[Cite as *Vlcek v. Chodkowski*, 2015-Ohio-1943.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

KEVIN VLCEK

Plaintiff-Appellee/Cross-Appellant

v.

BRYAN R. CHODKOWSKI, et al.

Defendants-Appellants/Cross-Appellees

Appellate Case No. 26078

Trial Court Case No. 12-CV-6154

(Civil Appeal from Common Pleas Court)

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O P I N I O N

Rendered on the 15th day of May, 2015.

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FAIN, J.

{¶ 1} Defendants-appellants Byran R.H. Chodkowski, Mark L. Reiss, Daniel Brodnick, Voncile DuBose, Dan Gentry, David Schmidt, Kolby Watson, and Peter Williams are all officials or employees of the City of Riverside. They appeal from an order of the trial court denying summary judgment on the issues of qualified immunity and statutory immunity in favor of Williams and DuBose. Defendants-appellants contend that the court erred in finding that Vlcek has proven a violation of his constitutional right to due process, based on errors of law regarding Vlcek's failure to exhaust administrative remedies and the right to written notice of his right to appeal. Plaintiff-appellee Kevin Vlcek cross-appeals from an order of the trial court granting summary judgment on the issue of immunity in favor of the police officers, Brodnick, Gentry, Schmidt, and Watson. We will only address the issues as they relate to the order of the trial court denying summary judgment in favor of Williams and DuBose on the issue of immunity; all the other orders appealed from are not final appealable orders.

{¶ 2} We conclude that the trial court did not err in rendering summary judgment on the issue of immunity with respect to the Riverside officials, Williams and DuBose. Accordingly, that order is Affirmed. The appeals from the other orders are Dismissed, for lack of a final appealable order.

I. The Course of Proceedings

{¶ 3} An adversarial relationship between the parties began in 1996 when the City of Riverside began its enforcement of a city ordinance prohibiting the storage of inoperable and unlicensed motor vehicles on Vlcek's property, and Vlcek filed a lawsuit to stop the enforcement. The 1996 lawsuit ended with the filing of a written settlement agreement, in which

Vlcek agreed to remove any unlicensed vehicle on his premises, and not to park or store any unlicensed motor vehicle outside of an enclosed structure on his property that was not parked or stored on the premises as of February 6, 1997. The final dismissal entry specifically stated that the court retained jurisdiction to enforce the terms of the settlement agreement.

{¶ 4} On three occasions between July, 2010 and September, 2011, the City of Riverside, through its officials, posted notices of violation on Vlcek's property, and caused the removal of several vehicles and trailers through its contractor, Sid's Towing. The City did not return to the common pleas court to seek an enforcement of the settlement agreement or to seek a contempt order against Vlcek as a way to obtain a court order to mandate the removal of vehicles or trailers. Instead, citations or notices of violation were issued to Vlcek to enforce two different City of Riverside ordinances: (1) Section 1331 of the Exterior Property Maintenance Code, which prohibits the outside storage of inoperable and unlicensed motor vehicles, and the outside storage of debris; and (2) Section 1173.25 of the Zoning Code, which prohibits outside storage of commercial vehicles and heavy equipment.

{¶ 5} On July 23, 2010, five separate parking violation warnings were affixed to three cars and two trailers that were stored outside on Vleck's property. The notices identify violations of Section 1331 and Section 1173.25, but the forms do not indicate a particular subsection of the law, there are no references to the source of the law (Riverside Code of General Ordinances, hereinafter referred to as R.C.G.O), and no specific remedies, action or appeal rights are identified other than "to move the vehicle immediately to avoid the possibility of further action being taken by the city by means of abatement and cost recovery, fines and/or court proceedings against the owner." A phone number was provided on the form for questions.

