

IN THE SUPREME COURT OF OHIO

JANINE LYCAN, et al.)	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

APPELLANT CITY OF CLEVELAND'S REPLY BRIEF

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I. Introduction

The “Merit Brief of Plaintiff-Appellees, Janine Lycan, et al.” (“Appellees’ Merit Brief”) points up the lack of substance behind their claims for equitable restitution against the City of Cleveland. The Lycan Appellees knowingly admitted traffic infractions captured by the automated traffic camera system authorized by Cleveland Codified Ordinance 413.031 (“CCO 413.031”). Appellees seek to avoid such reality by seemingly arguing in the alternative that their voluntary payments for the violations avoided any admissions, but that such an “admission” would in any event “preserve” their rights to appeal (See Appellees’ Merit Brief at p. 19), though Appellees offer no suggestion of when their appeals would have been forthcoming. The attempt to avoid the *res judicata* effect of their knowing admissions of liability by arguing their actions actually preserved their right to contest is directly counter to the language of the ordinance and the Notice of Liability each of them received.

The Lycan Appellees have attached with their brief the trial court’s Order of November 25, 2009 with their Appendix (Apx pages 0001-0006). At that time the court had concluded based on the facts of the matter that:

CCO 413.031(k) explicitly set out the appeal process. Paying the citation is excluded as a method of appeal in both the Ordinance and the citation. It is instead the method of admission, as is additionally shown on the citation itself. Payment in the face of the known right of appeal constituted an intentional release of the right to contest the citation.

(Order, Appellees’ Apx. at p. 0005). The Sixth Circuit Court of Appeals applied Ohio law governing claim preclusion under the principles of *res judicata* in considering the same issues that are presently raised by the Lycan Appellees. The Sixth Circuit

considered claims of equitable restitution based on voluntary payments and after review of Ohio law upheld dismissal of the complaint concluding:

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.

Carroll v. Cleveland, 522 Fed. Appx. 299, 307 (6th Cir.2013).

The underlying reality being denied by Appellees with their argument for equitable restitution is that each of them and the class they seek to represent voluntarily and knowingly admitted their liability within the legal framework of the adequate remedy at law provided by CCO 413.031. This same remedy at law was successfully used to challenge the application of the ordinance to motor vehicle lessees in *Dickson & Campbell, L.L.C. v. Cleveland*, 181 Ohio App. 3d 238, 2009-Ohio-738, 908 N.E.2d 964, 965 (8th Dist. 2009). The Lycan Appellees now seek to void their admissions based on *Dickson & Campbell*, notwithstanding, that each had recourse to judicial review within the adequate remedy at law provided by CCO 413.031. This Court has recognized:

[E]very wrong decision, even by an administrative body, is not void as being beyond the so-called jurisdiction of the tribunal, even though voidable by proper judicial process. Logic compels the conclusion that this is true where a specifically prescribed course of immediate judicial review or judicial examination is provided within the same act, for the relief of those persons claimed to be aggrieved by illegal or improper action of an administrative tribunal, especially where such persons fail to take advantage of the specific judicial review or examination so provided.

Garverick v. Hoffman, 23 Ohio St.2d 74, 79, 262 N.E.2d 695 (1970). The Lycan Appellees and the class they seek to represent should not be allowed to disregard their decision to admit liability for admitted violations of the traffic laws. Appellees' claims

arise out of the same core of facts that were presented at the time each of them admitted liability. The application of claim preclusion to Appellees' claims addresses the same ends that were recognized by this Court in *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 653 N.E.2d 226 (1995) and would serve to

“establish[] certainty in legal relations and individual rights, accord[] stability to judgments, and promote[] 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.

Id. at 383-4.

II. Decisions Cited by the Lycan Appellees as Supporting Equitable Refunds Are Not Applicable Where Each of Them Waived Available Adequate Remedies at Law.

The Lycan appellees broadly and mistakenly argue in their Introduction that the trial court's class certification order “adheres to the well-established precedents recognizing that prompt refunds are warranted under principles of equity whenever governmental entities have overcharged unsuspecting citizens without authority.” (Appellees' Merit brief at p. 3). The precedent referenced by Appellees is not applicable in this matter where each of them knowingly waived their right to recognized due process by way of the administrative appeal process established by CCO 413.031. They admit “none of the named Lycan or class members invoked the parking violations Bureau's Administrative [sic] review procedure...” (Appellees' Merit Brief at p. 12).

