Supreme Court of Ohio Clerk of Court - Filed May 06, 2016 - Case No. 2016-0703

IN THE SUPREME COURT OF OHIO

VILLAGE OF NEW MIAMI, et al.,	:	On Appeal From The
	:	Butler County Court of Appeals
Appellant,	:	
	:	Twelfth Appellate District
-vs-	:	
	:	Butler County Court Of
DOREEN BARROW, et al.,	:	Appeals Case No. CA2015-03-043
	:	
Appellees.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT VILLAGE OF NEW MIAMI

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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND/OR INVOLVES A SUBSTANTIAL CONSTITUTION QUESTION

This appeal addresses three areas of general and great public interest: (1) The fundamental matter of standing, that is, the jurisdictional necessity of an actual injury which allows a plaintiff to bring suit, including a class action, and the related matter of res judicata; (2) Automated traffic enforcement programs, which have been the subject of numerous lawsuits in state and federal courts in Ohio, including recent important cases in this Court, as well as the subject of recent General Assembly legislation; and (3) The authority of home-rule municipalities to establish administrative hearings to resolve civil liability. The citizens and municipalities of this State require this Court to clearly state for the first time who has standing to present a constitutional or other challenge to automated traffic programs. Should the named Plaintiffs in this class action who simply paid the fine and did not exhaust the administrative proceeding have standing to challenge that process? Can Plaintiffs be injured by an administrative hearing that they did not even experience?

This Court came to the verge of answering these questions in two recent automated traffic program cases but did not ultimately reach the standing issue. In its decision in *Lycan v. Cleveland*, Slip Opinion No. 2016-Ohio-422, another class action where the named plaintiffs paid the fee pursuant to the Notice of Liability and did not undergo an administrative hearing, this Court stated that it declined to address the issue of standing as a ground for reversing class certification "because Cleveland did not present a proposition of law to this Court concerning standing." *Id.* at ¶¶ 8, 26. This case presents Propositions of Law regarding standing and res judicata that would enable this Court to address those matters.

In *Jodka v. Cleveland*, 143 Ohio St.3d 50, 2015-Ohio-860, the Court accepted a certified conflict presenting the issue of standing of a plaintiff to make a constitutional challenge to an administrative hearing to resolve civil liability under a traffic program. That case, which was not a class action, was resolved by the holding in *Walker v. Toledo*, 143 Ohio St.3d 420, 2014-Ohio-5461 that the municipal court does not have exclusive jurisdiction to resolve such liability, and this Court did not address standing as such.

This appeal, however, directly presents the issue of standing in the context of a constitutional claim by class action plaintiffs. After New Miami instituted an automated speed enforcement program, plaintiffs-appellees received Notices of Liability and filed a class action lawsuit, claiming that the program's administrative hearing usurped the jurisdiction of the Municipal Court and violated the Ohio Constitution's due course of law provision, primarily because the Rules of Civil Procedure and Rules of Evidence were not used in the administrative hearing. The Butler County Court of Common Pleas granted summary judgment to Plaintiffs on both claims and enjoined the traffic program. It also certified the class, over New Miami's objections that the named Plaintiffs lacked standing because none of them went through the administrative hearing and that payment of the fine resulted in res judicata or claim preclusion. The Twelfth Appellate District affirmed the grant of class certification, incorrectly finding that Plaintiffs had standing simply because they received Notices of Liability. The Court of Appeals also incorrectly refrained from considering the effect of this Court's decision in *Walker v. City of Toledo* on the matter of standing, and did not even reach the issue of whether plaintiffs were required to go through the administrative hearing process.

While the decision of the Court of Appeals is in error and should be corrected, the issues raised in this appeal are not confined to the facts of this case. The orderly development of a body

of law addressing automated traffic programs is of great general interest. In addition to *Lycan* and *Jodka*, the Supreme Court has issued several important decisions regarding automated traffic programs that are directly applicable to the issues presented in this appeal. In *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, this Court held that the operation of such automated traffic enforcement programs imposing civil liability does not exceed a municipality's home rule authority. The decision of the Twelfth Appellate District below ran afoul of *Mendenhall* when it held that justiciable injury was inflicted upon the named Plaintiffs and gave them standing to act as class representatives simply because they received a Notice of Liability – even though that was not the injury alleged by the named Plaintiffs.

In *Walker v. Toledo*, this Court re-affirmed *Mendenhall* and further held that municipal courts do not have exclusive authority to resolve liability under automated traffic programs, but that municipalities have home rule authority to establish administrative proceedings. That holding resulted in the nullification of that claim made by the named Plaintiffs and eliminated that claim as a basis for standing, leaving only the due course of law claim as a potential source of standing. This Court further held in *Walker* that such administrative proceedings must be exhausted before offenders can pursue judicial remedies. None of the named Plaintiffs exhausted the administrative proceeding provided by New Miami before filing suit, yet the Court of Appeals held they had standing as class representatives to make their due course of law challenge. The Courts below need guidance in the application of standing principles.

This is an area of great public interest and concern, which requires that the Court clarify the determination of standing in class actions. As explained below, there was confusion in the initial 2014 Court of Appeals decision between justiciable standing and Rule 23 class membership standing when the Court held the former was satisfied by the latter, an error

corrected in the 2016 decision now appealed. Yet other issues in this appeal await clarification. Interlocutory appeals are provided in class actions in order to avoid the expense and time involved in prosecuting a class action. The determination of whether plaintiffs – perhaps especially including class action representatives – with due course of law constitutional claims must exhaust administrative remedies in order to have standing, should be decided at the outset of a lawsuit.

Further, this Court should clarify that the determination of standing in a class action must involve a more precise analysis of the nature and source of Plaintiffs' actual claims giving rise to standing. As this Court has directed, "Standing turns on the nature and source of the claims asserted by the plaintiffs." *Moore v. Middletown,* 133 Ohio State 3d 55, 2012-Ohio-3897 at ¶23. The Court of Appeals below did not direct its inquiry to the actual claim of injury asserted by the named Plaintiffs. Even though the named Plaintiffs' claims here are for lack of due course of law in the administrative hearing, the Court of Appeals stated that their injury arose out of receiving a Notice of Liability, rather than the administrative hearing that they did not go through. The Court below also failed to examine the effect of *Walker* on the named Plaintiffs' standing because overlapping issues involved in the grant of summary judgment were not yet appealed. In effect, the Court of Appeals foreclosed an independent inquiry into the standing of the named plaintiffs and preclusion of their claim, negating the value of an interlocutory appeal from class certification.

The Court should accept jurisdiction in this case to answer questions of great public and general interest about standing of class action plaintiffs in automated traffic programs which the Court did not have the opportunity to reach in *Lycan* and *Jodka,* but which are squarely presented in this appeal.