{¶ 6} In response to the first set of violation notices, Vlcek sent a letter on July 26, in which he disputed the violations and raised the issue of the prior court settlement. Williams called Vlcek to confirm that he wanted a hearing before the property maintenance appeals board, and agreed to set the matter for a hearing before the board. When the hearing was set for August 24, 2010, Vlcek verbally informed Williams, and then confirmed in writing, pursuant to a letter dated August 19, that he was not available on August 24 because of his commitment to report for temporary duty with the Air Force.[1] On August 25, 2010, action was taken to tow two of the vehicles and one trailer from Vlcek's property. A new hearing date was set for November 2, 2010. Prior to the hearing, the seized vehicles and trailer were returned to Vlcek, which he alleged were damaged in the process. A hearing was conducted on November 2, 2010, before the Exterior Property Maintenance Appeals Board. The Board Chairman issued "Findings of Fact" on November 23, 2010, concluding that the Board had no authority over three of the violations, because they were zoning code violations. The board report "sustained" the three violations of the property maintenance code and stated that Vlcek had 10 days to remove three specific vehicles from his property or to bring them into compliance, but did not state that the City would remove the property if Vlcek did not comply. The report did not contain any language regarding the right to challenge the decision or appeal, and did not contain any notification that the findings of the chairman would be presented to the board for adoption at a board meeting. On the same day the chairman's report was issued, November 23, 2010, the minutes of the board meeting reflect that the chairman's finding of facts were adopted. The

[1]Major Kevin Vlcek retired from the U.S. Air Force in 2009, and then became a civilian employee as a System Safety Engineer for the F-16 program office at Wright Patterson Air Force Base. He has a B.S. from the University of Michigan and two Masters degrees in Aeronautical Engineering.

minutes of the meeting also reflect that Williams explained to the board that they would send the decision to Vlcek by certified mail, wait ten days, then the city would remove the vehicles. Vlcek was not present at this meeting, and no record verifies that he was sent a copy of the minutes, which were not signed by the chair until February 14, 2012.

{¶ 7} On December 2, 2010, the City Manager issued a directive to the code enforcement officers suspending any enforcement of vehicle violations, including seizure and impoundment, until the spring of 2011. On December 15, 2010, Sid's Towing removed, from Vlcek's property, two of the three vehicles identified in the board's decision.

{¶ 8} On February 23, 2011, two notice of violations from the City of Riverside were prepared by the code enforcement officer and affixed to a vehicle and a trailer on Vlcek's property. In the second set of violation notices, the City of Riverside utilized a different form, which did specify that if the vehicle was not brought into compliance within ten days, it may be towed at the expense of the vehicle owner. The new notice form now contained four specific subsections of the law, but only the box identifying a violation of Section 1331.14 was checked, which applies to unlicensed or inoperable motor vehicles. The trailer that was tagged as a violation is not a motor vehicle. The notice of violation did not check any one of the three boxes for violations of R.C.G.O Chapter 1173, which apply to commercial vehicles and heavy equipment. The new notice also stated that Vlcek had 10 days from the violation date to file a written appeal to the Property Maintenance Appeals Board at City Hall. On March 3, 2011, Vlcek sent a letter to the board, challenging the violations, but it was not treated as an appeal or request for hearing. No hearing was scheduled or conducted on the second set of violation notices. On March 10, 2011, Sid's Towing removed from Vlcek's property the vehicle and

trailer that were cited in the second set of violation notices. No administrative order or court order was obtained prior to the seizure of the motor vehicle and the non-motorized trailer.

{¶ 9} On April 4, 2011, the City Manager issued three written policies directed to the code enforcement officers, Williams and DuBose, outlining the procedural steps that must be taken to issue notice of code violations, including the obligation to provide a notice of appeal right, a definitive compliance date, and a statement that if the property is not brought into compliance, "the city will seek corrective action through the abatement process, including reimbursement of funds to abate the violation or proceed with legal action through Municipal Court of Montgomery County, Eastern Division."