The civil penalty for violations is set by ordinance at CCO 413.031(o). The ordinance succinctly establishes civil charges for camera enforced violations as follows:

- (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

The Lycan appellees have not alleged they were overcharged in excess of the civil fine structure established by CCO 413.031(O). Appellee Lycan makes clear that she had paid “the \$100.00 fine under former CCO 413.031...” (Appellee’s Merit brief at p. 6).

Additionally, none of the Lycan Appellees can be characterized as being “unsuspecting citizens.” The Notice of Liability issued to each of them described the offense and as will be further addressed below, made clear that each of them had the opportunity to either admit with a payment or deny by seeking an appeal hearing. The Lycan Appellees knowingly and voluntarily admitted the traffic infractions captured by the City’s automated traffic enforcement cameras when they paid their fines “to avoid municipal enforcement efforts.” (Appellee’s Merit Brief at p. 11).

The two cases cited by Lycan in framing their introductory characterization - *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 are distinguishable and offer no support. In *Judy v. Ohio Bur. Of Motor Vehicles* the issue presented was not subject to quasi-judicial review but related to the state’s administratively overcharging fees for license reinstatement and did not address the litigation of the license suspensions themselves:

Furthermore, the statutory fee in former R.C. 4511.191(L)(2) is, by its express terms, a *reinstatement* fee. As a result, the fee is tied to the *reinstatement of the*

license rather than the suspensions enumerated in the first clause of former R.C. 4511.191(L).

Judy at ¶ 21. Unlike the civil fine authorized by CCO 413.031 for violations of the state's traffic laws, this Court had held before *Judy* that the statutory license reinstatement fee in question was not a punishment. *State v. Uskert*, 85 Ohio St.3d 593, 594, 709 N.E.2d 1200 (1999). The reinstatement fee that was found to be an unsupportable overcharge in *Judy* was administrative and clerical in nature and was unlike the contestable civil fine established in CCO 413.031, which provided rights to appeal by quasi-judicial hearing.

Similarly, the plaintiffs in *Santos v. Ohio Bur. Of Workers' Comp.* were challenging the state's subrogation fee authorized in R.C. 4123.931 against their recoveries in workers compensation cases as. *Id.* at 2004-Ohio-28 at ¶¶ 2-4. In deciding *Santos* this Court relied upon its earlier analysis in *Ohio Hosp. Assn. v. Ohio Dept. of Human Serv.*, 62 Ohio St.3d 97, 579 N.E.2d 695 (1991), which addressed the reimbursement of funds that had been withheld by administrative rule. *Santos* at ¶ 14. Unlike CCO 413.031 as at issue herein, the statute at issue in *Santos*, R.C. 4123.931, had "provide[d], in part, that BWC's *right of subrogation* [was] *automatic*, that no settlement or other recovery [was] final without notice to BWC, and that the entire amount of any settlement [was] subject to BWC's subrogation right." *Holeton v. Crouse Cartage Co.*, 92 Ohio St.3d 115, 116, 748 N.E.2d 1111 (2001), at FN 1 (emphasis added). Again, a state charge that did not provide for administrative quasi-judicial challenge. Both *Judy* and *Santos* addressed the collection of uncontestable fees, and neither case involved circumstances where those requesting "equitable" relief did not have recourse to a quasi-judicial administrative hearing process, which was available and knowingly waived by the Lycan Appellees and the class they seek to represent.

In similar fashion, the Lycan Appellees' later reference to *Ojalvo v. Board of Trustees of Ohio State University*, 12 Ohio St.3d 230, 466 N.E.2d 875 (1984) (See Appellees merit brief at pp. 25-26) is distinguishable, and points up another defect in the Lycan Appellees' class certification claims. *Ojalvo* did not involve voluntary payment of civil traffic fines, rather the case involved thousands of individual employees at Ohio State who had failed to receive the full amount of salary contractually due to them. Members of the *Ojalvo* class had not consented to the reduction in salary and each may well have been an "unsuspecting citizen" at the time of their salary payments. Equivalent "unsuspecting" circumstances are not presented here. The Lycan Appellees had received notices of traffic violations captured by camera, and each of them thereafter admitted to the traffic violation as was allowed by CCO 413.031. Not one of the Lycan Appellees has ever suggested their vehicle was not being operated in violation of the law at the time of their admission.