STATEMENT OF THE CASE AND FACTS

This case arises out of a challenge to the operation of an Automated Speed Enforcement Program by the Village of New Miami, Ohio, pursuant to Ordinance 1917 adopted July 5, 2012. Under the Ordinance, a Notice of Liability is issued when a vehicle is determined to be moving 11 mph or more than the stated speed limit, based upon time elapsed between two laser-determined locations. The vehicle owner then receives a Notice of Liability containing forms for payment of the fine or to request a hearing. An express provision addresses the effect of payment: "Payment is considered an admission of liability and waives your right to a hearing." When a hearing is requested, the administrative appeal is conducted by a hearing officer appointed by the village mayor. In this case, none of the three named Plaintiffs went through the administrative hearing. Plaintiffs Woods and Johnson paid the fine without requesting a hearing, and Plaintiff Maguire mailed a hearing request after the time period had expired.

The Named Plaintiffs subsequently filed class action claims in Butler County Court of Common Pleas challenging the Ordinance on grounds that it unconstitutionally infringed the jurisdiction of the Municipal Court, that it violated the due course of law guarantee of the Ohio Constitution, and asserted a claim of unjust enrichment. The Trial Court granted summary judgment on Plaintiffs' claim regarding jurisdiction in the Municipal Court, due course of law, and enjoined operation of the automated traffic enforcement program. The Trial Court did not rule on the motion on the unjust enrichment claim, which remains pending.

The Trial Court also granted an Order certifying the class, on April 2, 2014. On the initial appeal of that Order, the Twelfth Appellate District reversed the grant of class certification on the basis that the Trial Court failed to perform the necessary rigorous analysis of Rule 23 factors. *Barrow v. New Miami*, 12th Dist. Butler No. CA2014-04-092, 2014-Ohio-5743 at ¶¶ 30-

31 (hereinafter "*Barrow I"*). The Trial Court Entry on Remand held that in the class action context, the named Plaintiffs would satisfy the jurisdictional requirement of standing if they met the Rule 23 "standing to sue as a class representative requirement" under *Hamilton v. Ohio Savings Bank*, 82 Ohio State 3d 67, 74, 694 N.E. 2d 442 (1998). Feb 6, 2015 Entry on Remand at 6-7. Under the *Hamilton* test, "the Plaintiff must possess the same interest and suffer the same injury shared by all members of the class that he or she seeks to represent." The Trial Court did not require a showing of standing considered as actual injury (over objection). The Trial Court therefore found that Plaintiffs Woods and Johnson had standing to assert the claims of subclass one and Plaintiff Michelle Maguire had standing to assert the claims of proposed subclass two because each of them "possess the same interests and have suffered the same injury shared by all members of the class that they seek to represent." See Entry on Remand at pages 7-9. The Trial Court further found that the additional prerequisites of Civil Rule 23 were satisfied.

The Village of New Miami timely appealed from the February 6, 2015 Entry on Remand of the Trial Court. On February 1, 2016, the Butler County Court of Appeals for the 12th Appellate District issued its Judgment Entry and Opinion, affirming the grant of class certification. *Barrow v. New* Miami, 12th Dist. Butler No. CA2015-03-043, 2016-Ohio-340 ("*Barrow II")*. In its opinion, the Court of Appeals properly distinguished between jurisdictional/justiciability standing to sue and Rule 23 standing to serve as a class representative. The Court of Appeals found that the named Plaintiffs did satisfy the threshold requirement of jurisdictional standing. Citing the injury/causation/redressability test of *State ex rel. Ohio Academy of Trial Lawyers Sheward*, 86 Ohio State 3d 451, 469-70, 1999-Ohio-123, the Court held that (1) Appellees suffered a "direct and concrete injury" different from that suffered by the general public because the individuals receiving notices of liability incurred repercussions not

suffered by the general public; (2) that the Ordinance caused Appellees injury because Appellees would not have received the notices of liability and attendant financial repercussions in the absence of the Traffic Enforcement Program; and (3) that the requested relief of declaring the Ordinance unconstitutional would preclude operation of the program, void any notices of liability issued pursuant to it and result in disgorgement of the funds collected pursuant to the unjust enrichment claim. *Barrow II* at ¶¶20-23. The Court held that class certification was proper under Civil Rule 23.

In addition, the Court of Appeals held that it was not authorized to address the effect of *Walker v. Toledo*, 143 Ohio State 3d. 420, 2014-Ohio-5461 on the *Barrow* case at the present time, and therefore declined to address the rulings of this Court in *Walker* as the Village of New Miami had requested. *Barrow II* at ¶¶46-48.

New Miami timely filed an Application for Reconsideration of the February 1, 2016 Judgment Entry and Opinion. The Court of Appeals issued its Entry Denying Application for Reconsideration on March 22, 2016. The Village of New Miami appeal follows herewith.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: A putative class action plaintiff with constitutional claims challenging liability under an automated traffic enforcement program who does not first pursue the provided administrative proceeding lacks jurisdictional standing to pursue a judicial remedy.

None of the named Plaintiffs went through the administrative hearing process, found constitutional by this Court, to vehicle owners who receive a Notice of Liability. Nevertheless, the named Plaintiffs filed a class action in Butler County Court of Common Pleas alleging violation of the due course of law guarantee of the Ohio Constitution, and unjust enrichment.[1]

[1] Plaintiffs had originally brought a claim that the Ordinance's provision of an administrative hearing violated the jurisdiction of the Municipal Court pursuant to ORC §2720.02 and Article

Plaintiffs' primary allegations with regard to the deprivations of due process in the administrative hearing are that the Rules of Civil Procedure and Rules of Evidence were not followed in the administrative hearing. See First Amended Complaint at ¶¶64-66. Because Plaintiffs did not go through the hearing which allegedly deprived them of due course of law, they did not suffer any injury traceable to the administrative hearing and therefore lack standing to assert their claims.

Standing is a threshold jurisdictional issue which must be satisfied before there can be any inquiry into the required Rule 23 elements. An individual Plaintiff must have standing as a prerequisite in every case, including class actions. In the first appeal from class certification, *Barrow I*, the Court of Appeals held that jurisdictional standing was satisfied through the class membership prerequisite that class representatives must be members of the proposed class possessing the same interest and suffering the same injury shared by all members of the class. *Barrow I* at ¶11. This was premised on a misinterpretation of this Court's opinion in *Hamilton v. Savings Bank*. 82 Ohio State 3d 67, 1998-Ohio-365. *Hamilton* does not speak to jurisdictional standing, and simply requires that a class-action plaintiff demonstrate "standing to sue" as a representative of the class by sharing the same interest or injury alleged by the class.

In *Barrow* II, the Court of Appeals' February 1, 2016 Opinion properly distinguished between jurisdictional standing and Rule 23 standing to serve as a class representative. *Id.* at ¶¶11-15. The Court of Appeals properly stated that individual standing to sue is an indispensable requirement that must be present at the inception of every lawsuit, including class actions." *Id.* at ¶13, citing *Woods v. Oak Hill Community Med. Ctr*., 134 Ohio at 3d 261, 269 (4th Dist. 199).

IV, Section I of the Ohio Constitution. This Count's holding in *Walker* nullified that claim. Hence, Plaintiffs sole remaining claims are the due course of law claim and the unjust enrichment claim.

