

ORIGINAL

IN THE SUPREME COURT OF OHIO

Janine Lycan, et al.

Case No. 2014-0358

Plaintiffs-Appellees

On appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District

vs.

Court of Appeals Case No. 99698

City of Cleveland,

Defendant-Appellant

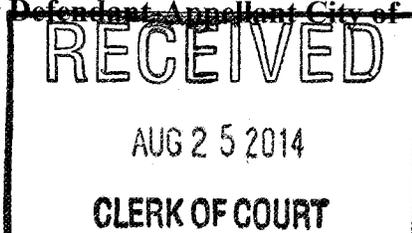
BRIEF OF AMICUS CURIAE XEROX STATE & LOCAL SOLUTIONS, INC. IN SUPPORT OF APPELLANT CITY OF CLEVELAND

Gregory V. Mersol (0030838)
Chris Bator (0038550) (Counsel of Record)
BAKER & HOSTETLER LLP
3200 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114-3485
Telephone: (216) 621-0200
Fax: (216) 696-0740
gmersol@bakerlaw.com
cbator@bakerlaw.com

Attorneys for Amicus Curiae Xerox State & Local Solutions, Inc.

Barbara A. Langhenry (0038838)
Director of Law
Jennifer Meyer (0077853) (Counsel of Record)
Assistant Director of Law
Gary S. Singletary (0037329)
Chief Counsel
City of Cleveland
601 Lakeside Avenue, Room 106
Cleveland, OH 44114-1077
Telephone: 216-664-2737
Facsimile: 216-664-2663
jmeyer@city.cleveland.oh.us
gsingletary@city.cleveland.oh.us

Attorneys for Defendant-Appellant City of Cleveland

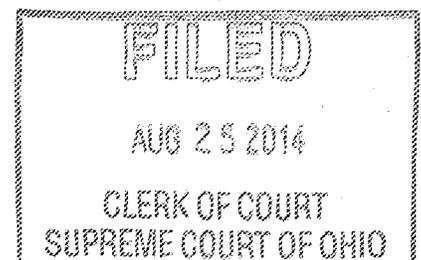


W. Craig Bashein, Esq. (0034591)
Bashein & Bashein Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
(216) 771-3239
(216) 781-5876 Fax
cbashein@basheinlaw.com

Paul W. Flowers, Esq. (0046625)
Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
(216) 344-9393
(216) 344-9395 Fax
pwf@pwfco.com

Blake A. Dickson, Esq. (0059329)
The Dickson Firm, L.L.C.
3410 Enterprise Parkway – Suite 420
Beashwood, Ohio 44122
(216) 595-6501
blakedickson@thedicksonfirm.com

Attorneys for Plaintiffs-Appellees Janine Lycan, et al.



Philip K. Hartmann (0059413)
(Counsel of Record)
Stephen J. Smith (0001344)
Yazan S. Ashrawi (0089565)
Frost Brown Todd LLC
10 West Broad Street; Suite 2300
Columbus, Ohio 43215
(614) 464-1211
Fax: (614) 464-1737
phartmann@fbtlaw.com
ssmith@fbtlaw.com
yashrawi@fbtlaw.com

John Gotherman (0000504)
Ohio Municipal League
175 S. Third Street, #510
Columbus, Ohio 43215-7100
(614) 221 4349
Fax: (614) 221-4390
jgotherman@columbus.rr.com

**Attorneys for Amicus Curiae
The Ohio Municipal League**

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I. STATEMENT OF AMICUS' INTEREST

Xerox State & Local Solutions, Inc., formerly known as ACS State & Local Solutions, Inc. ("Xerox"), is the company which provides and operates the red light and speeding cameras for the City of Cleveland in accordance with Cleveland's photo enforcement program. The program is authorized by Cleveland Codified Ordinance 413.031 ("CCO 413.031"). Xerox's interests are thus aligned with the City of Cleveland.

