codified Ordinances, the criminal penalties imposed by those sections, or the ability of a police officer to enforce those sections against any offender observed by the officer violating either of those sections. Nothing in this section shall be construed to limit the liability of an operator of a vehicle for any violation of division (b) or (c) of this section.

(f) *Selection of camera sites.* The selection of the sites where automated cameras are placed and the enforcement of this ordinance shall be made on the basis of sound professional traffic engineering and law enforcement judgments. Automated cameras shall not be placed at any site where the speed restrictions or the timing of the traffic signal fail to conform to sound professional traffic engineering principles.

(g) *Locations.* The following are the locations for the Automated Traffic Enforcement Camera System:

#### Locations

Shaker Boulevard at Shaker Square

Chester Avenue at Euclid Avenue

West Boulevard at North Marginal Road

Shaker Boulevard at East 116th Street

West Boulevard at I-90 Ramp

Chester Avenue at East 71st Street

East 55th Street at Carnegie Avenue

East 131st Street at Harvard Avenue

Carnegie Avenue at East 30th Street

Cedar Avenue at Murray Hill Road

Grayton Road at I-480 Ramp

Euclid Avenue at Mayfield Road

Warren Road at I-90 Ramp

Prospect Avenue at East 40th Street

East 116th Street at Union Avenue

Pearl Road at Biddulph Road

Carnegie Avenue at East 100th Street

Carnegie Avenue at Martin Luther King Jr. Drive

Memphis Avenue at Fulton Road

Lakeshore Boulevard at East 159th Street

St. Clair Avenue at London Road

Clifton Boulevard between West 110th Street and West 104th Street

Chester Avenue between East 55th Street and East 40th Street

Woodland Avenue between East 66th Street and East 71st Street

West Boulevard between I-90 Ramp and Madison Avenue

Broadway between Harvard Avenue and Miles Avenue

Lee Road between Tarkington Avenue and I-480 Ramp

I-90 and West 41st Street

I-90 and West 44th Street

The Director of Public Safety shall cause the general public to be notified by means of a press release issued at least thirty days before any given camera is made fully-operational and is used to issue tickets to offenders. Before a given camera issues actual tickets, there shall be a period of at least two weeks, which may run concurrently with the 30-day public-notice period, during which only "warning" notices shall be issued.

At each site of a red light or fixed speed camera, the Director of Public Service shall cause signs to be posted to apprise ordinarily observant motorists that they are approaching an area where an automated camera is monitoring for red light or speed violators. Mobile speed units shall be plainly marked vehicles.

(h) *Notices of liability.* Any ticket for an automated red light or speeding system violation under this section shall:

- (1) Be reviewed by a Cleveland police officer;
- (2) Be forwarded by first-class mail or personal service to the vehicle's registered owner's address as given on the state's motor vehicle registration, and
- (3) Clearly state the manner in which the violation may be appealed.

(1) *Penalties.* Any violation of division (b) or division (c) of this section shall be deemed a noncriminal violation for which a civil penalty shall be assessed and for which no points authorized by Section 4507.021 of the Revised Code ("Point system for license suspension") shall be assigned to the owner or driver of the vehicle.

(j) *Ticket evaluation, public service, and appeals.* The program shall include a fair and sound ticket-evaluation process that includes review by the vendor and a police officer, a strong customer-service commitment, and an appeals process that accords due process to the ticket respondent and that conforms to the requirements of the Ohio Revised Code.

(k) *Appeals.* A notice of appeal shall be filed with the Hearing Officer within twenty-one (21) days from the date listed on the ticket. The failure to give notice of appeal or pay the civil penalty within this time period shall constitute a waiver of the right to contest the ticket and shall be considered an admission.

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.