{¶ 10} On September 7, 2011, a notice of violation was issued to notify Vlcek of the city's intent to enforce "Section 1331.12(D)(6) of the codified ordinances of the City of Riverside, Ohio," which prohibited all outside storage and debris. The notice stated, "Please remove all outside storage and debris." The notice provided a phone number to schedule a bulk pick-up. It specifically stated that Vlcek was being given five days from receipt of the notice to bring the property into compliance. The notice informed Vlcek that the City was empowered to perform the necessary work to make the property compliant. The notice did not contain any specifics about the type of storage or debris under scrutiny and contained no statement about Vlcek's right to a hearing, any pre- or post-deprivation remedy or appeal right.

{¶ 11} On October 17, 2011, a summons was issued by the Montgomery County Municipal Court, informing Vlcek that a criminal complaint had been filed against him by the City of Riverside for a violation of Section 1331.12(D)(6), a minor misdemeanor, for failing to keep the exterior of his property free from outside storage and debris. The criminal complaint

was signed by DuBose and notarized by Williams. On February 3, 2012, the municipal court dismissed the criminal charge, with a finding of not guilty. The municipal court held that in the "interest of justice and fairness" the case should be dismissed, because the notice of violation was deficient by reason of its failure to include any notice of the defendant's administrative remedy to challenge the violation. The City of Riverside did not appeal this dismissal. Vlcek incurred attorney fees to defend the criminal charges brought against him.

{¶ 12} At all times pertinent to the issues in this appeal, Williams and DuBose were the only two employees working code enforcement for the City of Riverside. Williams was the Planning and Zoning Administrator for the City of Riverside. In this position, Williams reported to the Director of Economic Development, who reported to the City Manager. Williams's job duties required him to "interpret, explain and enforce city codes, policies and procedures." Ex. 34 to Deposition of Williams. R. 63. Williams was not involved in the parking violation notices issued in July, until he received the July 26 letter from Vlcek. Upon receipt of the letter, he became aware of the previous lawsuit, but took no action to locate information about it. Williams admitted that the department did not have any list or record of the vehicles Vlcek was permitted to store on his property pursuant to the 1997 settlement agreement. Williams admits to having had at least two conversations with Vlcek about scheduling a hearing of the property maintenance appeals board to allow Vlcek to challenge the July violation notices. Williams admitted receipt of the letter from Vlcek, dated August 19, which confirmed their telephone conversation in which Vlcek informed him that because of his obligation to report for Air Force duty, Vlcek could not make a hearing on August 19, but he still wanted a hearing. Williams did not direct DuBose to tow Vlcek's vehicles on August 25, 2010. Williams appeared at the board

hearing on November 2, 2010, and presented the violations to the board. Williams was present at the board meeting on November 23, 2010, and explained to the board that they had no authority to enforce zoning violations under the City Code of Ordinances, which had to be enforced through a court order. After the board issued its decision, Williams called Vlcek to inform him that he had ten days to become compliant, but did not specifically tell him of any intent to seize and impound the vehicles. Williams was present at Vlcek's residence when the vehicles were towed on December 5, 2010. After the second set of violation notices were issued on February 23, 2011, Williams admitted that he received a letter from Vlcek, dated March 3, 2011, but unlike the first instance, he did not call Vlcek to verify his intent and he did not schedule the matter for a hearing before the board. Williams admitted that the notices of violation issued in February do not contain an accurate description of the ordinance's requirement, under Section 1331.14 (f), to file an appeal within 48 hours of the date of the violation. Williams personally prepared the "Notice of Violation" dated September 7, 2011, which initiated the criminal process, but he admitted that he did not consult with the City Attorney. Williams admitted that the notice of violation issued in September does not contain any description of appeal rights, even though it was required by the ordinance and the city manager's written policy, issued on April 4, 2011.