Hence, the Court of Appeals, in *Barrow II*, applied the appropriate test to determine standing as a matter of subject matter jurisdiction and justiciability. A litigant must have a personal stake in the outcome of the controversy in order to file suit. *Anderson v. Brown*, 13 Ohio State 2d 53 (1968) syllabus at ¶1. To establish such a personal stake, the party invoking the court's jurisdiction must show that he or she suffered (1) an injury, (2) that is fairly traceable to the Defendant's allegedly unlawful conduct, and (3) the injury is likely to be redressed by the requested relief. *Moore v. Middletown*, 133 Ohio State 3d 55, 2012-Ohio-3897 at ¶22, citing *Lujan v. Defenders of Wildlife* (1999), 504 US 555, 560-561, 112 S.Ct. 2130. Class action plaintiffs must satisfy this requirement like any other plaintiff. *O'Shea v. Littleton* (1974), 414 US 488, 494, 94 S.Ct. 669; *Woods v. Oak Hill Community Med. Ctr.*, supra, at 269. Further, this inquiry into standing does not involve a court in an inquiry into the merits of the case. Rather, standing is a jurisdictional prerequisite that must be resolved before reaching the merits. *Federal Home Loan Mortgage Corp. v. Schwartzwald*, 134 Ohio St. 3d 13 at ¶23, 2012-Ohio-5017.

However, the Court of Appeals misapplied the three-part test for standing by focusing on facts not relevant to Plaintiffs' specific claim of deprivation of due process of law. The Court improperly identified the issuance of a Notice of Liability to the named Plaintiffs as the source of the Plaintiffs' injury. *Barrow II* at ¶¶21-24. The Court asked, "Do Appellees suffer a direct and concrete injury different from that suffered by the general public?" The Court of Appeals answered as follows:

> Yes. The general public may fear or dislike the automated traffic cameras and avoid all intersections in New Miami where the cameras are positioned. But only persons whose vehicles were recorded by the automated traffic cameras received Notices of Liability. Whether they paid the penalties are not, these individuals incurred repercussions not suffered by the general public. Thus, the group of individuals who received the Notice of

> Liability was injured in a manner distinct from the public generally. *Id.* at ¶21.

The Court of Appeals further asked whether the second prong of the standing test was satisfied: "Did the Ordinance cause Appellees' injury?" The Court stated:

> Yes… [B]ut for Civil Traffic Enforcement Program established pursuant to Ordinance 1917, Appellees would not have received the Notices of Liability and incurred the attendant financial repercussions." *Id.* at ¶22.

Plaintiffs' complaint in this matter is not that they received Notices of Liability. It is well settled that municipalities may establish an automated traffic program under their constitutionally granted home-rule authority. *Mendenhall v. City of Akron*, 117 Ohio State 3d 33, 2008-Ohio-270. The mere existence of an automated traffic program and issuance of Notices of Liability is not the source of Plaintiffs' claimed injury. Rather, Plaintiffs' entire First Amended Complaint concerns the alleged violation of due course of law in the procedure under which liability is determined. The Court of Appeals erred in finding that Plaintiffs' injury flowed from issuance of Notices of Liability under an automated Traffic Enforcement Program. Plaintiffs' due course of law claim does not allege injury on that basis, that is, that Plaintiffs were injured receiving a Notice of Liability. "Standing turns on the nature and source of the claim asserted by the Plaintiffs." *Moore v. Middleton*, supra, at ¶23. The Court of Appeals misperceived the nature and source of Plaintiffs' claims.

The United States Supreme Court further explained the proper focus, or "nexus" of the standing inquiry:

> In ruling on standing, it is both appropriate and necessary to look to the substantive issues… to determine **whether there is a logical nexus between the status asserted and the claim sought to be adjudicated.** For example, standing requirements will vary in First Amendment religion cases depending upon whether the party raises an Establishment Clause Claim of B and C or a claim under

> the Free Exercise Clause. **Such inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke judicial power.**

Flast v. Cohen, 392 US 83, 102, 88 S.Ct. 1942 (1968). Accord *Clifton v. Blanchester*, 131 Ohio State 3d 287, 2012-Ohio-780 at ¶18. (emphasis added).

The nexus relevant to the named Plaintiffs' standing to bring their claim is not that they were injured because they received a Notice of Liability under an automated traffic program. Given Ohio law, there could be no cause of action for such a claim on its own. Plaintiffs' claim is more restricted: they claim injury because the administrative procedure to determine liability violates due course of law. But the claimed injury, i.e., being deprived of due process, can only arise if Plaintiffs went through an administrative hearing which denied them due process. Under the standing test, the injury is the deprivation of due process, not receiving a Notice of Liability. Under the second prong of the test, the only injury traceable to the allegedly unconstitutional administrative hearing is the deprivation of due process; the Notice of Liability cannot be traceable to the administrative hearing. Lastly, the deprivation of due process can only be redressed by provision of adequate due process in the administrative hearing. Contrary to the conclusion of the Court of Appeals, the standing inquiry into the named Plaintiffs' status is not satisfied merely because they are subject to the Ordinance or received a Notice of Liability. The analysis of injury conducted by the Court of Appeals was defective because it attempted to satisfy the *Lujan* test from receiving a Notice of Liability and ignored the actual nexus of Plaintiffs' claimed injury, that they were deprived of due process in the administrative hearing.

By improperly finding that Plaintiffs were injured and have standing by issuance of a Notice of Liability, the Court of Appeals disregarded this Court's holdings in *Mendenhall* and *Walker*. In *Walker* this Court stated, "We reaffirm our holding in *Mendenhall v. Akron*… that

municipalities have home-rule authority under Article XVIII of the Ohio Constitution to impose civil liability on traffic violators through an administrative enforcement system." *Walker v. Toledo*, 143 Ohio State 3d 420, 2014-Ohio-5461 at ¶3.

Moreover, in *Walker*, this Court affirmatively held that administrative proceedings must be exhausted before a civil lawsuit challenging an automated traffic program, may be filed: "We hold that Ohio municipalities have home-rule authority to establish administrative proceedings, including administrative hearings, related to civil enforcement of traffic ordinances, and that these administrative proceedings must be exhausted before offenders or the municipality can pursue judicial remedies." *Id.*

There is no dispute in this case that none of the Plaintiffs went through the administrative hearing. None of the Plaintiffs suffered the deprivation of due process that they claim to have been injured by. However, the Court of Appeals failed to even analyze the exhaustion requirement because it wrongly believed it could not address *Walker*. *Id*. at ¶46-48.

Plaintiffs argued below that they were not required to exhaust administrative remedies as required by *Walker* because they are presenting a facial constitutional challenge. New Miami argued that Plaintiffs' claims were as-applied, especially after *Walker* held that Notice of Liability may be resolved in administrative hearings (where the Rules of Civil Procedure and Rules of Evidence are not used), rather than exclusively in Municipal Court. The Court of Appeals, erroneously believe it could not address the effect of *Walker* in this case, did not even reach the issue of Plaintiffs' failure to raise constitutional issues (whether as applied or facial) in the administrative hearing or the R.C. 2506.07 appeal to the Court of Common Pleas.

