

IN THE SUPREME COURT OF OHIO

Case No. 14-0358

Janine Lycan, et al.,)	
)	On appeal from the Cuyahoga County
)	Court of Appeals,
Plaintiff-Appellees,)	Eighth Appellate District
)	Case No. 99698
v.)	
)	
City of Cleveland,)	
)	
)	
Defendant-Appellant.)	

**BRIEF OF AMICUS CURIAE BRADLEY L. WALKER & SAM JODKA REGARDING THE THREE
SUPPLEMENTAL QUESTIONS POSED BY THIS COURT**

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Question #1: **Is there a final appealable order in which the trial court ruled on the *res judicata* question raised in appellant’s first proposition of law?**

Short answer: **Yes.**

Explanation. Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district * * *¹ A court of appeals has no jurisdiction over orders that are not final and appealable.² Whether an order is final and appealable is controlled by statute. Relevant here, R.C. 2505.02(B)(1) provides that:

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment***

The phrase “prevents a judgment” is not to be taken literally since in all fully-litigated cases one side is ultimately awarded judgment. That is, no order ever literally prevents a judgment since all cases must end. Rather, the phrase “prevents a judgment” means that the order prevents a judgment *in favor of the appealing party*, which could be the plaintiff or defendant. Cf., *State v. Baker*, 119 Ohio St.3d 197, 893 N.E.2d 163, 2008-Ohio-3330, ¶9.

On February 8, 2013, the trial court granted “partial” summary judgment to plaintiffs. But use of the word “partial” is a misnomer since the trial court held that the motorists met *all* the elements of their unjust-enrichment claim. *Lycan v. Cleveland*, 6 N.E.3d 91, 2014-Ohio-203, ¶9.

¹ Ohio Const. Art. IV, Section 3(B)(2).

² *State v. Baker*, 119 Ohio St.3d 197, 893 N.E.2d 163, 2008 -Ohio- 3330.

Hence, this ÷in effect determine(d) the action and prevent(ed) a judgmentö in favor of appellant Cleveland. It is therefore a ÷final order.ö

Granted, the motorists had pending a twin claim for ÷declaratory judgment,ö but the declaratory judgment action just mirrors the unjust-enrichment claim. Plus, the declaratory-judgment count is mooted because Cleveland earlier amended its ordinance to define ÷ownerö to include a ÷lesseeö so as to prospectively fix the problem presented by Lycanø's challenge. Accordingly, the answer to the above question is ÷yes.ö But if the answer is ÷noö then there never was a final order with respect to the res-judicata issue and therefore this court would lack statutory or constitutional power to opine upon that issue.

Question #2: **If the answer to question 1 is “yes,” did appellant timely appeal that trial court order?**

Short answer: **No.**

Explanation. Assuming that the February 8, 2013 order was a final order under R.C. 2505.02(B), the cityø's appeal is *untimely* since it did not appeal to the Eighth District until March 27, 2013. Appellants get thirty days to appeal under App. R. 4(A)(1). The time between February 8th and March 27th exceeds thirty days and therefore the only issue that could possibly be timely before this court is the class-certification order entered under Civil Rule 23. Significantly, in its notice of appeal filed in the Eighth District on March 27, 2013, the city indicated it was appealing the February 26th class-certification order.

Question #3: **If the answer to question 1 is “no,” are there other grounds allowing this court to address res judicata in the first instance on appeal of a class-certification order?**

Short answer: **No.**

Explanation. Class-certification orders are final orders under R.C. 2505.02(B)(5). But a class-certification order generally does *not* go to the merits of a case.³ That is, just because a class is certified does not mean that the plaintiff will prevail or that the defendant(s) cannot prevail on the merits. Indeed, one benefit to the defendant of class certification is if the defendant prevails on the merits—such as on a res judicata defense—then the class members are bound by that adverse judgment. Thus, a defendant with a true res judicata defense should *want* a class to be certified.

Here, assuming *arguendo* that the answer to question number one is “no,” then this court has nothing to review regarding res judicata since that issue is not relevant to reviewing the class-certification determination. And *amici* are not aware of constitutional or statutory authorities permitting this court to address application of the doctrine of res judicata in the *first*

³ A class action is permitted under Civ.R. 23(B), subject to the satisfaction of the following prerequisites:

- (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 (“numerosity”);
- (4) there must be questions of law or fact common to the class (“commonality”);
- (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class (“typicality”);
- (6) the representative parties must fairly and adequately protect the interests of the class (“adequacy”); and
- (7) one of the three Civ.R. 23(B) requirements must be met.