{¶ 13} DuBose was the Code Enforcement Officer for the City of Riverside, who reported directly to Williams. Her job description included a duty to "ensure that all zoning and code related activities within the City meet applicable codes and ordinances" and "review codes and ordinances and submit revisions/recommendations for consideration" and to "coordinate interdepartmental code enforcement activities". Ex. 32 to Deposition of DuBose. R.61. DuBose

was directly responsible for the decision to tow Vlcek's vehicles from his property on August 25, 2010. DuBose personally prepared and delivered two parking violation notices on February 23, 2011, which she affixed to a vehicle and a trailer on Vlcek's property. DuBose personally signed the criminal complaint that was filed in municipal court to prosecute Vlcek for alleged violations of the property maintenance code. DuBose did not consult with or ask the City Attorney to institute the criminal action, as directed by R.C.G.O 1331.07. DuBose admitted that she never asked for a search warrant to enter upon Vlcek's property, and she never had any type of court order, before she went onto his property.

{¶ 14} The parties have not attempted to invoke the jurisdiction of the trial court to enforce the 1997 settlement agreement. Vlcek filed a new action in 2012, based on 42 U.S.C. 1983, seeking compensatory damages for violations of his constitutional rights. Vlcek named as defendants the City Manager, Chodkowski, the Planning and Zoning Administrator, Williams, the Code Enforcement Officer, DuBose, the Chief of Police, Reiss, and four police officers: Brodnick, Gentry, Schmidt, and Watson. The City of Riverside is not a named party. The complaint also alleges a tort-based claim for malicious prosecution against Williams and DuBose in connection with the criminal charge unsuccessfully pursued in municipal court. Sid's Towing was also named in the complaint on a claim for conversion. A default judgment was awarded against Sid's Towing, and after a damages hearing, the court awarded Vlcek a judgment against Sid's Towing in the sum of $16,115.31, which included the value of damage or loss to six cars, three trailers, wrenches, locks and damage to the septic system.

{¶ 15} All parties filed motions for summary judgment on numerous issues, including the defendants' immunity defenses, the merits of Vlcek's constitutional claims, and his claim for

malicious prosecution. On January 17, 2014, the trial court issued an order sustaining in part, and overruling in part, both the plaintiff's and the defendants' motions, then invited the parties to file a motion for reconsideration. On February 3, 2014, the trial court issued an amended decision and order on both parties' motions for summary judgment. From this order, which denied defendants' summary judgment motion based upon the qualified immunity and statutory immunity defenses, Williams and DuBose appeal.

II. The Scope of this Appeal

{¶ 16} The immunity defenses raised by two of the eight Riverside officials involved in the seizure of Vlcek's property are the only issues on appeal. The denial of an immunity defense to Chodkowski and Reiss is not raised on appeal. In addition to the immunity defenses, the summary judgment from which this appeal is taken renders judgment in favor of Vlcek on one claim, and renders judgment in favor of the defendants on three claims. The summary judgment rendered in favor of the police officers Brodnick, Gentry, Schmidt, and Watson, was raised by Vlcek in his cross-appeal, but this summary judgment is not a final appealable order, there being no Civ. R. 54(B) certification that there is no just cause for delay, and the summary judgment not being the denial of a claim of immunity. Similarly, the partial summary judgment rendered in favor of Vlcek on his due process claim is not a final appealable order. The summary judgment rendered against Vlcek on his civil conspiracy claim is not a final appealable order.

{¶ 17} The denial of summary judgment on all other claims addressed in the trial court decision are not final appealable orders or were not raised in this appeal. The denial of summary judgment on Vlcek's malicious prosecution claim was not raised on appeal. Vlckek's cross-appeal of the trial court's order denying summary judgment on his remaining due process

claims, the search and seizure claims and the just compensation claims are not final appealable orders. There being no Civ. R. 54(B) certification that there is no just cause for delay, the trial court order denying summary judgment is not a final appealable order.

{¶ 18} Our decision is solely addressed to the immunity defenses, and has no effect on the claims still pending before the trial court.