<u>Proposition of Law No. 2</u>: A Court of Appeals making an interlocutory review from a grant (or denial) of class certification must consider and apply intervening Supreme Court law that affects the nature and source of plaintiffs' claims when making a determination regarding the standing of the named plaintiffs.

The Butler County Court of Appeals declined to address the effect of *Walker* on the issue of the named Plaintiffs' standing. *Barrow II* at ¶¶46-48. New Miami had argued to the Court that Plaintiffs, who did not have an administrative hearing, lacked standing to contest the constitutionality of the hearing of the New Miami administrative procedure, and that *Walker* changed the nature of Plaintiffs' constitutional challenge because *Walker* reaffirmed the use of administrating proceedings to resolve notices of liability and did not require litigation in the Municipal Court. As such, New Miami argued that the absence of the Rules of Civil Procedure and Rules of Evidence in the administrative hearing could no longer constitute part of Plaintiffs' claim, intensifying the as-applied nature of the claim. The Court of Appeals stated:

> "We are not authorized to address the effect of *Walker* on *Barrow* at this time. The only final appealable order before us is the trial court's February 2015 decision certifying the class. The trial court's precertification decision granting partial summary judgment to Appellees on the first three claims is not yet before us…. [W]hether or not *Walker* nullifies all or part of Appellee's claims is a merits issue. Any proclamation we make on the effect of *Walker* at this stage would be advisory. We therefore decline to address *Walker* at this phase of the litigation.

Opinion at ¶48.

The Court of Appeals' reluctance is misplaced. As a reviewing court, it is bound to make its own de novo determination of the named Plaintiffs' standing. That issue was properly presented to the Court of Appeals in the appeal from the grant of class certification. The Court of Appeals was bound to determine standing by looking at "the nature and source of the claim asserted by the plaintiffs." <u>Moore v. Middletown</u>, 2012-Ohio-3897, ¶ 23, 133 Ohio St. 3d 55, 60, 975 N.E.2d 977, 982, citing *Warth*, 422 U.S. at 500, 95 S.Ct. 2197, 45 L.Ed.2d 343. The nature

and source of Plaintiffs' due process claims is necessarily affected by Ohio Supreme Court law effective at the time of the Court of Appeals' analysis, including this Court's decision in *Walker*, even though it was decided after the present case was initiated. The Court of Appeal's refusal to consider *Walker* effectively turns the law of the case rule on its head, by holding the Court of Appeals bound by a prior decision of a lower court. And even in appropriate application of the law of the case rule, where a lower court is bound by decisions of the reviewing court, there is an exception when there is an "intervening decision" of the Supreme Court changing the law. "Absent extraordinary circumstances, such as an intervening decision by the Ohio Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case." *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 11 OBR 1, 462 N.E.2d 410, syllabus. The Court of Appeals erred in failing to address the effect of *Walker* on the issue of standing raised in the appeal from the certification of the class.

As a result of *Walker*, the nature and source of Plaintiffs' claim of injury is radically changed, e.g., an administrative hearing does not require use of the Rules of Civil Procedure and Rules of Evidence, the absence of which was Plaintiffs' primary allegation of violation of due course of law. See First Amended Complaint at ¶¶64-66. After *Walker*, Plaintiffs' constitutional claim is necessarily an as-applied challenge.

<u>Proposition of Law No. 3</u>: A class action plaintiff contesting liability in an automated traffic program who has paid the fine and not requested a hearing, has admitted liability and is barred by *res judicata* from representing the class.

Plaintiffs Woods and Johnson paid the fines set forth in the Notices of Liability issued by New Miami, and did not request an administrative hearing, yet they filed a class action based on constitutional challenges to the speed camera ordinance. *Carroll v. the City of Cleveland* (6th Cir. 2013), 522 F. App'x 299, was also a class-action challenge to a Cleveland automated speed

camera ordinance. Under similar facts, where the named Plaintiffs paid the fine without requesting a hearing, the trial court held that Plaintiffs' claims were appropriately dismissed on the basis of claim preclusion. Claim preclusion is comprised of four elements: 1) a prior final valid decision on the merits by a court of competent jurisdiction; 2) a second action involving the same parties or their privies as the first; 3) a second action raising claims that were or could have been litigated in the first action; and 4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action. *Id.* at 304. In *Carroll*, the Court determined that each of those four elements was present.

Those four elements also apply to Woods and Johnson: their payment of the civil fines is a final judgment; the present second action involves the same parties as the first – Woods and Johnson, and the Village of New Miami; Woods and Johnson could have raised their as-applied constitutional challenges in an administrative hearing, had they requested one, and in the appeal to the Court of Common Pleas under ORC §2506.01; both actions arise out of the Notices of Liability issued to them. Because the claims of Wood and Johnson are barred, they have no standing in this matter, either individually or as representatives of the class.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The appellant requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify a true and accurate copy of the foregoing Memorandum was served upon the following via electronic mail on this the 6th day of May, 2016:

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APPENDIX

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IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

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MARY L. SWAIN
BUTLER COUNTY
CLERK OF COURTS

DOREEN BARROW, et al., :

Plaintiffs-Appellees, : CASE NO. CA2015-03-043

- vs - : JUDGMENT ENTRY

FILED BUTLER CO.
COURT OF APPEALS
FEB 01 2016
MARY L. SWAIN
CLERK OF COURTS

VILLAGE OF NEW MIAMI, et al., :

Defendants-Appellants. :

The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Butler County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

Mike Powell, Presiding Judge

Robert P. Ringland, Judge

Robert A. Hendrickson, Judge

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

DOREEN BARROW, et al.,	:	
Plaintiffs-Appellees,	:	CASE NO. CA2015-03-043
	:	OPINION
- vs -		2/1/2016
	:	
VILLAGE OF NEW MIAMI, et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2013-07-2047

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HENDRICKSON, J.

{¶ 1} Defendant-appellant, the village of New Miami, appeals a decision of the Butler County Court of Common Pleas certifying a class action challenging the constitutionality of a municipal ordinance. For the reasons outlined below, we affirm.

I. INTRODUCTION

A. Facts

{¶ 2} New Miami operates a civil enforcement program to deter motorists from exceeding the speed limit at several intersections in its village. The Automated Speed Enforcement Program (ASEP) was instituted in July 2012 with the adoption of Ordinance 1917. If a vehicle exceeds the posted speed limit, a camera photographs the license plate and the registered owner of the vehicle receives a Notice of Liability in the mail.

{¶ 3} Pursuant to the Notice of Liability, motorists may pay the penalty and thereby waive the right to a hearing. Alternatively, motorists may request a hearing within 30 days from the date of the violation. The hearing is conducted by a hearing officer appointed by the mayor of New Miami. As outlined in the notice, motorists may proffer one of four affirmative defenses at the hearing: the vehicle was stolen, someone else was driving the vehicle, the vehicle was loaned to someone, or the license plate was not clearly discernable in the photograph.