Also currently pending before this Court is the case of *Jodka v. City of Cleveland, et al.*, No. 99951, 2014-Ohio-208 (8th Dist.), Ohio Supreme Court Case No. 2014-0480 (certified conflict appeal) and Case No. 2014-0636 (discretionary appeal). Xerox, referred to as ACS for purposes of the *Jodka* litigation, is a co-defendant with the City of Cleveland. The plaintiff in *Jodka*, like the plaintiff in *Walker v. City of Toledo*, Ohio Supreme Court Case No. 2013-1277, is challenging whether CCO 413.031 violates Article IV, Section 1 of the Ohio Constitution and jurisdiction of the municipal court under Ohio Revised Code Section 1901.20(A)(1). Xerox and the City of Cleveland filed amicus briefs in *Walker* in support of the defendants-appellants City of Toledo and Redflex. By entries dated July 9, 2014, this Court accepted the *Jodka* appeals but has held them and suspended briefing pending this Court's decision in *Walker* which has already been fully brief and argued. *Walker*, *Jodka*, and *Lycan* each involve a challenge to speeding and red light camera ordinances in which Xerox has an interest.

II. STATEMENT OF THE CASE AND FACTS

Xerox adopts the Statement of the Case and Facts set forth in the City of Cleveland's Merit Brief.

III. ARGUMENTS IN SUPPORT OF PROPOSITION OF LAW

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 an available adequate remedy at law are precluded by *res judicata* from subsequently acting as class representatives and presenting equitable claims predicated in unjust enrichment. *Carroll v. Cleveland*, 522 Fed.Appx. 299 (6th Cir. Ohio 2013).

A. *Res Judicata* Applies To Claims That Could Have Been, But Were Not, Asserted Before The Cleveland Parking Violations Bureau And Subsequent Court Appeals.

This Court has already ruled that CCO 413.031 provides an adequate remedy at law to motorists who receive violation notices under the camera ordinance. *Scott v. City of Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573, 859 N.E.2d 923 at ¶ 24. The ordinance provides for a hearing before the City of Cleveland Parking Violations Bureau and then a subsequent administrative appeal to the Cuyahoga County Court of Common Pleas pursuant to Ohio Revised Code § 2506.01 and then to the court of appeals. When reviewing an administrative decision under Ohio Revised Code Chapter 2506, the court of common pleas reviews the whole record, including any new or additional evidence under Ohio Revised Code § 2506.03, and 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. *City of Cleveland v. Posner*, 193 Ohio App.3d 211, 2011-Ohio-1370, 951 N.E.2d 476 (8th Dist.) at ¶ 13; *Carroll v. City of Cleveland*, 522 Fed. Appx. 299, 301 (6th Cir. 2013) (citations omitted).

The case of *Dickson & Campbell v. City of Cleveland*, 181 Ohio App.3d 238, 2009-Ohio-738, 908 N.E.2d 964 (8th Dist.), is ample evidence that the administrative remedy of CCO

413.031 works and was a proper remedy for the *Lycan* plaintiffs to pursue. The plaintiff in *Dickson & Campbell* refused to pay the violation, pursued an administrative appeal, and argued successfully before the Eighth District Court of Appeals that the version of CCO 413.031 in effect at that time only applied to vehicle owners, not lessees such as the plaintiff. The motorist in *City of Cleveland Parking Violations Bureau v. Reginald E. Barnes*, 8th Dist. No. 94502, 2010-Ohio-6164, also successfully invoked the administrative appellate process to establish no liability for a ticket issued to him from a mobile camera unit because of the lack of a warning sign.

The *Lycan* plaintiffs had the option of challenging the charged violations without first paying the fine (as did the plaintiffs in *Dickson & Campbell* and *Barnes*), yet all but one chose to voluntarily pay the fine without challenging the ticket (like the plaintiff in *Jodka*)¹. Consequently, by waiving their right to a hearing, plaintiffs admitted liability for the traffic violations and simply failed to avail themselves of all available grounds for relief. Plaintiffs, just like the plaintiffs in *Dickson & Campbell* and *Barnes*, were given a full and fair opportunity to present their claims pursuant to CCO 413.031 and Ohio Revised Code Section 2506.01. They chose not to take advantage of this opportunity, and upon payment of the fine, final judgment of liability was entered against them.

