

IN THE SUPREME COURT OF OHIO

CASE NO. 14-0358

**JANINE LYCAN; THOMAS PAVLISH; JEANNE TASK; LINDSEY CHARNA;
AND JOHN T. MURPHY, individually and on behalf of the class,
Plaintiff-Appellees,**

-vs-

**CITY OF CLEVELAND
Defendant-Appellant.**

**ON APPEAL FROM THE EIGHTH APPELLATE DISTRICT
CASE NO. 99698**

SUPPLEMENTAL BRIEF ON THE ISSUE OF *RES JUDICATA*

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SUPPLEMENTAL BRIEF

Plaintiff-Appellees, Janine Lycan, Thomas Pavlish, Jeanne Task, Lindsey Charna, and John T. Murphy, submit this Supplemental Brief in accordance with this Court's Entry of September 16, 2015. They respond to this Court's three questions as follows:

1. Is there a final appealable order in which the trial court ruled on the res judicata question raised in appellant's proposition of law?

A. THE DEVELOPMENT OF THE *RES JUDICATA* DEFENSE

The only ruling properly before this Court is the Order and Opinion dated February 25, 2013, certifying a class in accordance with Civ.R. 23(B). Although summary judgment was rendered in Plaintiffs' favor though an entry of summary judgment on February 8, 2013, the restitution and other equitable relief that is owed has yet to be determined. Consequently, appellate jurisdiction exists only to review the "order that determines that [the] action may or may not be maintained as a class action[.]" *R.C. 2505.02(B)(5)*. The entry of February 25, 2013 does not explicitly address *res judicata*, undoubtedly because the defense had been rejected in an earlier round of appeals.

In order to identify the issues properly before this Court, a brief review of the evolution of Defendant's misguided *res judicata* defense is necessary. The municipality has been arguing since the commencement of this class action lawsuit that Plaintiffs' failure to exhaust the traffic division's administrative review procedure and "voluntary" payment of the fines precludes any civil recovery. *Defendant City of Cleveland's Memorandum in Support of Motion to Dismiss dated April 9, 2009, p. 5; Defendant City of Cleveland's Motion for Judgment on the Pleadings dated July 14, 2009, pp. 2 & 8-9*. The argument was couched in terms of "collateral estoppel," and was specifically raised in opposition to Plaintiff's Motion for Class Certification. *Defendant City of Cleveland's Opposition to Class Certification, p. 11*. The City supplemented this

response on August 10, 2009, to incorporate the federal court decision that had been rendered four days earlier in *McCarthy v. Cleveland*, U.S. N.D. Ohio No. 1:09-CV-1298 (Aug. 6, 2009), which dismissed a “copy-cat” class action lawsuit.

Res judicata had not been specifically argued at that point in time, and was never alleged in the Answer of Defendant City of Cleveland to Plaintiff’s Amended Complaint, which was filed on June 11, 2009. Collateral estoppel, however, was preserved. *Id.*, p. 4, paragraph 47. Defendant further alleged that Plaintiffs “waived their right to bring suit by paying their respective fines[,]” “waived their right to bring suit by failing to appeal their respective tickets within the time period set forth under C.C.O. § 413.031[,] and “failed to exhaust their administrative remedies.” *Id.*, p. 5, paragraphs 50, 51, and 54.

Citing the *McCarthy* case, the trial court granted a judgment in Defendant’s favor on pleadings. *See Order dated November 25, 2009*. The Court specifically found that Plaintiffs could not prevail as a matter of law since they had not invoked the City’s administrative review procedure. *Id.*, pp. 4-5. Class certification was also denied since Plaintiffs were barred from a recovery, and thus could not qualify as members of the proposed class. *Id.*, p.5.