{¶ 4} A motorist may appeal the result of the hearing to the Butler County Court of Common Pleas. Motorists who neglect to pay the penalty are subject to a late fee and are reported to a collection agency, and the judgment against them is conveyed to credit reporting agencies.

B. Procedure

{¶ 5} In July 2013, six named plaintiffs (hereinafter "appellees") filed suit against New Miami challenging the Ordinance. This was followed by an amended complaint which advanced four causes of action. Count I sought a declaration that the Ordinance divested the municipal court of jurisdiction over traffic violations in contravention of the Ohio

Constitution.[1] Count II sought a declaration that the Ordinance violated appellees' due process rights. Count III prayed for injunctive relief prohibiting continued enforcement of the allegedly unconstitutional Ordinance. Finally, Count IV sought equitable restitution for any penalties or fees paid by appellees pursuant to the allegedly unconstitutional Ordinance.

{¶ 6} In March 2014, the trial court granted summary judgment to appellees on Counts I, II, and III.[2] The court also certified a class comprised of all persons who had received Notices of Liability under New Miami's ASEP. New Miami appealed the certification decision.

{¶ 7} In the first appeal, this court reversed and remanded for the trial court to clarify its Civ.R. 23 findings in support of certification. *Barrow v. New Miami*, 12th Dist. Butler No. CA2014-04-092, 2014-Ohio-5743 (*Barrow I*). The trial court issued a decision complying with our remand instructions in February 2015. This appeal followed.

II. ANALYSIS

{¶ 8} Assignment of Error No. 1:

{¶ 9} THE TRIAL COURT ERRED IN CERTIFYING A CLASS ACTION UNDER CIVIL RULE 23(B)(2) WITH TWO SUBCLASSES, AND IN APPOINTING PLAINTIFFS WOODS AND JOHNSON AS [SUB]CLASS 1 REPRESENTATIVES AND PLAINTIFF MCGUIRE AS SUBCLASS 2 REPRESENTATIVE.

{¶ 10} New Miami's sole assignment of error challenges the trial court's decision to

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1. Appellees' amended complaint purported to invoke "R.C. §2720.02" as a basis for declaratory relief. No such section exists. Declaratory judgment actions are governed by Chapter 2721 of the Ohio Revised Code. We presume this was merely a typographical error in the complaint, given the fact that appellees clearly titled Count I "Declaratory Judgment – Infringement on Jurisdiction of the Mayor's Court and the Municipal Court" and Count II "Declaratory Judgment – Violation of Ohio Constitution." Moreover, the Revised Code section cited by appellees was only off by one number.

2. Appellees filed their motions for partial summary judgment and class certification simultaneously. The trial court's entry granting partial summary judgment preceded its entry granting class certification by about three weeks. The wisdom and effect of determining liability before sanctioning a class is not before this court, but we note the procedural anomaly.

certify the class. New Miami argues that the trial court failed to consider the threshold issue of whether the class representatives possessed jurisdictional standing to file suit. New Miami insists that the trial court erroneously equated the Civ.R. 23 class membership prerequisite with jurisdictional standing. Alternatively, New Miami urges that appellees failed to satisfy the requirements of Civ.R. 23.

A. Standing to Sue Versus Standing to Represent the Class

{¶ 11} Part of the confusion in this case arises from the commingling of terminology for two legal concepts which are, in fact, distinct: standing to sue and standing to serve as a class representative. A brief review of the relevant law should provide clarity.

{¶ 12} Subject matter jurisdiction refers to a court's power to hear and decide a case on the merits. *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 75, 1998-Ohio-275. Jurisdiction and justiciability are threshold considerations in every case, without exception. *Cf. Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197 (1975). Even where a court possesses subject matter jurisdiction over a matter, it shall refuse to hear a case that is not justiciable. *Id. See also ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, ¶ 11 ("Article IV, Section 4[B] provides that the courts of common pleas 'shall have such original jurisdiction over all *justiciable matters*'"). (Emphasis in original.) Examples of issues affecting justiciability are ripeness, mootness, and standing.

{¶ 13} Individual standing to sue is an indispensable requirement that must be present at the inception of every lawsuit, including class actions. *Woods v. Oak Hill Community Med. Ctr.*, 134 Ohio App.3d 261, 269 (4th Dist.1999). There is no separate "class action standing" requirement. 1 Rubenstein, *Newberg on Class Actions*, Section 2.1, at 59 (5th Ed.2011). Rather, once individual standing is met, plaintiffs must satisfy the class representation prerequisites contained in Civ.R. 23(A) and the action must fall into one of the categories delineated in Civ.R. 23(B). *Id.*

{¶ 14} What New Miami deems "jurisdictional standing" contemplates justiciability, which effectively acts as a limitation upon jurisdiction. *Warth* at 498. Regardless of nomenclature, New Miami correctly asserts that all class members, including the representatives, must satisfy the threshold requirement of standing in order for the lawsuit to be justiciable. "Standing is a preliminary inquiry that must be made before a trial court may consider the merits of a legal claim." *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, ¶ 9.

{¶ 15} In other words, a litigant must have a personal stake in the outcome of the controversy to file suit. *Cf. Anderson v. Brown*, 13 Ohio St.2d 53 (1968), paragraph one of the syllabus. The classic three-part test for making this determination was outlined by the United States Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992). Pursuant to *Lujan*, a plaintiff demonstrates a sufficient stake in the controversy only if he or she can show an injury in fact, causation, and redressability. *Id.* at 560-561. *See also Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, ¶ 22 (implementing the *Lujan* test). "These three factors – injury, causation, and redressability – constitute 'the irreducible constitutional minimum of standing.'" *Id.*, quoting *Lujan* at 560. This is the concept of standing which New Miami challenges.

B. Deciding the Standing Issue Does Not Engage the Merits

{¶ 16} Appellees maintain that New Miami invites this court to consider the merits of the complaint under the guise of standing. It is true that the certification stage of a class action is not an appropriate time to delve into the merits of a case. *Ojalvo v. Bd. of Trustees of Ohio State Univ.*, 12 Ohio St. 3d 230, 233 (1984). The allegations in the complaint are to be accepted as true rather than analyzed during certification. *Begala v. PNC Bank*, 1st Dist. Hamilton No. C-990033, 1999 WL 1264187, *5 (Dec. 30, 1999). The merits may be examined only where inextricably intertwined with the "rigorous analysis" of the certification

elements. *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, ¶ 29-44, analyzing *Wal-Mart v. Dukes*, 564 U.S. 338, 131 S.Ct. 2541 (2011). This inquiry is exceedingly limited, permitting scrutiny of the merits only to the extent necessary to ascertain the propriety of certification. *Stammco* at ¶ 33.

{¶ 17} These limitations notwithstanding, New Miami correctly asserts that a determination of the threshold issue of standing for justiciability purposes does not implicate an assessment of the merits of appellees' claims. It is well-established that standing does not hinge upon the merits of a claim that certain governmental action is unconstitutional. *Moore* at ¶ 23. To the contrary, "standing turns on the nature and source of the claim asserted by the plaintiffs." *Id. See also Warth*, 422 U.S. at 500. As the United States Supreme Court explained:

> [I]n ruling on standing, it is both appropriate and necessary to look to the substantive issues * * * to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated. For example, standing requirements will vary in First Amendment religion cases depending upon whether the party raises an Establishment Clause claim or a claim under the Free Exercise Clause. Such inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke [ ] judicial power.