None of these issues relate to the application of res judicata, which is a defense to the underlying claim and not to certification of a class.

instance on appeal—the whole purpose of an “appeal” is to review what occurred below, not to address issues in the first instance.

This is especially true in an appeal of a class-certification order, which has nothing to do with “res judicata” since certifying a class is not an indicator of approval (or disapproval) of the underlying merits as mentioned above. That is, even if the claim here could be said to be barred by res judicata, that still would not defeat class certification since res judicata is an affirmative defense—it is *not* a means to overcome class certification. Since the doctrine of res judicata is not relevant to certification under the Rule 23 determinations, it cannot be reviewed on appeal of a Rule 23 determination, let alone “in the first instance.”

Res judicata would only possibly be relevant to a class action if a class was certified and *then* it was determined that the plaintiffs’ claim is barred by res judicata. Stated differently, if a class were certified and then it was determined that the claims were barred by the doctrine of res judicata, then the class members’ claims would be defeated since they’d be bound by the res-judicata decision. But invoking the doctrine *to defeat class certification* doesn’t make any sense because any determination that res judicata somehow bars class certification would mean that none of the putative class members would be bound by that determination since putative or would-be class members are not bound by rulings in a case where no class was certified. If no class is certified the absent members are not represented and therefore are not bound by an adverse judgment as to the lead plaintiffs.⁴

⁴ See e.g., *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 994 N.E.2d 408, 2013 -Ohio- 3019, ¶8, fn. 2. (“A fail safe class definition is one in which the putative class is defined by reference to the merits of the claim. It requires a court to rule on the merits of the claim at the class certification stage in order to tell who was included in the class. *Id.* “Such a class definition is improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment.”) (internal citations omitted).

In sum, if the city is invoking “res judicata” here as a means to defeat class certification, then this is a perplexing litigation strategy.

First, if the city prevailed, none of the putative class members would be bound if the class were de-certified.

Second, res judicata is not a basis for de-certification.

Third, this court cannot reach the merits of substantive defenses in appeals arising under R.C. 2505.02(B)(5) since such appeals are limited to addressing class certification. Otherwise, every conceivable merits defense could be swept into an appeal under R.C. 2505.02(B)(5), which is absurd and unworkable especially if this court be done “in the first instance” in this state’s Supreme Court.

In sum, class certification does *not* hinge upon whether or not the claims at issue are barred by res judicata and is therefore not relevant to a decertification appeal under R.C. 2505.02(B)(5). In truth, the city does not really seek decertification; it just seeks an order that *the claim* as opposed to “class certification” is barred by res judicata. This issue is not properly before this court in this case nor could it ever be in any appeal arising under R.C. 2505.02(B)(5).

Other considerations if this court does have grounds to consider res judicata in the first instance or if there is a timely appeal of a final order. Out of caution, assuming this court reaches the res judicata issue, it should still affirm. Here’s why.

The first element of a res judicata defense is a prior final, valid decision on the merits by a tribunal of *competent* jurisdiction. *See Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, ¶84. Under R.C. 1901.20, the Cleveland municipal court is the sole tribunal that under Art. IV, Sec. 1 of the Ohio constitution the General Assembly has vested with jurisdiction of alleged ordinance violations. Of course, if the class members’ alleged ordinance

violations were filed in municipal court, then they would not be subject to collateral attack in common pleas court. *Lingo v. State*, 138 Ohio St.3d 4277 N.E.3d 1188, 2014 -Ohio- 1052.

But here, Cleveland city council denied the class members the opportunity to have their day in municipal court by unilaterally funneling them to a non-judicial "appeal" to a city worker.

City council has no "police" or "self-government" power to deny defendants their day in municipal court. Provisions of the underlying ordinance are a direct affront to Art. IV. Sec. 1 as explained by the dissent in *Walker v. Toledo*, ---N.E.3d---, 2014 WL 7322854, 2014 -Ohio- 5461 (dissent) (O'Neill, J., jointed by Pfeifer and French, J.J.) The Ohio General Assembly vests tribunals with their original jurisdiction under Ohio Const. Art. IV, Sec. 1. And the only tribunal here vested with competent jurisdiction of alleged ordinance violations is the Cleveland municipal court. The General Assembly vested that court with jurisdiction and provided that it has jurisdiction of *any* ordinance violation unless the violation is within the jurisdiction of a parking-violation bureau. That means the municipal court had jurisdiction of every underlying alleged violation in this case.

