

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**

**MOTION FOR RECONSIDERATION OF APPELLANT
THE CITY OF CLEVELAND**

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MOTION FOR RECONSIDERATION OF APPELLANT CITY OF CLEVELAND

On February 9, 2016 this Court issued, on a 4-3 vote, a judgment entry and opinion that affirmed in part and vacated in part the judgment of the Court of Appeals for Cuyahoga County. Pursuant to S.Ct.Prac.R. 18.02(B)(4) the City of Cleveland requests reconsideration of this Court's decision for the reasons addressed below. Given the circumstances presented as to the sequencing of the trial court's ruling on summary judgment and class certification, the City believes this Court has appropriate appellate jurisdiction to consider both *res judicata*¹ and standing within the context of the City's appeal. This case is now approaching seven years in age and the City's Proposition of Law is appropriately presented for review and would be dispositive:

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. Accord *Carroll v. Cleveland*, 522 Fed. Appx. 299 (6th Cir. Ohio 2013).

As was noted in the Justice Kennedy's dissent in this present appeal: "The gravamen of the [City's] proposition of law revolves around whether the application of the defense of *res judicata* bars the class representatives from serving the class as certified." *Lycan v. Cleveland*, Slip Opinion No. 2016-Ohio-422, ¶ 45.

¹ While the City recognizes this Court's holding vacates the Eighth District's holding concerning *res judicata*, this Court did not address the substantive mistakes incorporated in the appellate court's *res judicata* analysis. The City's position in filing its motion for reconsideration remains that the *res judicata* analysis and holding of the Eighth District in this matter was flawed and incorrect as a matter of law and remains subject to reversal.

I. A Final Appealable Order Exists

This Court has previously recognized that CCO 413.031, the City’s former traffic camera enforcement ordinance, provided those receiving a civil camera ticket an adequate remedy at law. *State ex rel. Scott v. Cleveland* 112 Ohio St.3d 324, 2006 -Ohio-6573, 859 N.E.2d 923, ¶ 24. During this immediate appeal, this Court further addressed and held “[f]inally, we hold that Ohio municipalities have home-rule authority to establish administrative proceedings, including administrative hearings, in furtherance of these ordinances, that must be exhausted before offenders or the municipality can pursue judicial remedies.” *Walker v. Toledo*, 143 Ohio St.3d 420, 2014-Ohio-5461, 39 N.E.3d 474, at ¶ 3 (emphasis added). Without question, the *Lycan* appellees (offenders) before pursuing the judicial remedy in purported equity herein failed to utilize, much less exhaust, the administrative appeals process provided by the City with CCO 413.031.

This Court’s *Lycan* majority opinion noted before proceeding with its analysis that “[i]n the absence of a final appealable order from the trial court addressing that issue, we will not address Cleveland’s res judicata argument in the first instance.” *Lycan*, at ¶20. The majority opinion then notes, “The parties do not dispute that the order that Cleveland appeals here—the trial court’s February 26, 2013 class-certification order—is a final, appealable order.” *Id.* at ¶ 23. The City respectfully disagrees with the majority’s following conclusion that res judicata had not been considered by the trial court in the course of its subsequent decision to grant class certification. The City’s res judicata defense was presented to the trial court and denied before the class was certified, but such defense clearly remained within the thread of the trial court’s subsequent class certification consideration.

II. The Trial Court Knowingly Rejected All Defenses to Include the Application of Res Judicata to Plaintiffs Appellees in Granting Class Certification After the Award of partial Summary Judgment.

On February 8, 2013 the trial court issued a Journal Entry that granted partial summary judgment in favor of the Plaintiffs, thereby rejecting the City’s defenses and motion for summary judgment. The City had argued, in part, the following to the trial court before it awarded partial summary judgment:

As was noted by the City in its brief in opposition and motion for summary judgment at page eight the Ohio Supreme Court will apply *res judicata* in the context of administrative hearings, holding “[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.” *Grava v. Parkman Twp.* 73 Ohio St.3d 379, 653 N.E.2d 226 (1995). (Syllabus). This also applies even where equity is involved as “[t]he 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. Plaintiffs had an adequate remedy as a matter of law and they now have no basis for filing this subsequent action. [Footnote omitted].

(“Defendant City of Cleveland’s Reply Brief in Support of the City’s Motion for Summary Judgment”, at pp. 11-12).

The record in this matter evidences that the trial court’s February 8, 2013 Journal Entry granting partial summary judgment to Plaintiffs also, but subsequent to consideration of summary judgment, set a class certification hearing for February 19, 2013. The City respectfully disagrees with the *Lycan* majority’s characterization that “[n]othing in the trial court’s class-certification order...can be construed as an *implicit ruling* on Cleveland’s *res judicata* argument.” *Lycan*, 2016-Ohio-422, ¶ 25 (emphasis

added). The trial court made the procedurally anomalous choice² to rule on summary judgment prior to scheduling a hearing and thereafter ruling on the issue of class certification. The trial court further chose not to explain its reasoning in first granting summary judgment, but as referenced in the *Lycan* majority opinion, the trial court did note with its class certification order that “[i]n its Summary Judgment Order, this Court has already ruled that there are no unique defenses to the claims of the named class members.” See *Id.* (emphasis added). Clearly, the trial court had understood, taken into account, and rejected the City’s res judicata argument before and in the course of deciding the Plaintiffs-Appellees were proper class representatives.

Given the procedural anomaly associated with the sequencing of the trial court’s separate close in time rulings, the City disagrees with the conclusion in the majority opinion that “it would be highly speculative to construe the class certification order as an implicit ruling on res judicata.” *Id.* The record and the trial court’s language establish that the trial court was at the very least implicitly, if not explicitly, rejecting the City’s res judicata argument within the scope of the class certification ruling.