The Eighth District in *Lycan* erroneously ruled that *res judicata* did not apply because there was never an actual judgment entered by the administrative body or a court and that *res*

¹ Plaintiff Jeane Task neither paid the fine nor challenged it. *Lycan*, 2014-Ohio-203 at ¶ 6. The fact that she did not pay, however, does not save her claim from the application of *res judicata*. CCO 413.031(k) advises that failure to file an administrative appeal constitutes an admission. Furthermore, as noted by the court in *Shavitz v. City of High Point*, 270 F. Supp.2d 702, 710 (M.D. N.C. 2003), a person who receives a red light camera traffic ticket and does nothing, *i.e.*, fails to pay or file an administrative appeal, lacks standing to make a subsequent challenge to the red light camera ordinance.

judicata should not apply in administrative proceedings involving traffic violations. *Lycan v. City of Cleveland*, No. 99698, 2014-Ohio-203 (8th Dist.) at ¶¶ 15, 17-19. This ruling ignores the fact that *res judicata* applies to quasi-judicial decisions of an administrative agency even when the claim is resolved “without vigorously controverted proceeding before the agency.” “Consent decrees have the same *res judicata* and collateral estoppel effects as judgments resolving disputed issues.” *Scott v. City of East Cleveland*, 16 Ohio App.3d 429, 431, 476 N.E.2d 710 (8th Dist. 1984), *citing*, *Horne v. Woolever*, 170 Ohio St. 178, 182, 163 N.E.2d 378 (1959).

An admission of liability via payment without contest (or in the case of Plaintiff Task, via neither payment nor contest) is no different than a consent decree. Both are entered into voluntarily and result in a final disposition. And the fact that the administrative proceeding at issue is for resolution of a traffic ticket should have no effect on the application of *res judicata* when, as here, the plaintiffs had a full and fair opportunity to present their defense, *i.e.*, that the ordinance did not apply to lessees—the very argument they assert in the current lawsuit. The Sixth Circuit Court of Appeals correctly recognized these concepts when it ruled (based on the application of Ohio law) in the “copycat lawsuit” to *Lycan* that *res judicata* did bar plaintiffs’ claims. *Carroll v. City of Cleveland*, 522 Fed. Appx. 299, 2013 WL 1395900 (6th Cir. 2013)

In *Kovach v. District of Columbia*, 805 A.2d 957 (D.C. 2002), the District of Columbia Court of Appeals also addressed the issue of whether *res judicata* applied to a plaintiff’s lawsuit challenging a red light camera violation which he had voluntarily paid. In that case, the plaintiff received a ticket for running a red light as recorded by a traffic camera. He paid the \$75 rather than try to contest it as authorized by the D.C. Traffic Adjudication Act which provided for a hearing before a hearing examiner and a right of subsequent appeal. *Id.* at 961. Five months after plaintiff paid his fine, the District removed the camera at issue because it was recording an

inordinate number of violations resulting from the placement of traffic signal which was causing confusion for motorists. The District also decided to dismiss outstanding fines but decided not to reimburse those that already paid, like the plaintiff. *Id.* at 960. Kovach sued the District in a class-action complaint alleging statutory and constitutional challenges to the District's decision to forgive outstanding violations but to refuse to refund payments already made.

In addressing the District's *res judicata* defense, the appellate court noted that the nature of the proceeding available under the Traffic Adjudication Act did support the application of *res judicata*. However, with respect to Kovach's particular claims, *res judicata* did not apply because his claims challenging the District's decision not to issue refunds did not exist at the time he paid his ticket since the District did not remove the camera until five months after he paid. *Id.* at 961.