While the Lycan Appellees want to disregard the decision in *State ex rel. Scott v. Cleveland* 112 Ohio St.3d 324, 2006 -Ohio- 6573, 859 N.E.2d 923 (see Appellees' Merit Brief at p. 18), it is important to note that this Court concluded in that early challenge to the City's camera enforcement ordinance that individuals receiving a notice of violation do "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." *Id.* at ¶ 24. Unlike the circumstances in *Judy, Santos*, and *Ojalvo*, the Lycan Appellees come to this Court seeking, in effect, equitable reversal of their decision to admit liability within their recourse to the adequate remedy in the ordinary course of the law provided to them by the ordinance. The Lycan Appellees chose not to

request a hearing and forewent the R.C. 2506 appeal that would have been available following a requested initial administrative hearing. The Eighth District itself had recognized in analyzing and dismissing the *Scott* challenge to CCO 413.031 that the available appeal provided the opportunity to challenge the ordinance:

“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, ¶ 19. In the more recent class action presented in *Jodka v. City of Cleveland*, 8th Dist. No. 999516, 2014 -Ohio- 208, N.E.3d 1208¹, the Eighth District extinguished plaintiff’s attempted class action for restitution premised on unjust enrichment for lack of standing after he, like the Lycan Appellees, chose to pay the civil fine identified with the notice of liability issued to him under authority of CCO 413.031. *Id.* at ¶ 37.

III. The Lycan Appellees Chose Not to Appeal Within Twenty-One (21) Days as Allowed by the Ordinance and They Knowingly Admitted Their Liability.

Though acknowledging that each of them voluntarily surrendered their opportunity to challenge the ordinance as it was applied to them, Appellees raise an untenable and ill-supported interpretation of CCO 413.031(k) with the argument that they and others who paid their fines “would not be forfeiting their right to appeal or admitting to wrongdoing.” (Appelles’ merit brief at p. 20). The Lycan Appellees have gone as far

¹ A certified conflict (Case No. 2014-0480) and separate appeal/cross appeal (Case No. 2014-0636) in *Jodka* have been accepted by this Court and held for the decision in 2013-1277, *Walker v. Toledo*, 6th Dist. Lucas No. L-12-1056, 2013-Ohio-2809; with the briefing schedule stayed.

as to argue that by paying their civil tickets that they actually preserved the right to appeal. (See Appellee’s Eighth District Merit Brief, case no. 99698, at pages 22-23). The argument, “copycat” or not, was also presented in *Carroll* and has no basis for support.

CCO 413.031(k) states in pertinent part:

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.

(emphasis added). The first sentence of section (k), which Appellees avoid referencing, establishes that a notice of appeal “shall” be filed within twenty-one (21) days. This is not a controversial proposition or a sentence given to multiple interpretations. The Eighth District Court of Appeals has recognized that “[a] party who receives a notice of liability may contest the ticket by filing a notice of appeal within 21 days from the date listed on the ticket.” *Cleveland Parking Violations Bur. v. Barnes*, 8th Dist. No. 94502, 2010 - Ohio- 6164. The Lycan Appellees did not file a notice of appeal within the 21 days allowed by CCO 413.031(k), but instead chose to admit liability.

The Lycan Appellees attempt to confuse these established facts by arguing at page 19 of their brief that “Named Plaintiffs and class members avoided ‘a waiver of the right to contest the ticket’ when they paid the civil penalties.” As was noted above in the trial court’s original dismissal of Appellees’ claims in 2009 this is unsupportable and not a credible argument given Appellees’ admissions by way of payment, the clear language of CCO 413.031, and the language of the Notices of Liability received by each of them. That the Lycan Appellees have a hard time logically making their argument is demonstrated at page 19 of their brief where they inconsistently argue on the one hand that “paying the penalty avoided any admissions”, while almost directly following this

declaration with the contrary statement that “an ‘admission’ preserves, and not ‘waives’, rights to appeal.” (*Id.*, emphasis added). Both sides of the argument are incorrect.