The trial court’s class certification ruling should be read, therefore, with and within the context of the partial summary judgment ruling. While the City disagrees with the Eighth District’s subsequent analysis and now vacated res judicata holding, the appellate court properly accepted the City’s assignment of error. As was noted by Justice Kennedy’s dissent:

² See e.g. *Barrow v. New Miami*, 12th Dist. Butler No. CA2015-03-043, 2016-Ohio-340, ¶ 6, fn 2: “The wisdom and effect of determining liability before sanctioning a class is not before this court, but we note the procedural anomaly.”

In its memorandum in opposition to the certification of the class, the city did argue that it was problematic for individuals who had paid their fines without availing themselves of the administrative-appeal process to serve as class representatives. The city argued: “All Plaintiffs, including Lycan, lack standing because each and every one of them admitted the violation by payment and/or not appealing the violation notice.” Although it labeled its argument as a standing argument, it correctly asserted the reasoning that applies to other defenses that destroy typicality. * * * “When an issue of law that was not argued below is implicit in another issue that was argued and is presented by an appeal, we may consider and resolve that implicit issue.” *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 279, 617 N.E.2d 1075 (1993).

Lycan, ¶ 43 (J. Kennedy, dissenting).³ The City requests reconsideration of its proposition of law within the interlocutory class certification appeal. Such reconsideration would serve the ends of judicial economy and resolve with finality this long pending case.

III. Standing is Jurisdictional and May be Raised at Any Time During the Pendency of the Proceedings

The majority’s opinion further provides “[t]o the extent that Cleveland raises standing as an independent ground for reversing class certification, we decline to address that issue here because Cleveland did not present a proposition of law to this court concerning standing.” *Id.* at ¶ 26. By way of background, the Eighth District Court of Appeals decided *Jodka v. Cleveland*, 2014 -Ohio- 208, 6 N.E.2d 1208⁴ on the same date

³ Moreover, “[s]ince the trial court’s granting of the motion for partial summary judgment was acknowledged in the class-certification hearing, the city was not required to reargue a settled issue” *Id.* at ¶ 44.

⁴ The *Jodka* decision had found the City’s ordinance to be unconstitutional for the reasons addressed by this Court in *Walker v. Toledo, supra*. The appellate court’s unconstitutionality holding in *Jodka* was reversed by this Court following *Walker*: “This cause, here on appeal from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed on the authority of *Walker v. Toledo*, 143 Ohio St.3d 420, 2014-Ohio-5461, 39 N.E.3d 474, and this cause is remanded to the trial court for further proceedings.”

this court decided *Lycan*. The Eighth District established under similar circumstances — a purported class representative was presenting unjust enrichment claims after waiving his right to the administrative appeal — would have no standing to proceed. *Jodka* at ¶¶ 35-37. Specifically the appellate court concluded at ¶ 37:⁵

Jodka admitted in his complaint that he simply paid the citation the city issued to him. Thus, Jodka neither placed himself under the purported authority of the quasi-judicial process the city instituted in CCO 413.031 nor contested the ordinance's constitutionality during such process. *Carroll*. This fact made Jodka an inappropriate person to assert a claim that provisions of CCO 413.031 unconstitutionally stripped the municipal court of jurisdiction over his offense.

This same scenario is presented in *Lycan*.

While no specific proposition of law was placed before this Court on the issue of standing as divorced from *res judicata*, this Court has previously recognized:⁶

We recognized that standing is a “jurisdictional requirement” in *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 179, 298 N.E.2d 515 (1973), and we stated: “It is an elementary concept of law that a party lacks standing *to invoke the jurisdiction* of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action.” (Emphasis added.) *See also New Boston Coke Corp. v. Tyler*, 32 Ohio St.3d 216, 218, 513 N.E.2d 302 (1987) (“the issue of standing, inasmuch as it is jurisdictional in nature, may be raised at any time during the pendency of the proceedings”); Steinglass & Scarselli, *The Ohio State Constitution: A Reference Guide* 180 (2004) (noting that the jurisdiction of the common pleas court is limited to justiciable matters).

Fed. Home Loan Mortg. Corp. v. Schwartzwald, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 22. Whether viewed as barred by *res judicata* or by lack of standing following their failure to appeal their civil citations, the trial court was incorrect in certifying the Plaintiffs-Appellees as class representatives.

Jodka v. Cleveland, 143 Ohio St.3d 50, 34 N.E.3d 99 (Mem), 2015 -Ohio- 860

⁵ The complete citation to *Carroll* as referenced therein is *Carroll v. Cleveland*, 522 Fed Appx. 299 (6th Cir. Ohio 2013).

IV. Conclusion

As was noted in Justice Kennedy’s dissent herein the “Eighth District did not err in addressing the question of res judicata and that this court should address the substance of this appeal.” *Id.* at ¶ 46. Moreover, it is well recognized that res judicata is to be applied within the context of administrative hearings. *Grava v. Parkman Twp.* 73 Ohio St.3d 379, 653 N.E.2d 226 (1995). The trial court’s order certifying a class was only made after awarding partial summary judgment to Plaintiffs-Appellees and rejecting the City’s res judicata defense associated with their failure to participate in the administrative appeals process established with CCO 413.031. This case is now approaching seven years in age. For the reasons addressed in the merit and amicus briefs placed before this Court, the City believes reconsideration and substantive review of the res judicata issue addressed and summarized in its Proposition of Law would serve to (1) resolve this case with finality and (2) further the public policy goal of judicial economy.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A true copy of the foregoing “Motion for Reconsideration of Appellant City of Cleveland” was duly served by electronic mail (email) this 19th day of February 2016 on counsel for Appellees at the following email addresses:

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