Nevertheless, Kovach still lost. The appellate court ruled that Kovach's payment of the fine was an admission of liability resulting in issue preclusion (which the court labeled as collateral estoppel). Even though he had no argument at the time he paid his fine as to the District's enforcement policy, he still could have made an appeal to the hearing officer and argued, like the other motorists in the class he hoped to represent, that he was confused by the placement of the traffic signal. Instead, he decided not to appeal but to pay which acted as an admission of liability and thus negated any claim that he was confused by the light. As the appellate court explained:

The adjudication of appellant's liability collaterally estops him from now asserting that he is part of a class of people who were confused by the stoplight's placement—a necessary and essential part of his claim that the District's decision to forgive some fines was arbitrary and capricious under both District of Columbia law and the Constitution. By admitting liability, appellant has taken himself out of the class of persons he claims have been unfairly prejudiced by the District's decision.

Id. at 962-63.

The appellate court also rejected Kovach's argument that payment of a traffic ticket does not constitute an admission of guilt in his class action proceeding challenging the District's decision not to issue refunds. The court noted the general rule under D.C. law that the payment of a traffic ticket would not be admissible in a subsequent tort action against the plaintiff based on the traffic violation. However, Kovach's payment of the violation "does not allow him to disavow his admission of liability where the administrative adjudication of his traffic violation is directly at issue in this case." *Id.* at 963, nt. 6.

Unlike the plaintiff in *Kovach* whose statutory and constitutional claims did not yet exist at the time he paid, all of the *Lycan* plaintiffs could have made challenges before the Parking Violations Bureau and on appeal that CCO 413.031 did not apply to them as lessees. This defense existed at the time they received their violations. And this very defense had successfully been invoked by the plaintiff in *Dickson & Campbell*. Instead of contesting the violation, all but one of the *Lycan* plaintiffs paid which is an admission of liability. Thus, *res judicata* should apply to bar their present lawsuit against the City of Cleveland.²

And as was the case in both *Carroll* and *Kovach*, the fact that the prior proceeding involved the administrative resolution of a traffic ticket should make no difference as to the application of *res judicata*. Even though CCO 413.031(k) is "designed to provide a simple and expeditious means" of resolving traffic camera violations as noted by the *Lycan* court, 2014-Ohio-203 at ¶ 18, the fact remains that the *Lycan* plaintiffs could have fully asserted their

² Xerox is not a party in the *Lycan* litigation, but is in privity with the City of Cleveland and thus would have been able to assert *res judicata* as a defense if it had been sued with the city. *See, e.g., State of Ohio ex rel. Schachter v. Ohio Public Employees Retirement Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704, 905 N.E.2d 1210 (privity established by mutuality of interests and desired result).

arguments at the administrative proceeding and on appeal. This is not a situation (as noted by the *Kovach* court) where *res judicata* is being asserted offensively against parties to establish liability—such as a subsequent tort suit where the parties are defendants. Here, Lycan and the others are plaintiffs seeking to recover fines voluntarily paid which they could have challenged via the administrative appeal process. The City of Cleveland seeks to apply *res judicata* defensively to prohibit the plaintiffs' claims. Under such circumstances, it is not unjust for *res judicata* to apply. The Eighth District should have ruled consistent with the Sixth Circuit in *Carroll* and applied *res judicata* to bar the plaintiffs' claims.

B. *Res Judicata* and Lack of Standing Are Related Defenses For Claims Challenging CCO 413.031 Where the Plaintiffs Did Not Pursue Administrative Remedies.

On the same day, January 23, 2014, separate panels of the Eighth District Court of Appeals issued decisions in *Lycan* (8th Dist. No. 99698) and *Jodka* (8th Dist. No. 99951) involving challenges to CCO 413.031. In *Lycan*, in addressing class certification, it ruled that *res judicata* did not bar plaintiffs' class-action complaint seeking relief for vehicle lessees under the version of CCO 413.031 in effect prior to 2009. In *Jodka*, a separate panel of the appellate court ruled that the plaintiff lacked standing to assert constitutional challenges to CCO 413.031 and to seek relief via unjust enrichment. Although the nature of the claims are different, in both cases, the plaintiffs (except for one plaintiff in *Lycan*) paid their violations and none of them pursued an administrative appeal afforded by CCO 413.031 and Ohio Revised Code Section 2506.01. The result in both cases should have been the same under either *res judicata* or lack of standing—the plaintiffs' claims should all be barred.