Plaintiffs appealed this final order, and the Eighth Judicial District reversed the trial court. *Lycan v. Cleveland*, 8th Dist. Cuyahoga No. 94353, 2010-Ohio-6021 (“*Lycan I*”). Even though Plaintiffs have always admitted that they never invoked the administrative hearing process, the unanimous panel determined as a matter of law that the availability of “this opportunity does not necessarily foreclose any right to equitable relief.” *Id.* at ¶ 8. Defendant’s request for further Supreme Court review was denied. *Lycan v. Cleveland*, 128 Ohio St.3d 1501, 2011-Ohio-2420, 947 N.E.2d 683 (table).

It was only upon remand that Defendant first argued *res judicata*, which was asserted as an apparent afterthought in a footnote. *Defendant City of Cleveland’s Opposition to Plaintiffs’ Motion for Summary Judgment dated August 31, 2012*

(“*Defendant’s Memo. Opp. S.J.*”), p. 8, *fn.1*. The defense was indistinguishable from the unsuccessful collateral estoppel argument, and remained founded upon Plaintiffs’ failure to pursue the administrative review procedure. *Id.* The *McCarthy* decision was still cited in support, even though the Eighth District had been unpersuaded by the federal court opinion. Defendant had simply affixed a new label to an unsuccessful position. Not surprisingly, *res judicata* was never specifically addressed in either the order of February 8, 2013, granting partial summary judgment or the order of February 26, 2013, certifying a class.

In the second appeal to the Eighth District, Defendant asserted *res judicata* strictly as a fall-back position. *Corrected Merit Brief of Appellant City of Cleveland filed July 8, 2013, 8th Dist. Cuyahoga No. 99698 (“Defendant’s Second Court of Appeals Brief”)*, pp. 18-29. In unanimously affirming the trial judge, the appellate court rejected the novel argument that the doctrine could bar the class members’ claims even though there were no prior judicial or administrative adjudications. *Lycan v. Cleveland*, 2014-Ohio-203, 6 N.E.3d 91, ¶ 13-19 (8th Dist.) (*Lycan II*). After examining the aberrational ruling that had been rendered in *McCarthy/Carroll v. Cleveland*, 6th Cir. No. 11-4025, 2013 W.L. 1395900 (April 5, 2013),¹ the Eighth District refused to expand the venerable doctrine of *res judicata* to bar claims by implication. This sound holding is consistent with the overwhelming consensus of authorities recognizing that a prior judicial or administrative determination is essential for the defense. *State ex rel. Cordray v. Marshall*, 123 Ohio St.3d 229, 2009-Ohio-4986, 915 N.E.2d 633, ¶ 38; *State ex rel. Denton v. Bedinghaus*, 98 Ohio St.3d 298, 2003-Ohio-861, 784 N.E.2d 99, ¶ 14-15; *State ex rel. Brookpark Entertainment, Inc. v. Cuyahoga Cty. Bd. of Elections*, 60 Ohio St.3d 44, 47, 573 N.E.2d 596 (1991); *State ex rel. Rose v. Ohio Dept. of Rehab. &*

¹ The caption of the federal action changed from *McCarthy v. Cleveland* to *Carroll v. Cleveland* after the named plaintiff passed away.

Corr., 91 Ohio St.3d 453, 455, 746 N.E.2d 1103 (2001); *Collett v. Cogar*, 35 Ohio St.3d 114, 115, 518 N.E.2d 1202 (1988). Since none of the Named Plaintiffs or class members pursued the municipality's hearing process, no "judgment" exists that could implicate *res judicata*. *United Tele. Co. of Ohio v. Tracy*, 84 Ohio St.3d 506, 511, 705 N.E. 2d 679 (1999) (holding that *res judicata* did not apply where an administrative proceedings was not filed with the board of tax appeals); *Metropolis Night Club, Inc. v. Ertel*, 104 Ohio App.3d 417, 419, 662 N.E.2d 94 (8th Dist.1995) (*res judicata* was no longer a bar once prior final judgment was reversed on appeal).