(Citation omitted.) *Flast v. Cohen*, 392 U.S. 83, 102, 88 S.Ct. 1942 (1968). *Accord Clifton v. Blanchester*, 131 Ohio St.3d 287, 2012-Ohio-780, ¶ 18. Thus, we must analyze standing with an eye towards the particular claims advanced by appellees in their complaint. *Moore* at ¶ 23.

C. Did Appellees Have Standing to File This Lawsuit?

{¶ 18} Properly framed to fit this case, our inquiry is whether appellees have standing to pursue a declaratory judgment action challenging the constitutionality of Ordinance 1917 implementing New Miami's ASEP. Specifically, we examine whether appellees have

standing to assert that the Ordinance violates the due course of law provision in the Ohio Constitution. *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶ 48 (noting that the due course of law provision in the Ohio Constitution is analogous to the Due Process Clause of the United States Constitution).

{¶ 19} It should be emphasized that our inquiry does not assess whether the Ordinance itself is constitutional. *Moore* at ¶23. Such an analysis would involve a three-part test that is distinct from the *Lujan* test for standing. *See, e.g., In re B.C.*, 141 Ohio St.3d 55, 2014-Ohio-4558, ¶ 18 (applying the three-part procedural due process test enunciated by the United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893 [1976]). Rather, our focus in the present matter concerns whether there is a sufficient nexus between the status asserted by appellees and their due process claim. *Flast* at 102.

{¶ 20} In order to possess standing to challenge the facial constitutionality of an ordinance, "the private litigant must generally show that he or she has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, that the law in question has caused the injury, and that the relief requested will redress the injury." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469-470, 1999-Ohio-123. This reflects the *Lujan* standard for determining standing.

1. Did Appellees Suffer a Direct and Concrete Injury Different From That Suffered by the General Public?

{¶ 21} Yes. The general public may fear or dislike the automated traffic cameras and avoid all intersections in New Miami where the cameras are positioned. But only persons whose vehicles were recorded by the automated traffic cameras received Notices of Liability. Whether they paid the penalties or not, these individuals incurred repercussions not suffered by the general public. Thus, the group of individuals who received the Notice of Liability was

injured in a manner distinct from the public generally. *See, e.g., League of United Latin Am. Citizens v. Kasich*, 10th Dist. Franklin No. 10AP-639, 2012-Ohio-947, ¶ 32.

2. Did the Ordinance Cause Appellees' Injury?

{¶ 22} Yes. "[When] the plaintiff is himself an object of the action (or foregone action) at issue * * *, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Clifton*, 131 Ohio St.3d 287, 2012-Ohio-780, at ¶ 16, quoting *Lujan*, 504 U.S. at 561-562. Here, but for the civil traffic enforcement program established pursuant to Ordinance 1917, appellees would not have received the Notices of Liability and incurred the attendant financial repercussions.

3. Will the Relief Requested Redress Appellees' Injury?

{¶ 23} Yes. If Ordinance 1917 is declared unconstitutional on its face, New Miami's ASEP cannot continue to operate as established under the ordinance. Operation of the program would be halted by the injunctive relief requested by appellees. Effectively, any Notices of Liability issued pursuant to this unconstitutional program would be void. Regarding those appellees who paid the penalty, any funds collected pursuant to the program would be disgorged pursuant to the relief requested under appellees' unjust enrichment claim. Regarding those who did not pay, actions undertaken by collection agencies and credit reporting agencies would presumably have to be rescinded because the program upon which they were founded was unconstitutional.

{¶ 24} Because all three prongs are met, we hold that appellees possess jurisdictional standing to pursue a declaratory judgment action challenging the constitutionality of Ordinance 1917.

D. Was Certification Proper under Civ.R. 23?

{¶ 25} It is not necessary to review all seven of the class certification elements. New

Miami concedes that it does not contest the trial court's findings regarding the existence of an identifiable class, numerosity, or adequacy of representation by class counsel. Rather, New Miami challenges the trial court's findings regarding the class membership status of the representatives, commonality, typicality, adequacy, and the propriety of certification under Civ.R. 23(B)(2).

{¶ 26} At the outset, we observe that consideration of New Miami's challenge to the class membership status of the representatives is barred by the law-of-the-case doctrine. In *Barrow I*, we held that plaintiffs Woods, Johnson, and McGuire shared the requisite interest and injury with the members of their respective subclasses to serve as class representatives. *Barrow I*, 2014-Ohio-5743 at ¶ 10-18. *See also Warner*, 36 Ohio St.3d at 96-97. A decision rendered by a reviewing court in a case remains the law of that case on legal questions in subsequent proceedings. *Brock v. Brock*, 12th Dist. Clermont No. CA2013-04-026, 2014-Ohio-350, ¶ 38. Accordingly, *Barrow I* operates as law-of-the-case regarding the satisfaction of the implied class membership prerequisite under Civ.R. 23(A).

{¶ 27} We review the remaining findings properly challenged by New Miami for an abuse of discretion. *See Marks v. C.P. Chem. Co., Inc.*, 31 Ohio St.3d 200, 201 (1987). An abuse of discretion connotes that a ruling was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *Id.*

1. Commonality

{¶ 28} Civ.R. 23(A)(2) requires commonality of claims in a class action. This involves scrutinizing class claims for a "common nucleus of operative facts, or a common liability issue." *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 77, 1998-Ohio-365. The commonality requirement was clarified by the United States Supreme Court in *Wal-Mart v. Dukes*, 564 U.S. 338, 131 S.Ct. 2541 (2011). *See also Stammco*, 136 Ohio St.3d 231, 2013-Ohio-3019 at ¶ 29-44 (implementing *Wal-Mart*). The existence of common questions is still

required, but the inquiry does not end there. *Id.* at ¶ 32. Rather, there must be the potential for the claims to "generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart* at 2551, quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L.Rev. 97, 132 (2009). (Emphasis in original.) Where an action involves subclasses, this inquiry must be assessed as to each subclass separately. *See* Civ.R. 23(C)(4)(b).

{¶ 29} All members of Subclass 1 seek repayment of penalties and fines paid pursuant to the ASEP. As the trial court explained, these class members share a common prayer for restitution of monies paid pursuant to the allegedly unconstitutional Ordinance. Despite varied rationales underlying the subclass members' payments, there exist common issues of law that are likely to generate common answers to resolve the litigation. *Wal-Mart* at 2551.

