

**IN THE SUPREME COURT OF OHIO**

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**CASE NO. 14-0358**

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**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.**

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

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**PLAINTIFF-APPELLEES' MEMORANDUM IN OPPOSITION TO  
MOTION FOR RECONSIDERATION**

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## MOTION

### I. INTRODUCTION

Plaintiff-Appellees, Janine Lycan, Thomas Pavlish, Jeanne Task, Lindsey Charna, and John T. Murphy, oppose the Motion for Reconsideration of Appellant the City of Cleveland dated February 19, 2016 (“Defendant’s Motion”). In *Matthews v. Matthews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278 (10th Dist.1981), Judge (now the late Chief Justice) Moyer described the heavy burden imposed upon parties seeking reconsideration:

App. R. 26, which provides for the filing of an application for reconsideration in this court, includes no guidelines to be used in the determination of whether a decision is to be reconsidered and changed. The test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been [emphasis added].

*See also City of Columbus v. Hodge*, 37 Ohio App.3d 68, 523, 523 N.E.2d 515 (10th Dist.1987). The instant Motion fails to identify an obvious error or raise a relevant issue that was not considered previously, and therefore should be denied.

Defendants are offering nothing new, and are essentially urging the *Lycan* majority to adopt the dissenting opinion. Given the eleven month lapse between oral argument and the issuance of the opinion, it is evident that all of the members of this Court have already carefully considered each other’s views before reaching a decision. This Court had even extended the courtesy of identifying the jurisdictional issue that had been identified following oral argument and affording the parties an opportunity to submit supplemental briefs outlining their positions. *See Entry dated September 16, 2015*. There is thus no legitimate reason to believe that the *Lycan* majority overlooked or failed to appreciate anything significant before the opinion was released.

## II. THE TRIAL JUDGE'S "ANOMALOUS CHOICE"

As has been the case throughout this protracted appeal, Defendant has continued to criticize the trial judge for having the temerity to grant partial summary judgment in favor of Plaintiffs eighteen days before the class was certified. *Defendant's Motion*, pp. 2-3. They have not suggested that they ever requested a stay of the proceedings on the merits or timely objected to the so-called "anomalous choice[.]" *Id.*, p. 4 (footnote omitted). The clerk's docket actually reflects that Defendants had been aggressively seeking an adjudication in their favor on the merits from the moment the Complaint was served, including an unsuccessful Motion to Dismiss dated April 9, 2009, an unsuccessful Motion for Judgment on the Pleadings dated July 14, 2009, and an unsuccessful Cross-Motion for Summary Judgment dated August 31, 2012. None of these filings should have been submitted if Defendant legitimately believed that class certification had to be resolved before anything else.

But more significantly than that, there is no merit to the insinuation that the trial judge somehow blundered by failing to specifically address *res judicata* in his rulings of February 8, 2013 and February 26, 2013. Defendant is not disputing that the affirmative defense was never raised in the Answer that was filed on June 11, 2009. The doctrine of waiver now applies. *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 Defendant's pleading, 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 v. Cleveland*, 8<sup>th</sup> Dist. No. 94353, 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.

Despite the waiver in the pleadings, Defendant urged the Eighth District to consider *res judicata* in the second appeal. *Lycan v. Cleveland*, 8<sup>th</sup> Dist. No. 99698, 2014-Ohio-203, ¶13-19. The panel accommodated this request, likely in the hopes of eliminating the issue and concluding the litigation. *Id.* The decision they received was not, however, what Defendants were expecting. *Id.* The municipality thus has no right to complain that this Court refused to consider an issue falling outside the scope of appellate review permitted by R.C. 2505.02(B)(5). *Res judicata* was never a valid defense once the Answer was served.

### **III. INAPPLICABILITY OF THE DEFENSE**

Defendant's contrived *res judicata* theory was always implausible, which undoubtedly explains why the affirmative defense was omitted from the Answer. This state has long recognized that the doctrine is triggered only once a final judgment has actually been entered without fraud or collusion. *State ex rel. Cordray v. Marshall*, 123

Ohio St.3d 229, 237, 2009-Ohio-4986, 915 N.E.2d 633, ¶138; *State ex rel. Denton v. Bedinghaus*, 98 Ohio St.3d 298, 302, 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, 599 (1991); *State ex rel. Rose v. Ohio Dept. of Rehab. & Corr.*, 91 Ohio St.3d 453, 455, 746 N.E.2d 1103, 1105 (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 Violations Bureau’s hearing process, no “judgment” exists that could support a *res judicata* defense. *United Tele. Co. of Ohio v. Tracy*, 84 Ohio St. 3d 506, 511, 1999-Ohio-366, 705 N.E. 2d 679, 684 (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, 95 (8th Dist.1995) (*res judicata* was no longer a bar once prior final judgment was reversed on appeal).