III. Williams and DuBose Are Not Entitled to Qualified Immunity

{¶ 19} The defendants-appellants' First Assignment of Error is as follows:

THE TRIAL COURT ERRED BY DENYING THE APPELLANTS PETER WILLIAMS AND VONCILE DUBOSE QUALIFIED IMMUNITY.

{¶ 20} The United States Supreme Court has established a defense of qualified immunity for governmental officials sued under 42 U.S.C. 1983, when their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). The standard that must be applied to determine whether qualified immunity should be granted involves a three-prong test: (1) whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiffs show that a constitutional violation has occurred; (2) whether the violation involved a clearly established constitutional right of which a reasonable person would have known; and (3) whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights. *Radvansky v. City of Olmstead Falls*, 395 F. 3d 291, 302 (6th Cir. 2005). Once qualified immunity is raised, it is the plaintiff's burden of proof to establish that the defendants are not entitled to qualified immunity. *Silberstein v. City of Dayton*, 440 F. 3d

306, 311 (6th Cir. 2006).

{¶ 21} Vlcek submitted his own affidavit, the depositions of five Riverside officials and 39 documents to support a factual finding that his constitutional right to due process was violated. Our independent review of the evidence reveals numerous factual grounds to support a conclusion that the actions of Williams and DuBose directly deprived Vlcek of his right to due process. Williams and DuBose both had job descriptions requiring them to ensure that all code enforcement complied with their statutory authority, and yet they prepared, posted and served violation notices on Vlcek's property that did not comply with the applicable code, or with the city manager's directives, and that did not inform Vlcek of his appeal rights. Williams failed to schedule a hearing upon receipt of Vlcek's letter challenging the second notices. Williams and DuBose took action to effectuate the seizure of Vlcek's property prior to the expiration of a reasonable time for an appeal. Williams and DuBose took action outside their scope of authority when they pursued criminal charges without referring prosecution to the city attorney and without providing any administrative hearing process for the third notice of violation. The trial court properly construed these facts and found that there was no genuine issue of material fact, concluding that Vlcek's due process rights had been violated.

{¶ 22} The constitutional right to due process, which includes the right to notice and an opportunity to be heard in the administrative hearing process, is a clearly established right, which any reasonable, competent public official responsible for code enforcement would have known. *Hicks v. Leffler*, 119 Ohio App. 3d 424, 428, 695 N.E.2d 777 (10th Dist.1997). Williams and DuBose were charged with enforcing a local ordinance containing a statutory right to notice and an opportunity to be heard. R.C.G.O. 1331.14 (e), (f) & (g) specifically provide that owners of

junk vehicles are entitled to a notice of the violation, and an opportunity to file an appeal with the property maintenance appeals board. R.C.G.O 1331.06 outlines the procedure and authority of the board, including the right to hearing. A reasonable finder of fact could find that Williams and DuBose, the only two officials responsible for code enforcement, were aware of the procedural due process rights contained in the ordinances they were charged with enforcing.

{¶ 23} The remaining issue is whether the court correctly concluded that the actions of Williams and DuBose, which denied Vlcek his right to due process, were objectively unreasonable. "The issue of whether a public official did not act reasonably (and hence not entitled to qualified immunity) is a matter for the court and, therefore, may properly be determined by summary judgment." *Scott v. City of Columbus*, 10th Dist. Franklin No. 00AP-689, 2001 WL 309417 (Mar. 30, 2001).

{¶ 24} Defendants-appellants argue that the actions of the city officials were reasonable, as a matter of law, because Vlcek failed to exhaust his administrative remedies to challenge the seizure of his personal property, and because the city was not legally required to provide Vlcek with written notice of his appeal rights in order to afford him the right to due process. The defendants-appellants further argue that since Vlcek did not exhaust his administrative remedies, the issue of whether his property constitutes a nuisance is established, as a matter of law, which gave the city the right to summarily remove the nuisance, without infringing on any constitutional rights.