The immediately preceding two quotes are sandwiched around an instructional quote taken from the Notice of Liability that was received by each of the Lycan Appellees. The quotation² referenced by Appellees’ at p. 19 of their brief is incomplete without reference to the language that immediately follows on the Notices of Liability. Language following the heading quoted by Appellees provides specific directions for either admitting or denying the alleged infraction. The noticed instructions provide:

TO ADMIT:

You have four options: 1) pay via the internet at www.clevelandphotoosafety.com; 2) pay by telephone by calling 216-664-4744...3) mail your payment...to the City of Cleveland, Parking Violations Bureau, Photo safety Division, P.O. Box 99910, Cleveland, OH 44199-0910; or 4) pay in person at Cleveland Police Headquarters, 1300 Ontario Street in downtown Cleveland, Monday to Friday 8:00 AM to 7:30 PM or Saturdays from 8:00 AM to 3:00 PM...

(See Plaintiff’s First Amended Complaint, Notices of Violation attached thereto as Exhibits A, B, and C, second side).³ Clearly, one conclusively admits liability and does not avoid an admission of liability by making a payment.

The same Notice further provided instructions to each of the Lycan Appellees and the class they seek to represent on the steps to be taken to deny the citation as follows:

² The Quotation referenced by Appellees comes after the heading “Directions for Answering” in the following format , which is shown here in reduced typeface to represent how it appears sequentially in linear format on the Notice:

DIRECTIONS FOR ANSWERING
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

³ Note that separate Exhibits F,G,H,I,J,P,Q,R,and S as are also attached to the First Amended Complaint are citations apparently issued by the unrelated City of East Cleveland pursuant to that City’s ordinance and the exhibits are **not** Cleveland notices.

TO DENY:

Please check the applicable box below and mail this entire notice to Cleveland parking Violations Bureau, Photo Safety Division, PO Box 99910, Cleveland, OH 44199-0910. Attach all requested documentation.

[] I REQUEST A HEARING

You will receive a notice by mail of the date and time of your hearing. Hearings will be at the Justice Center in downtown Cleveland.

[] MY VEHICLE WAS STOLEN AT THE TIME OF THE INFRACTION

Enclose a copy of the Police Report showing that the vehicle was stolen prior to the date and time of the violation.

[] MY VEHICLE WAS NOT IN MY CUSTODY, CARE OR CONTROL AT THE TIME OF THE INFRACTION

For this defense you must complete the affidavit below...***...**Please print clearly.**

(*Id.*, see e.g. Exhibit B to Plaintiff's First Amended Complaint).

Notwithstanding such clear and unambiguous instruction, Appellees' attempt to argue there was no admission with their paying of the civil fine established on the Notice defies (1) the language of the instructions on the Notice, (2) the language of the ordinance, and (3) all common sense and logic. Moreover the Eighth District in dismissing the equitable restitution claims in *Jodka* has recognized:

* * * 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 v. Cleveland, at ¶ 36, quoting *Carroll v. Cleveland*, 522 Fed.Appx. 299 (6th Cir.2013).⁴ The evident understanding to be taken from the course of conduct undertaken by each of the Lycan Appellees is well understood -- their vehicle had been captured violating the traffic laws by probative and substantial evidence captured by the City's automated traffic enforcement cameras. Each of them were provided specific instruction

⁴ The Eighth District specifically found a lack of standing under the same admitted liability circumstance presented in the instant *Lycan* litigation:

Jodka never availed himself of the unconstitutional quasi-judicial process created by CCO 413.031(k) and (l); consequently, he lacks standing to present his claim of unjust enrichment. *Id.* at ¶ 34.

on how to admit or deny their civil citations within the recognized adequate remedy at law provided to them, and each of them knowingly admitted civil liability when they did not file a notice of appeal within twenty-one (21) days and made their voluntary payment.⁵ As was recognized by the district court in reviewing a separate camera related complaint, “Plaintiffs [who] did not receive an administrative hearing because they admitted their offenses by paying their fines, thereby conced[ed] civil liability.” *Foor v. Cleveland*, N.D. Ohio Case No. 1:12 CV 1754, 2013 WL 4427432, at *5.