On June 11, 2014, this Court accepted jurisdiction over this appeal. *Lycan v. Cleveland*, 139 Ohio St.3d 1416, 2014-Ohio-2487, 10 N.E.3d 737 (table).

B. THE JURISDICTIONAL SCOPE OF THE ORDER ON APPEAL

Although appellate jurisdiction is limited by R.C. 2505.02(B)(5) to the class certification order, the *res judicata* defense – if successful – would have precluded certification since none of the Named Plaintiffs would possess common, typical, and representative claims for relief. Plaintiffs recognize that this Court has held that a consideration of the merits is required during a review of a class certification order. *Cullen v. State Farm Mut. Auto Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, 999 N.E.2d 614, ¶ 17-18. They have thus argued that damaging admissions by Defendants' representatives furnish substantial justifications for a classwide recovery. For instance, the Administrator of the Parking Violations Bureau has conceded that citations were being issued to vehicle lessees even though her department knew they had no authority to do so. *T.d. 67, Deposition of Maria Vargas taken October 11, 2011, pp. 78-80.*

In accordance with *Cullen*, 137 Ohio St.3d 373, Plaintiffs have not challenged the jurisdiction of this Court to consider the *res judicata* defense. Despite its fatal flaws, the argument does pertain to the merits of their claims for classwide relief. Plaintiffs' position remains, however, that the defense is not a proper basis for reversing the lower

courts.

Initially, the trial court was under no obligation to even consider the issue. *Res judicata* had not been raised in the Answer to the Amended Complaint, and thus had been waived. *State ex rel. Auto. Loan Co. v. Jennings*, 14 Ohio St.2d 152, 160, 237 N.E.2d 305 (1968).

While collateral estoppel and the failure to exhaust administrative remedies had been asserted in the defense pleadings, the law-of-the-case doctrine precludes these issues from being revisited. *Brief of Plaintiff-Appellees filed August 8, 2013, 8th Dist. Cuyahoga No. 99698, pp. 18-21*. Prior to the first appeal, the trial judge dismissed the First Amended Complaint on grounds that Plaintiffs were required to pursue the municipality's administrative remedies, but had failed to do so. *Journal Entry dated November 25, 2009, pp. 3-5*. The federal district court's decision in *McCarthy/Carroll* was specifically followed at Defendant's considerable urging. *Id.* That is the exact same position that Defendant is now pursuing before this Court under the guise of *res judicata*.

But the failure to exhaust/collateral estoppel defense was rejected in the first appeal. *Lycan I*, 2010-Ohio-6021. The Eighth District specifically found that the availability of the administrative review procedure "does not necessarily foreclose any right to equitable relief." *Id.* at ¶ 8. Although the decision does not specifically reference *res judicata*, that is immaterial. It is evident from Defendant's Brief that the municipality was attempting to establish preclusive effect for an administrative review proceeding that is available, but never pursued. *Reply Brief of Appellee City of Cleveland filed April 23, 2010, 8th Dist. Cuyahoga No. 94353, pp. 10-11 & 16-20*. The argument has always been the same. Defendant has merely added new labels to create the illusion of a new position.

As a consequence of the first appeal, the law-of-the-case doctrine now controls.

Nolan v. Nolan, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984); *Blackwell v. International Union, U.A.W. Local No. 1250*, 21 Ohio App.3d 110, 112, 487 N.E.2d 334 (8th Dist.1984); *Stuller v. Price*, 10th Dist. Franklin No. 02AP-29, 2003-Ohio-583, ¶ 56.

This Court has observed that:

The doctrine of law of the case is necessary, not only for consistency of result and the termination of litigation, but also to preserve the structure of the judiciary as set forth in the Constitution of Ohio.

State ex rel. Potain, S.A. v. Mathews, 59 Ohio St.2d 29, 32, 391 N.E.2d 343 (1979).