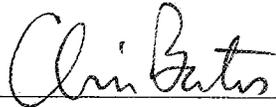
In the context of CCO 413.031 violations where the motorist either pays or fails to request a hearing but instead files a separate suit challenging the ordinance, the defenses of *res judicata* and lack of standing are just opposite sides of the same coin. This is evident by the fact

that the Eighth District in *Jodka* in establishing lack of standing relied heavily on the Sixth Circuit's decision in *Carroll v. City of Cleveland* where the Sixth Circuit ruled that lessees' claims in a suit similar to *Lycan* were barred by *res judicata*. The result of both lack of standing and *res judicata* is that the plaintiff is not an appropriate person to challenge the ordinance. See *Jodka*, 2014-Ohio-208 at ¶ 37 (in the context of standing, by paying the ticket without an administrative appeal, *Jodka* was an inappropriate person to make constitutional challenges to CCO 413.031); *Kovach*, 805 A.2d at 962-63 (in the context of collateral estoppel, admitting liability by payment of the ticket without seeking a hearing took plaintiff out of the class of persons he sought to represent). The Eighth District in *Lycan* should have reached the same result but for the fact that it misapplied the effect of *res judicata* in the context of CCO 413.031 as noted above in Xerox's first argument.

IV. CONCLUSION

For the foregoing reasons, Amicus Curiae Xerox respectfully requests that this Court reverse the decision of the Eighth District Court of Appeals in favor of Plaintiffs-Appellees. This Court should adopt the City of Cleveland's proposition of law and hold that Plaintiffs-Appellees' claims are bared by *res judicata*.

Respectfully submitted,



Gregory V. Mersol (0030838)
Chris Bator (0038550) (Counsel of Record)
Baker & Hostetler LLP
3200 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114-3485
Telephone: 216.621.0200
Facsimile: 216.696.0740
gmersol@bakerlaw.com
cbator@bakerlaw.com

Attorneys for Amicus Curiae Xerox State &
Local Solutions, Inc.

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he served a copy of the foregoing BRIEF OF AMICUS CURIAE XEROX STATE & LOCAL SOLUTIONS, INC. IN SUPPORT OF APPELLANT CITY OF CLEVELAND to the following via U.S. Mail, postage prepaid on August 21, 2014:

Barbara A. Langhenry (0038838)
Director of Law
Jennifer Meyer (0077853) (Counsel of Record)
Assistant Director of Law
Gary S. Singletary (0037329)
Chief Counsel
City of Cleveland
601 Lakeside Avenue, Room 106
Cleveland, OH 44114-1077
jmeyer@city.cleveland.oh.us
gsingletary@city.cleveland.oh.us

Attorneys for Defendant-Appellant City of Cleveland

W. Craig Bashein, Esq. (00349591)
Bashein & Bashein Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
cbashein@basheinlaw.com

Paul W. Flowers, Esq. (0046625)
Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
pwf@pwfco.com

Blake A. Dickson, Esq. (0059329)
The Dickson Firm, L.L.C.
3410 Enterprise Parkway – Suite 420
Beashwood, Ohio 44122
blakedickson@thedicksonfirm.com

Attorneys for Plaintiffs-Appellees Janine Lycin, et al.

Philip K. Hartmann (0059413)
(Counsel of Record)
Stephen J. Smith (0001344)
Yazan S. Ashrawi (0089565)
Frost Brown Todd LLC
10 West Broad Street; Suite 2300
Columbus, Ohio 43215
(614) 464-1211
Fax: (614) 464-1737
phartmann@fbtlaw.com
ssmith@fbtlaw.com
yashrawi@fbtlaw.com

John Gotherman (0000504)
Ohio Municipal League
175 S. Third Street, #510
Columbus, Ohio 43215-7100
(614) 221 4349
Fax: (614) 221-4390
jgotherman@columbus.rr.com

**Attorneys for Amicus Curiae
The Ohio Municipal League**



Chris Bator
Attorney for Amicus Curiae Xerox State & Local
Solutions, Inc.