IV. The Admissions of the Lycan Appellees Distinguish Them From the Lessee Who Challenged the City Ordinance in *Dickson-Campbell v. Cleveland*.

The Lycan Appellees frame incorrectly and overwroughtly describe the City’s prior efforts in defending its legal position in *Dickson & Campbell v. Cleveland*, 181 Ohio App.3d 238, 2009-Ohio-3625, 910 N.E.2d 478 through its appeal and seeking jurisdiction in that case to this Court. (See Appellees’ Merit Brief at p. 8, first two paragraphs). The City neither “fumed”, took a position that can be properly characterized as a “fulmination”, nor does the City agree that its arguments on appeal therein involved “pejorative rhetoric.” More realistically considered, the City disagreed with the Eighth District Court of Appeals in *Dickson & Campbell*, a matter that involved on appeal the interpretation of the statutory language used in CCO 413.031.

The Lycan Appellees incorrectly characterize the City’s jurisdictional argument to this Court in *Dickson & Campbell* in arguing “Despite Defendant’s pejorative rhetoric and insistence that the Eighth District’s ruling would “expose” the municipality to a

⁵ In making their confusing, contradictory, and unsupported arguments concerning waiver and admission, the Lycan Appellees seek further to differentiate “arguably those lessees like Plaintiff Jeanne Task (“Task”) who refused to pay the citations...” (Appellees’ Merit Brief at p. 19). This is a differentiation without meaning under the obvious circumstance of the admissions associated with each with their timely payments and lack of appeals.

“disgorgement” of fines that had been collected, the request for further review was denied.” (Appellees’ Merit Brief at p. 8)⁶. It may seemingly be a subtle point, but the City never argued any “insistence” that the *Dickson & Campbell* would expose the City to disgorgement as characterized. Rather, the City, in recognition of the class action lawsuit that had been brought by *Lycan* immediately in the wake of the *Dickson & Campbell* decision, argued on appeal concerning why the case was of public and great general interest that there could be the “potential” of such exposure. Potential is not “insistence” and the City provides the following excerpt from its Memorandum to correct both the characterization and Appellees’ reference to the use of “pejorative rhetoric.”

The Court of Appeals' refusal below to apply the plain language of the City's ordinance has exposed the City to *potential* monetary damages and disgorgement of civil penalties paid by lessees of vehicles that were operated in a manner that violated the City's traffic laws. *A plaintiff is currently attempting to utilize the instant Eight District Court of Appeals' decision as the basis for a class action lawsuit against the City in Lycan v. City of Cleveland, Cuyahoga C.P. No. CV-09-686044.*

(see “Memorandum in Support of Jurisdiction of Appellant City of Cleveland”, *Dickson & Campbell v. City of Cleveland*, Ohio Sup Ct. Case No. 09-0694) (emphasis added).⁷

In deciding *Dickson & Campbell* the Eighth District’s analyzed, in a 2-1 divided opinion, the definition of “owner” as used in the ordinance. The City had argued that a lessee was also an owner for purposes of the Notices of Liability issued pursuant to the ordinance. The court of appeals understood:

The hearing examiner reviewed a printout (copy is not clear as to what it was) from the BMV that listed the license plate and the vehicle's VIN number. The

⁶ The Lycan Appellees’ citation to *Dickson & Campbell LLC v. Cleveland*, 122 Ohio St.3d 1479, 2009-Ohio-3625, 910 N.E.2d 478 is but a citation to the table referencing that the City’s appeal was not allowed.

⁷ See http://www.sconet.state.oh.us/pdf_viewer/pdf_viewer.aspx?pdf=642430.pdf (last reviewed October 28, 2014).

top of the printout listed VW Credit Leasing, Ltd. It then listed Dickson & Campbell under “additional owner name” and gave Dickson & Campbell's address.

Blake Dickson argued that there cannot be “two owners legally.” The hearing examiner, however, disagreed and concluded that the BMV identified Dickson & Campbell as an additional owner, and under CCO 413.031, that was sufficient. The examiner found Dickson & Campbell liable for the speeding infraction and imposed a \$100 fine.