The Eighth District was unpersuaded by this position in *Lycan II* and concluded that *res judicata* could be revisited because “*Lycan I* did not address the issue[.]” *Lycan II*, 2014-Ohio-203, ¶ 13. But the law-of-the-case doctrine’s prohibition against re-argument extends to not only those issues “which were fully pursued,” but also those “available to be pursued, in a first appeal.” *City of Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 404-405, 659 N.E.2d 781 (1996); *see also Murphy v. Murphy*, 4th Dist. Lawrence No. 09CA28, 2010-Ohio-5037, ¶ 12; *Federal Fin. Co. v. Turner*, 7th Dist. Mahoning No. 05 MA 134, 2006-Ohio-7072, ¶ 12-16. New arguments that could have been raised in the earlier appeal may not be resurrected during the subsequent proceedings. *Beifuss v. Westerville Bd. of Edn.*, 37 Ohio St.3d 187, 190-191, 525 N.E.2d 20 (1988); *Brooks v. Ohio State Anesthesia Corp.*, 10th Dist. Franklin No. 96APE05-576, 1996 W.L. 492981, *5 (Aug. 29, 1996). Over one hundred and thirty-five years ago, the Supreme Court wisely recognized that:

It is well settled by authority, and is a doctrine sound in principle, that all questions which existed on the record, and could have been considered on the first petition in error, must ever afterward be treated as settled by the first adjudication of the reviewing court. (Emphasis added.)

Pollock v. Cohen, 32 Ohio St. 514, 519 (1877); *see also Charles A. Burton, Inc. v. Durkee*, 162 Ohio St. 433, 438-439, 123 N.E.2d 432 (1954); *Pipe Fitters Union Loc. No.*

392 v. Kokosing Constr. Co., 81 Ohio St.3d 214, 218, 690 N.E.2d 515 (1998). Defendant certainly could have amended its Answer and specifically pursued *res judicata* in the trial court before *Lycan I* was commenced, and cannot resurrect the defense now.

Once this Court refused to accept Defendant's challenge to the *Lycan I* ruling, the issues that were – or could have been – raised were conclusively adjudicated. The late Chief Justice Moyer explained for a majority of the Court in *Sheaffer v. Westfield Ins. Co.*, 110 Ohio St.3d 265, 2006-Ohio-4476, 853 N.E.2d 275, ¶ 16, that:

Under the law-of-the-case doctrine, the denial of jurisdiction over a discretionary appeal by this court settles the issue of law appealed.

The Eighth District thus erroneously concluded that *res judicata* could still be considered in the second appeal. *Lycan II*, 2014-Ohio-203, ¶ 13. Either the defense was never timely raised and was waived, or it was pursued under the guise of collateral estoppel/failure to exhaust and rejected in *Lycan I*. In either case, the lower courts should be affirmed.

2. If the answer to question 1 is “yes,” did appellant timely appeal the trial court order?

Plaintiffs acknowledge that the trial court's Order of February 26, 2013, granting class certification was timely appealed on March 27, 2013. *App. R. 4(A)*. Their position remains, however, that the inseparable “failure to exhaust” and *res judicata* defenses were no longer available for the reasons previously stated.

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?

No valid grounds exist for considering the previously waived or rejected *res judicata* defense at this late stage in the proceedings. The misguided *McCarthy/Carroll* reasoning had been the basis of the trial court's original dismissal entry, which was reversed in the first appeal. *Lycan I*, 2010-Ohio-6021, ¶ 8. Once this Court declined to

accept jurisdiction, the issue of whether Plaintiffs were no longer entitled to relief for unjust enrichment as a result of their failure to pursue their administrative remedies was no longer subject to debate. *Sheaffer*, 110 Ohio St.3d 265, 2006-Ohio-4476, 853 N.E.2d 275 at ¶ 16.

CONCLUSION

In accordance with these authorities, this Court should hold that while the February 26, 2013 class certification order was timely appealed, the defense of failure to exhaust/*res judicata* was not properly part of that ruling pursuant to either principles of waiver or the law-of-the-case doctrine.

Respectfully Submitted,

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