{¶ 30} Similarly, all members of Subclass 2 share a common prayer for relief from application of the allegedly unconstitutional Ordinance. These subclass members seek declaratory and injunctive relief striking down operation of the Ordinance. Their various reasons for failing to pay the penalties do not defeat the common issues of law that underlie resolution of their claims. *Id.*

{¶ 31} Despite New Miami's argument to the contrary, the trial court's failure to invoke the commonality standard as clarified by *Wal-Mart* does not connote an abuse of discretion. As stated, an abuse will not lie where a court merely commits an error of law or judgment. *Marks*, 31 Ohio St.3d at 201. The court's decision must be unreasonable, arbitrary, or unconscionable. *Id.* It was not. The resolution of the litigation does not hinge upon proof of individual appellees' various defenses to infractions recorded by the automated traffic cameras. Rather, a declaration striking down Ordinance 1917 as unconstitutional would resolve the claims of *all* members of both subclasses. We hold that the trial court did not abuse its discretion in finding that the proposed subclasses in the case at bar satisfied the

commonalty requirement imposed by Civ.R. 23(A)(2).

2. Typicality

{¶ 32} Pursuant to Civ.R. 23 (A)(3), the claims or defenses of the class representatives must be typical of the claims or defenses of the class. This does not require that the class representatives possess claims or defenses that are identical to those of the putative class members. *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 484-485, 2000-Ohio-397. Rather, where a class representative's interests are substantially aligned or not in express conflict with those of the class, typicality is satisfied. *Id.* at 484. *See also Marks*, 31 Ohio St.3d at 202.

{¶ 33} Regarding Subclass 1, the trial court did not abuse its discretion in finding that the claims of Woods and Johnson were typical of the subclass. Although not required, Woods and Johnson are identically situated with all members of the proposed subclass. That is, they are persons who received a Notice of Liability and paid a penalty pursuant thereto. The fact that the amounts paid by these class representatives may vary from other members of the class is inapposite. The following directive, plucked from a leading class action treatise by the Ohio Supreme Court, supports such a finding:

> When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.

Baughman at 485, citing 1 Newberg & Conte, *Newberg on Class Actions*, Section 3.13, at 74-77 (3d Ed.1992). Thus, as noted by the trial court, the fact that members of Subclass 1 paid differing amounts does not defeat typicality. All members of the subclass uniformly challenge the due process afforded by the Ordinance, and all advance the same injury and seek the same remedy. As such, the trial court did not abuse its discretion in finding the typicality requirement imposed by R.C. 23(A)(3) was met by Subclass 1.

{¶ 34} Similarly, regarding Subclass 2, the trial court did not abuse its discretion in finding that the claims of McGuire were typical of the subclass. Again, though it is not necessary for the class representative to be in the exact same position as all members of the proposed class, McGuire is so situated. Like all other members of Subclass 2, McGuire is a person who received a Notice of Liability and did not pay the penalty. The fact that differing reasons might underlie McGuire's or any other member's decision to forestall payment of the penalty does not obviate typicality. *See Baughman* at 485. All members of the subclass uniformly challenge the due process afforded by the Ordinance, and all advance the same injury and seek the same remedy. Thus, the trial court's determination that Subclass 2 satisfied the typicality requirement under Civ.R. 23(A)(3) did not constitute an abuse of discretion.

3. Adequacy of Representation

{¶ 35} In accordance with Civ.R. 23 (A)(4), the representative parties must fairly and adequately protect the interests of the putative class members. This issue involves consideration of two distinct elements, namely, adequacy of the class representatives and adequacy of counsel. *Marks*, 31 Ohio St.3d at 203. New Miami does not challenge the trial court's finding that appellees' counsel is capable of representing the class. Instead, New Miami attacks the adequacy of the class representatives.

{¶ 36} A class representative satisfies the adequacy requirement where his or her interest is not antagonistic to those of the remaining class members. *Id.* As stated, far from being antagonistic to the interests of the remaining members of Subclass 1, the interests of Woods and Johnson are directly aligned with the rest of the subclass. All are recipients of the Notice of Liability who incurred financial repercussions in the form of payments rendered pursuant to the allegedly unconstitutional Ordinance. All seek a declaration invalidating the Ordinance and disgorgement of their payments.

members of Subclass 2. All are recipients of the Notice of Liability who did not pay the penalty but were subject to financial repercussions in the form of collection agencies and credit reporting as a result of the allegedly unconstitutional Ordinance. All seek a declaration invalidating the Ordinance and enjoining enforcement thereof. Thus, the trial court did not commit an abuse of discretion when it found that the representatives for both subclasses satisfied the adequacy requirement imposed by Civ.R. 23(A)(4).

4. Categorization of Action Under Civ.R. 23(B)

a. General Applicability

{¶ 38} Finally, a proposed class action must fall within the purview of one of the categories delineated by Civ.R. 23(B) in order to be certified. Here, the trial court found that the action qualified for certification under Civ.R. 23(B)(2). This subsection provides that an action is maintainable as a class action where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole[.]"

{¶ 39} Certification under Civ.R. 23(B)(2) requires that (1) a proposed class primarily seeks injunctive relief, and (2) the proposed class is cohesive. *Wilson v. Brush Wellman, Inc.*, 103 Ohio St.3d 538, 2004-Ohio-5847, ¶ 13. Here, cohesiveness of the class is not an issue. Both subclasses complain of conduct perpetrated by New Miami against the class as a whole. *Id.* at ¶ 7. Specifically, appellees challenge alleged due process defects applicable to all those subjected to Ordinance 1917. The propriety of certification under subsection (B)(2) thus turns upon the type of relief sought.

{¶ 40} The primary relief sought by both subclasses is a single declaration that the Ordinance is unconstitutional and a single injunction prohibiting its enforcement. This would provide relief to all members of both subclasses. *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, ¶ 21.

{¶ 41} Additionally, members of Subclass 1 seek restitution of monies paid under the Ordinance. It is true that actions that predominately seek individualized monetary damages are not properly certifiable under Civ.R. 23(B)(2). *Id.* However, as stated, the primary objective in the case at bar is to halt operation of the allegedly unconstitutional Ordinance. *See Maas v. The Penn Cent. Corp.*, 11th Dist. Trumbull No. 2006-T-0067, 2007-Ohio-2055, ¶ 45 (upholding certification under Civ.R. 23(B)(2) where "granting the declaratory and injunctive relief that appellees seek is of greater value to the class members than monetary relief * * *"). Consequently, the trial court did not abuse its discretion in certifying the class under Civ.R. 23(B)(2).

b. Common Questions Predominate

{¶ 42} Even if the prayer for damages on behalf of Subclass 1 could not properly be certified under Civ.R. 23(B)(2), the Ohio Supreme Court advocated for certification of "incidental aspects" of a case under Civ.R. 23(B)(3). *Hamilton*, 82 Ohio St.3d at 87, quoting 7A Wright, Miller, & Kane, *Federal Practice and Procedure*, Section 1775, at 470 (2d Ed.1986). Civ.R. 23(B)(3) permits maintenance of a class action where:

> [Q]uestions of law or fact common to the members of the class predominate over any questions affecting only individual members, and [ ] a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

{¶ 43} The trial court found that this standard was satisfied in the present matter. The court reasoned that common legal issues in the lawsuit constituted significant aspects of the case that were amenable to resolution for all members in a single adjudication. *Marks*, 31 Ohio St.3d at 204. Admittedly, as mentioned, the particular circumstances surrounding each motorist may mean that class members proffer different arguments in their respective defenses. This does not defeat certification under Civ.R. 23(B)(3), however. As noted by the Ohio Supreme Court:

Ohio Supreme Court:

> The mere existence of different facts associated with the various members of a proposed class is not by itself a bar to certification of that class. If it were, then a great majority of motions for class certification would be denied. Civ.R. 23(B)(3) gives leeway in this regard and permits class certification where there are facts common to the class members.