Thus, the second hearing officer found that Dickson & Campbell was an owner of the vehicle as defined under CCO 413.031.

Dickson & Campbell v. Cleveland, at ¶¶ 12-14 (emphasis added). The Eighth District construed the language of CCO 413.031’s references to “vehicle owner.” *Id.* at ¶¶ 35-36. The Eighth District looked to legislative intent and the words used in the ordinance and the majority came to a conclusion that disagreed with the City’s use of the term. *Dickson & Campbell* at ¶ 39. The dissent would have affirmed the trial court in favor of the City understanding the BMV’s use of the term “owner” :

I respectfully dissent. Our standard of review is limited to determining whether the common pleas court abused its discretion in finding that the administrative order is supported by reliable, probative, and substantial evidence. The evidence supports the trial court’s decision because Dickson & Campbell is registered as the owner of the vehicle pursuant to BMV records. Therefore, I would affirm the court’s judgment.

Id. at ¶ 56 (Conway Cooney, J. dissenting). The analysis undertaken in the case was seriously undertaken and the decision clearly establishes that the remedy at law recognized with CCO 413.031 is fair and well distanced from the cartoonish “legal gotcha” characterized by Appellees at page 13 of their brief.

The Lycan Appellees and the defined class they seek to represent were afforded the same due process and ability to challenge CCO 413.031 that was undertaken by the lessee in *Dickson & Campbell*. Instead, each of them in assessing their rights within the recognized remedy at law chose to voluntarily pay the civil fines assessed under the

ordinance, thereby admitting with finality the violation that had been documented by the City's automated camera system. The same pertinent factual circumstances were presented, addressed, and dismissed by the district court in what the Lycan Appellees have referred to as "copycat" litigation, *McCarthy v. City of Cleveland*, N.D. Ohio No. 1:11-CV-1122, 2011 WL 4383206 (Sept. 20, 2011) (*McCarthy II*). The trial court in *McCarthy II* (*Carroll* on appeal) concluded:

[I]f the Plaintiffs had availed themselves of the quasi-judicial procedures of 413.031, they could have also sought review of the Parking Violations Bureau's ruling in the court of common pleas under *Ohio Revised Code § 2506.1*.

According to the Plaintiffs, they were aware of their rights to appeal the citations, but made the informed choice to not challenge their citations. By their own admission, the Plaintiffs paid the \$100 fine to avoid "incurring the burdensome and substantial costs in challenging the alleged violations." ...Consequently, by waiving their right to a hearing, the Plaintiffs admitted liability for the traffic violations and "simply failed to avail [themselves] of all available grounds for relief in the first proceeding." *Grava*, 73 *Ohio St.3d* at 383, 653 *N.E.2d* 226. The Plaintiffs were given a full and fair opportunity to present their claims pursuant to C.C.O. 413.031 and *Ohio Revised Code § 2506.01*. They chose to not take advantage of this opportunity, and a final judgment of liability was entered against them. The Cleveland Parking Violations Bureau's finding that Plaintiffs McCarthy and Carroll were liable for a traffic violation is an established legal fact, which was not appealed. As to the Plaintiffs' liability for their traffic violation, then, this Court finds that valid, final judgment was entered against them, and the first element of *res judicata* is satisfied.

Id. at *3. The district court was thereafter affirmed by the Sixth Circuit on appeal in *Carroll v. Cleveland*, 522 Fed.Appx. 299 (6th Cir.2013).

V. The Sixth Circuit's *Carroll* Decision is Not an Aberration as Argued by Appellees and the Court Correctly Upheld Dismissal of the "Copycat" Claims In That Matter Based on *Res Judicata*.

The Lycan Appellees begin their analysis of *res judicata* by claiming that "this Court is being asked to hold for the first time in the history of Ohio jurisprudence that an actual legal proceeding and the imposition of a valid prior judgment are unnecessary to invoke the defense." (Appellees' Merit brief at p. 13). The City disagrees with the

characterization as the Appellees took their actions in admitting liability within the scope of the adequate remedy at law provided to them. As in *Grava*, the Lycan Appellees “had a full and fair opportunity to present [their] case[s] * * * and simply failed to avail [themselves] of all available grounds for relief in the first proceeding.” *Id.* at 383.