Liability shall not be found where the evidence shows that the automated camera captured an event is not an offense, including each of the following events and such others as may be established by rules and regulations issued by the Director of Public Safety under the authority of division (n) of this section:

- 1) The motorist stops in time to avoid violating a red light indication;
- 2) The motorist proceeds through a red light indication as part of funeral procession;
- 3) The motorist is operating a City-owned emergency vehicle with its emergency lights activated and proceeds through a red light indication or exceeds the posted speed limitation;
- 4) The motorist is directed by a police officer on the scene contrary to the traffic signal indication.

Liability shall also be excused if a vehicle is observed committing an offense where the vehicle was stolen prior to the offense and the owner has filed a police report;

The Director of Public Safety, in coordination with the Parking Violations Bureau, shall establish a process by which a vehicle owner who was not the driver at the time of the alleged offense may, by affidavit, name the person who the owner believes was driving the vehicle at the time. Upon receipt of such an affidavit timely submitted to the Parking Violations Bureau, the Bureau shall suspend further action against the owner of the vehicle and instead direct notices and collection efforts to the person identified in the affidavit. If the person named in the affidavit, when notified, denies being the driver or denies liability, then the Parking Violations Bureau shall resume the notice and collection process against the vehicle owner, the same as if no affidavit had been submitted, and if the violation is found to have been committed by a preponderance of evidence, the owner shall be liable for any penalties imposed for the offense.

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.

(1) *Evidence of ownership.* It is prima facie evidence that the person registered as the owner of the vehicle with the Ohio Bureau of Motor Vehicles, or with any other State vehicle registration office, was operating the vehicle at the time of the offenses set out in divisions (b) and (c) of this section.

(m) *Program oversight.* The Director of Public Safety shall oversee the program authorized by this Section. The Director of Public Service shall oversee the installation and maintenance of all automated cameras. An encroachment permit shall be authorized in the legislation in which locations are selected.

(n) *Rules and Regulations.* The Director of Public Safety may issue rules and regulations to carry out the provisions of these sections, which shall be effective thirty (30) days after publication in the City Record.

(o) *Establishment of Penalty.* The penalty imposed for a violation of division (b) or (c) of this section shall be follows:

413.031(b) All violations \$100.00 413.031(c) Up to 24 mph over  
the speed limit \$100.00 25 mph or more over  
the speed limit \$200.00 Any violation of a school  
or construction zone  
speed limit \$200.00

*Late penalties*

For both offenses, if the penalty is not paid within 20 days from the date of mailing of the ticket to the offender, an additional \$20.00 shall be imposed, and if not paid with 40 days from that date, another \$40.00 shall be imposed, for a total additional penalty in such a case of \$60.00.

(p) *Definitions.* As used in this section:

(1) "Automated traffic enforcement camera system" means an electronic system consisting of a photographic, video, or electronic camera and a vehicle sensor installed to work alone or in conjunction with an official traffic controller and to automatically produce photographs, video, or digital images of each vehicle violating divisions (b) or (c).

(2) "System location" is the approach to an intersection or a street toward which a photographic, video or electronic camera is directed and is in operation. It is the location where the automated camera system is installed to monitor offenses under this section.

(3) "Vehicle owner" is 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.

(Ord. No. 1284-05. Passed 7-13-05, eff. 7-20-05)

## **2506.01 Appeal from decisions of agency of political subdivisions.**

(A) Except as otherwise provided in sections 2506.05 to 2506.08 of the Revised Code, and except as modified by this section and sections 2506.02 to 2506.04 of the Revised Code, every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in Chapter 2505. of the Revised Code.

(B) The appeal provided in this section is in addition to any other remedy of appeal provided by law.

(C) As used in this chapter, "final order, adjudication, or decision" means an order, adjudication, or decision that determines rights, duties, privileges, benefits, or legal relationships of a person, but does not include any order, adjudication, or decision from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority if a right to a hearing on such appeal is provided, or any order, adjudication, or decision that is issued preliminary to or as a result of a criminal proceeding.

Effective Date: 03-17-1987; 08-17-2006