In re Consol. Mtge. Satisfaction Cases, 97 Ohio St. 3d 465, 2002-Ohio-6720, ¶ 10.

{¶ 44} Hence, the existence of differing defenses among class members does not obliterate the significance of the legal issues that predominate in this case, namely, the constitutionality of the Ordinance and the propriety of restitution. *Id.* In addition, these factual differences do not make the predominant issues any less capable of resolution in a single adjudication before the trial court. *Id.* Indeed, the court may decide in one stroke whether the procedure established by Ordinance 1917 ensures adequate due process to citizens. This amenability to swift disposition renders class action status superior to other methods for a fair and efficient adjudication of the matter in complicity with Civ.R. 23(B)(3). *Marks* at 204. *See also Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds*, __ U.S. __, 133 S.Ct. 1184, 1195 (2013). We therefore see no abuse of discretion in the trial court's alternate path supporting certification under Civ.R. 23(B)(3).

{¶ 45} In sum, the trial court's entry on remand reaffirming certification of the class adequately set forth its findings in support of certification. The trial court therefore properly certified the class in the case at bar.

E. How Does *Walker* Affect *Barrow*?

{¶ 46} During the pendency of the proceedings below, the Ohio Supreme Court released *Walker v. Toledo*, 143 Ohio St.3d 420, 2014-Ohio-5461. The high court reaffirmed its holding in *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, that municipalities may, pursuant to their home-rule authority under Article XVIII of the Ohio Constitution,

Walker at ¶ 3, 21. The court ruled that the ordinance in that case did not unlawfully usurp the jurisdiction of municipal courts over traffic violations. *Id.* at ¶ 22-25. In addition, the court held that municipalities' home-rule authority permitted them to establish civil administrative proceedings that must be exhausted before traffic violators may pursue judicial remedies. *Id.* at ¶ 26-28.

{¶ 47} New Miami insists that any members of either subclass who did not have an administrative hearing lack standing to contest the constitutionality of the hearing procedures afforded by Ordinance 1917. Alternatively, New Miami maintains that the issuance of the decision in *Walker* by the Ohio Supreme Court transformed appellees' constitutional challenge from facial to as applied.

{¶ 48} This court is of the opinion that we are not authorized to address the effect of *Walker* on *Barrow* at this time. The only final appealable order before us is the trial court's February 2015 decision certifying the class. The trial court's pre-certification decision granting partial summary judgment to appellees on their first three claims is not yet before us. *See generally State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St.3d 543, 1997-Ohio-366. Whether or not the administrative procedure established by Ordinance 1917 in fact satisfies procedural due process is not yet before us. Similarly, whether or not *Walker* nullifies all or part of appellees' claims is a merits issue. Any proclamation we make on the effect of *Walker* at this stage would be advisory. We therefore decline to address *Walker* at this phase of the litigation.

III. CONCLUSION

{¶ 49} Pursuant to the foregoing analysis, we hold that the trial court's February 2015 decision reaffirming class certification sufficiently enunciated the bases upon which the court made its decision in support of class certification. Accordingly, we affirm the trial court's certification decision.

{¶ 50} Judgment affirmed.

M. POWELL, P.J., and RINGLAND, J., concur.

IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

2016 MAR 22 PM 2:00

DOREEN BARROW, et al.,

Appellees,

vs.

VILLAGE OF NEW MIAMI, et al.,

Appellants.

CASE NO. CA2015-03-043
REGULAR CALENDAR

ENTRY DENYING APPLICATION FOR RECONSIDERATION

FILED BUTLER CO.
COURT OF APPEALS
MAR 22 2016
MARY L. SWAIN
CLERK OF COURTS

The above cause is before the court pursuant to an application for reconsideration filed by counsel for appellant, the Village of New Miami, on February 11, 2016; a memorandum in opposition filed by counsel for appellees, Doreen Barrow, et al., on February 19, 2016; and a reply memorandum filed by counsel for appellant on February 26, 2016. When reviewing an application for reconsideration, an appellate court determines whether the application calls the attention of the court to an obvious error in its decision, or raises and issue for consideration which was either not considered at all or not fully considered by the court when it should have been. *Grabill v. Worthington Industries, Inc.*, 91 Ohio App.3d 469 (10th Dist.1993).

New Miami's automated speed enforcement program was instituted in July 2012. If a vehicle's speed exceeds the posted limit, a machine photographs the license plate and the registered owner of the vehicle receives a notice of liability in the mail. In July 2013, six named plaintiffs filed suit against New Miami advancing four causes of action. The plaintiffs' motion for class certification was granted. New Miami appealed, and this court reversed the trial court's decision. The case was remanded to the trial court with instructions to explain its Civ.R. 23 findings in

support of class certification. *Barrow v. New Miami*, 12 Dist. Butler No. CA2014-04-092, 2014-Ohio-5743. The trial court issued a decision in compliance with the remand instructions and this appeal followed.

On appeal, New Miami raised one assignment of error challenging the trial court's decision to certify the class. New Miami insisted that the trial court failed to consider the threshold issue of whether subclass representatives had standing to file suit. In a unanimous decision, this court overruled New Miami's assignment of error, finding that the representatives of each subclass possessed jurisdictional standing to file suit.

In its application for reconsideration, New Miami claims that this court failed to consider or fully consider whether the plaintiffs had standing to bring their due process claim. New Miami argues that this court erred by finding that the plaintiffs suffered a direct and concrete injury different from that suffered by the general public. New Miami also contends that this court erroneously failed to consider the effect of the Ohio Supreme Court's decision in *Walker v. Toledo*, 143 Ohio St.3d 420, 2014-Ohio-5461. New Miami claims that application of the *Walker* case means that the plaintiffs have no standing to bring their due process claim because they failed to exhaust administrative remedies.

New Miami's arguments re-visit the same issues raised on appeal, namely whether the plaintiffs had standing to challenge the New Miami ordinance that established its automated speed enforcement program. Such is not a proper basis

for reconsideration. A motion for reconsideration is not appropriate where arguments raised are simply variations of those raised and rejected on appeal. See *Martin v. Lake Mohawk Property Owner's Assn., Inc.*, 7th Dist. Carroll No. 10 CA 869, 2011-Ohio-6538. Further, issues involving the underlying merits of a class action are not properly addressed during the certification phase under the guise of standing. See *Lycan v. Cleveland*, __ Ohio St.3d __, 2016-Ohio-422.

Based upon the foregoing, the application for reconsideration is DENIED.

IT IS SO ORDERED.

Mike Powell, Presiding Judge

Robert P. Ringland, Judge

Robert A. Hendrickson, Judge