There is no dispute but that the Lycan Appellees had been served with the Notice of Liability pursuant to CCO 413.031 and were involved in a legal proceeding at the time they made their admissions of liability. This Court has recognized that “the strict rules of evidence applicable to courts of law shall not apply... [t]he contents of the ticket shall constitute a prima facie evidence of the facts it contains...” *Scott* at ¶ 6. The Eighth District has concluded that camera generated evidence is both probative and substantial:

“The evidence used against defendant at the administrative hearing was the notice of liability for speeding, the [Automatic Traffic Enforcement Camera (“ATEC”)] photographs, and the logbook showing the ATEC's calibration. Given the relaxed standards of evidence in administrative hearings, this evidence is certainly probative and substantial as to whether defendant was speeding. Cf. *HCMC, Inc. v. Ohio Dept. of Job & Family Servs.*, 179 Ohio App.3d 707, 2008–Ohio–6223, 903 N.E.2d 660, ¶ 48 (a state agency audit is admissible and prima facie evidence of what it asserts in an administrative hearing).” *Cleveland v. Posner*, Cuyahoga App. No. 95301, 2011–Ohio–1370, ¶ 27–28 (“*Posner II*”). This is probative evidence that appellant was speeding.

Cleveland v. Cord, 8th Dist. No. 96312, 2011 -Ohio- 4262, ¶¶ 11-12.

None of the Lycan Appellees contested the evidence documenting the traffic violations referenced in their notices of liability and each made voluntary and knowing decisions within the framework of the “adequate remedy in the ordinary course of the law” available to them to admit liability. The admissions coupled with expiration of the time established for appeal has the resultant effect of a final judgment. “Where a claim could have been litigated in the previous suit, claim preclusion also bars subsequent

actions on that matter.” *O’Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007 - Ohio- 1102, 862 N.E.2d 803, ¶ 6, citing *Grava, supra*.

Appellees’ citation to *United Tele. Co. of Ohio v. Tracy*, 84 Ohio St.3d 506 (1999) does not stand for the proposition placed before this court at page 14 of their brief. The court in *United Tele.* rejected collateral estoppel and res judicata defenses that had been raised because the BTA had not conducted “a second administrative proceeding; the remanded proceeding was part of the same administrative proceeding.” *Id.* at 511. That is not the case with Appellees’ admissions, nor is there a question of “implied waiver” as suggested by Appellees at page 14. When the Appellees paid their tickets, each expressly admitted liability in accordance with the instructions of the Notice received, and by knowingly forgoing the administrative hearing, each obviously intended for that to be the end of any subsequent issues the City could bring against them. Appellees paid the civil citations and the City collected the payment, with each party agreeing not to take further action regarding the captured violations, just as would be the result of a settlement or consent judgment entered into between the parties. The Sixth Circuit well understood that the admissions of liability in the similar *Carroll* challenge addressed finality:

We move, therefore, to the four-part analysis outlined above. 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.

Carroll at 304. Clearly, the Lycan Appellees intended that their admission would be the final judgment and the “illusion” argument at page 13 of their brief discounts reality.

VI. Exhaustion of Administrative Remedies is Not before This Court.

The Lycan Appellees confuse what is before this Court in that section of their brief entitled “III. The Futility of Administrative Review”. (See Appellants Merit bBrief at pp. 21-28). The appeal before this Court is predicated on the application of *res judicata* and not an affirmative defense associated with failure to exhaust administrative remedies.

Appellees incorrectly argue at page 22 of their brief that “the evidentiary record is devoid of any proof that the review procedure provided in CCO 413.031(k) could have been utilized to overturn a citation on the grounds that the municipality had exceeded its authority by misconstruing the ordinance to reach non-owners.” This is demonstrably wrong and disregards the Eighth District’s 2009 decision in *Dickson & Campbell*.

Appellees selectively cite to the deposition testimony of Cleveland Municipal Court employee Maria Vargas⁸ throughout their brief in an effort, if understood, to suggest that their decision to admit was undertaken because the appeal process was unfair. As was addressed in the *McCarthy* “copycat” challenge criticizing the same administrative hearing process under CCO 413.031 this should not be countenanced.

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.