Defendant has failed to identify any other state that allows *res judicata* to be established through an implied waiver theory. Instead, the universal rule appears to be that a valid prior judgment is indispensable. *Storti v. Univ. of Washington*, 330 P.3d 159, 165, ¶ 22 (Wash.2014); *Girdwood Min. Co. v. Comsult LLC*, 329 P.3d 194, 200 (Alaska 2014); *U.S. Bank, N.A. v. 1905 2nd St. NE, LLC*, 85 A.3d 1284, 1288 (D.C.2014); *In re B.C.*, 233 W.Va. 130, 755 S.E.2d 664 (2014); *Reynolds v. First NLC Financial Services, LLC*, 81 A.3d 1111, 1116 (R.I.2014); *Hooker v. Haslam*, 393 S.W.3d 156, 165 (Tenn.2012),f fn. 6; *Mountain W. Bank, N.A. v. Glacier Kitchens, Inc.*, 365 Mont. 276, 279-280, 2012 MT 132, 281 P.3d 600, 602-603; *Cochran v. Griffith Energy Services, Inc.*, 426 Md. 134, 140, 43 A.3d 999, 1002 (2012); *Miller v. Glacier Develop. Co., L.L.C.*, 293 Kan. 665, 668, 2170 P. 3d 1065, 1068 (2011); *Smith v. Guest*, 16 A.3d 920, 934 (Del.2011); *Kobrin v. Bd. of Registration in Medicine*, 444 Mass. 837, 843-844, 832 N.E.2d 628, 634 (2005); *Stewart v. Brinley*, 902 Sop. 2d 1, 9 (Ala. 2004); *Amstadt v.*

*U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex.1996). As one would expect, the test is the same in federal courts. *Bittinger v. Tecumseh Products Co.*, 123 F.3d 877, 879-880 (6th Cir.1997); *Swindle v. Livingston Parish School Bd.*, 655 F.3d 386, 400 (5th Cir.2011); *Coleman v. Martin*, 363 F.Supp.2d 894, 901 (E.D.Mich.2005).

A corollary to this fundamental principal is that *res judicata* only applies when there was actual litigation in the prior proceedings.<sup>1</sup> *Ameigh v. Baycliffs Corp.*, 81 Ohio St.3d 247, 249, 690 N.E.2d 872, 875 (1998); *Robinson v. Springfield Local School Dist. Bd. of Educ.*, 9th Dist. Summit No. 20606, 2002-Ohio-1382; *Gohman v. Atlas Roofing Corp.*, 12th Dist. Warren No. CA2010-07-063, 2010-Ohio-5956, ¶21. Not surprisingly, other jurisdictions are in agreement. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex.2010); *Grant v. State*, 686 So.2d 1078, 1092 (Miss.1996); *McNeil v. Owens-Corning Fiberglas Corp.*, 545 Pa. 209, 213, 680 A.2d 1145, 1147-1148 (1996); *Egglund v. Egglund*, 240 Neb. 393, 395, 482 N.W.2d 245 (1992). And federal courts follow the same rule. *Am. Contractors Indem. Co. v. Atamian*, D.Kan. No. 08-2586-JWL, 2011 WL 1990580, \*2 (May 23, 2011); *Rodriguez-Ayala v. Commonwealth of Puerto Rico*, D.P.R. No. CIV. 07-1157 MEL, 2011 WL 4527440, \*4 (Sept. 28, 2011); *Kovats v. Michigan*, U.S. Dist. Ct., W.D., Mich., Case No. Run:06-CV-755, \*2 (May 16, 2008). The revolutionary notion that *res judicata* can be imposed by implication is irreconcilable with these precedents and has been justifiably rejected.

And apart from the absence of prior administrative judgments, a civil recovery remains available whenever the pursuit of an administrative review proceeding would have been futile. *San Allen, Inc. v. Buehrer*, 8<sup>th</sup> Dist. No. 99786, 2014-Ohio-2071, ¶64 &

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<sup>1</sup> Plaintiffs appreciate that once there has been actual litigation that is resolved in a final judgment, *res judicata* will preclude any claims that could have been pursued in the proceeding. *Holzemer v. Urbanski*, 86 Ohio St.3d 129, 133, 712 N.E.2d 713, 716 (1999). The point that his being made, which has been repeatedly recognized throughout the United States, is that a proceeding must actually be held and a decision rendered before any further claims are barred.

71-75. Discovery confirmed below that Defendant had adopted a firm policy soon after the Traffic Camera Enforcement Program was established that would have prevented any of the Plaintiffs from prevailing in a review proceeding. The Administrator of the Parking Violations Bureau and Photo Safety Division, Maria Vargas (“Vargas”), testified that a Committee decision was rendered to issue the citations to both owners and non-owners of the vehicles that were photographed. *T.d. 67, Deposition of Maria Vargas taken October 11, 2011, pp. 78-80.* In once particularly poignant exchange during the questioning, she conceded that:

Q. \*\*\* Where in the ordinance does it allow you to issue citations to a nonowner driver?

A. No, it does not.

Q. So you guys were issuing notices to nonowners and you knew you weren’t allowed to?

MS. MEYER: Objection.

Q. Is that Correct?

MS. MEYER: Objection.

A. Yeah.

Q. And how many violations did you collect money on?

A. I have no idea.

Q. So if these people didn’t know better, they’d get a notice and some would, some would pay, correct?

MS. MEYER: Objection.

A. That is correct

Q. And you guys took their money even though you knew you weren’t allowed to take their money?

MS. MEYER: Objection.

A. That is correct.

*Id., p. 114 (emphasis added).* Because this was the City’s official position, there was no

chance that a lessee, renter, or other non-owner could use the administrative hearing process to overturn a citation. *Id.*, pp. 167-170. Plaintiffs' failure to pursue a futile administrative remedy thus is not a bar to a civil recovery.

**CONCLUSION**

For the foregoing reasons, this Court should deny the Motion for Reconsideration of Appellant, the City of Cleveland.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **Motion** has been sent by e-mail, on this 29<sup>th</sup> day of February, 2015 to:

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