Yet Cleveland city council stripped the court of its jurisdiction or at least made the jurisdiction unreachable by conferring exclusive original jurisdiction the city's own employee. This means no discovery, no courtroom rules, no procedural rules and no rules of evidence. This lopsided "tribunal" is not one of "competent" jurisdiction: under R.C. 1901.20 everyone is entitled to their day in municipal court. In *Walker*, this court held that municipalities have a "home rule" right to deny alleged ordinance offenders their day in municipal court yet never identified the source of this "power." Is it a policy power? Or self-government power? Each "power" flows from different sources and for different purposes.

Instead, the court reached a “constitutional” decision by relying almost entirely upon R.C. 1901.20 and *Mendenhall v. Akron*, a case that didn’t even involve an Art. IV, Sec. 1 challenge. *See Mendenhall v. Akron*, 117 Ohio St.3d 33, 881 N.E.2d 255, 2008-Ohio-270, ¶2 (“We will confine our analysis to comparing the ordinance with the state statute dealing with speed regulations.”)

Cementing the need for reversing *Walker* are the recent amendments to R.C. 1901.20 which now provide an additional exception for certain “camera violations” that did not previously exist at the time *Walker* was decided. *See* S 342, eff. 3-23-15; amending R.C. 1901.20 eff. 3-23-15. (“The municipal court has jurisdiction to hear misdemeanor cases committed within its territory and has jurisdiction over the violation of any ordinance of any municipal corporation within its territory, *unless the violation is a civil violation based upon evidence recorded by a traffic law photo-monitoring device and issued pursuant to division (B)(3) of section 4511.093 of the Revised Code or the violation is required to be handled by a parking violations bureau or joint parking violations bureau pursuant to Chapter 4521. of the Revised Code.* ***”)

The fact that the General Assembly added an additional exception shows that in the absence of the exception it is the municipal court – and no other “tribunal” – that has jurisdiction. In truth, an “administrative appeal” to common pleas court of an “administrative appeal” to a “hearing officer” has *nothing* to do with Art. IV, Sec. 1 nor does it “cure” city council’s negation of the municipal court’s jurisdiction, which council has no power to do in the first place or else there’d be no need for the General Assembly to provide two exceptions in R.C. 1901.20. Article IV, Sec. 1 supersedes Article XVIII and therefore all that matters is the General Assembly gave the municipal court jurisdiction. Municipalities have no Article XVIII power to affect that jurisdiction in any manner. Denying the class members their day in municipal court – and the

chance to take advantage of courtroom rules and procedures and discovery and have their case heard by a professional and elected member of this state's judiciary" offends Art. IV, Sec. 1. Cleveland wholly usurped the municipal court's jurisdiction by giving a city worker *exclusive original* jurisdiction. This is plainly unconstitutional and therefore this court should overrule *Walker v. Toledo* in addressing the res judicata issue and therefore hold that the res judicata defense fails its first prong.

The *Galatis* test for overruling precedent does not apply to constitutional issues. This court should once and for all end the "traffic camera" debate in this state by overruling *Walker* and holding that all alleged ordinance violations must be filed in municipal court unless an exception in R.C. 1901.20 applies. This court need not engage in the *Galatis* test to do so. *See State v. Bodyke*, 126 Ohio St.3d 266, 933 N.E.2d 753, 2010-Ohio-2424, ¶35 ("Our decision in *Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, established the test for departing from precedent. But *Galatis* arose in the context of insurance and contract law, not constitutional law. That difference is significant, as we made clear in our decision in *Rocky River*, 43 Ohio St.3d at 6610, 539 N.E.2d 103. In that case, we acknowledged that stare decisis "does not apply with the same force and effect *when constitutional interpretation is at issue.*") (emphasis in original).

Because the underlying unconstitutional defect is *not* cured by a supposed right to further appeal from the city employee's already-incompetent jurisdiction and therefore Cleveland cannot meet the first element of its own res judicata defense.

Respectfully submitted,

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I hereby certify that on October 5, 2015 a true and accurate copy of the foregoing was sent by U.S. Mail, postage prepaid to the following:

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