McCarthy v. City of Cleveland, 626 F.3d at 289 (McKeague, J. concurring). The Lycan

⁸ The deposition of Ms. Vargas is formally cited by Appellees as T.d. 67, Deposition of Maria Vargas taken on October 11, 2011. The City will reference “Vargas Deposition.”

Appellees paid their fines and did not challenge the probative and substantial evidence referenced in the notice to them, nor did they challenge based on their status as lessees.

Ms. Vargas is the municipal court employee overseeing the administrative hearing process and collections associated with both parking and CCO 413.031 camera documented traffic violations and she was deposed two and a half years after the *Dickson & Campbell* decision. Appellees initially mischaracterize her deposition as “poignant” in an effort to suggest the City was knowingly citing non-owners without authority. (Appellees Merit Brief at p. 2). What is left out of their characterization on page 2 is the context at that extended point in the deposition. Ms. Vargas was addressing the potential liability of non-owner drivers and not whether notices of liability could be addressed to lessees as additional owners. (See Vargas Deposition at pp. 113-114). Ms. Vargas was mistaken as both the instructions on the Notices of Liability and the text of CCO 413.031 did allow (and continue to do so) individuals receiving a Notice of Liability to “Deny” the infraction by identifying the actual non-owner driver operating the vehicle at the time of the captured traffic violation. (See e.g. Ex. B to Appellees’ First Amended Complaint). Appellees’ implication that the ordinance did not authorize such denial is simply incorrect, with CCO 413.031(k) as enacted stating in pertinent part:

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.

Ms. Vargas further testified that a committee involving several City departments had developed “business rules” related to the photo enforcement program. (Vargas

Deposition at pp. 67-68). Ms. Vargas was not part of the committee discussions concerning the rules. (*Id.* at pp. 68-69). Ms. Vargas understood that the BMV identified lessees as an “additional owner” of their motor vehicles based on her “prior experience with the parking violations.” (*Id.* at p. 77). She further establishes that the business rules provided with regard to leased vehicles:

“The name, social security number or driver’s license number of the additional owner as listed by the Ohio Bureau of Motor Vehicles (OBMV) will be used for identification/noticing purposes.”

(*Id.* at p. 71). Ms. Vargas testified the business rules provided for sending notices of liability based on BMV identification:

Q. All right. And then you get back from leave and you see these business rules and you now know that lessees will be identified through BMV and issued notices, correct?

...

A. That’s correct.

Q. All right. And you believe the committee made that decision as a whole or somebody in particular.

...

A. The committee as a whole.

(*Id.* at pp. 79-80). Further, Ms. Vargas makes clear that until *Dickson & Campbell* she understood the City had the right to issue notices of liability to lessees. (*Id.* at p. 80).

The decision in *San Allen, Inc. v. Buehrer*, 8th Dist. No. 99786, 2014-Ohio-2071 discussed at pages 24-25 of Appellees’ brief addressed statutory and constitutional challenges to the BWC's implementation of group-experience rating plans, not civil liability issues. The decision and the reasoning therein did not involve the exercise of “quasi-judicial” authority with further recourse to an appeal under R.C. Chapter 2506 and the case is simply inapplicable to the issues before this Court. Again, this appeal is not postured on whether the Lycan Appellees failed to exhaust their administrative remedies.

The adequate remedy at law available to the Lycan Appellees did not end with their receiving a Notice of Liability or deciding whether to admit or request the available quasi-judicial administrative hearing provided by CCO 413.031. Rather it also included judicial review before a court with the power to determine whether the resultant administrative order “was unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence.” *Dickson & Campbell* at ¶ 7. Each of the Lycan Appellee’s decisions were not isolated or taken outside of the available adequate remedy at law previously, and their admissions were undertaken with the finality protected by the recognized principles of *res judicata*.

VI. CONCLUSION

The finality issue presented in this matter is not complex despite the efforts expended by the Lycan Appellees to make it appear so. The Sixth Circuit properly applied *res judicata* in upholding the dismissal of the “copycat” class claims brought by the lessees in *Carroll*. The City requests that this Court reverse the decision of the Eighth District and recognize that Appellees’ claims are precluded and correctly barred by *res judicata* given the voluntary admission of liability undertaken by each of them.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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