{¶ 25} Recently, the Eighth District Court of Appeals held that a property owner was not required to exhaust his administrative remedies before filing a civil action seeking damages for a deprivation of his due process rights in a nuisance abatement process when the

administrative board had no authority to grant monetary relief. *AMM Peric Property Investment, Inc. v. City of Cleveland,* 8th Dist. Cuyahoga No. 99848, 2014-Ohio-821. Notably, the property owner was not only seeking damages for personal property in a nuisance abatement process but was also seeking attorney fees for the cost of pursuing his constitutional rights. *Id.*at ¶ 11. The Eighth District Court of Appeals relied on the holding of the Ohio Supreme Court in *State ex rel. Teamsters Local Union 436 v. Cuyahoga Cty. Bd. of Commrs.*, 132 Ohio St.3d 47, 2012-Ohio-1861, 969 N.E.2d 224, as follows:

> It is true that parties need not pursue their administrative remedies if doing so would be futile or a vain act. *Driscoll v. Austintown Assoc.,* 42 Ohio St.2d 263, 275, 328 N.E.2d 395 (1975). However, a "vain act" occurs when an administrative body lacks the authority to grant the relief sought; a vain act does not entail the petitioner's probability of receiving the remedy. The focus is on the *power* of the administrative body to afford the requested relief, and not on the happenstance of the relief being granted.

Id.at ¶ 24.

{¶ 26} The Riverside Codified Ordinances do not provide the Property Maintenance Appeal Board with the ability to provide any monetary relief to Vlcek, if he had prevailed in an attempt to challenge the nuisance abatement process. Although the Board may have been able to order the return of Vlcek's vehicles and trailers, it had no authority to award him money for the damage which was caused by the towing process, or for the attorney fees he incurred in his defense. Vlcek had no obligation to pursue the futile act of filing an administrative appeal to a board that had no authority to grant the relief he seeks in this action.

{¶ 27} The defendants-appellants rely on the holding of *Beganskas v. Town of Babylon*, E.D.N.Y. Nos. 03-CV-0287, 04-CV-5693, 2006 WL 2689611 (Sept.19, 2006), for the proposition that local governments have the power to summarily abate a nuisance without a warrant. This reliance is misplaced. The *Beganskas* holding is limited to the ability of a local enforcement officer to "search" private property for violations of local ordinances, and does not extend to the "seizure" of personal property to abate a nuisance. *Id.* The nexus of Vlcek's fourth amendment claim is not based on the official's search of his property; it is the seizure of his personal property that is the basis of his damage claim. It has been established that pursuant to the Fourth Amendment to the U.S. Constitution, the government may not seize a citizen's personal property without a warrant based on probable cause, or an official order of a court or administrative agency, after an opportunity to be heard is properly afforded to the property owner. *Conner v. City of Santa Ana*, 897 F. 2d 1487 (9th Cir. 1990), citing *Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1492, 56 L.Ed. 2d 486 (1978). The trial court found that the Riverside officials who ordered the seizure of Vlcek's property on August 25, 2010, did not act in accordance with any nuisance abatement order from a court or board, and the record supports this finding. The record also supports a finding that the seizure of Vlcek's property on March 10, 2011, was done without any hearing or order of an administrative board or court, even though Vlcek challenged the notice of violation in writing. The enforcement of the second set of violation notices was also done in contravention to the City Manager's directive to suspend code enforcement. The third notices of violation did not identify any right to appeal or opportunity for a hearing. The timing of the seizures also contributed to a process that effectively deprived Vlcek of a reasonable time within which to pursue an appeal.

{¶ 28} It has been held that the proper exercise of procedural due process requires an effective notice of the right to be heard. *Chirila v. Ohio State Chiropractic Bd.*, 145 Ohio App. 3d 589, 763 N.E. 2d 1192 (10th Dist. 1981). "Due process is a flexible concept and calls for such procedural safeguards as the particular situation demands." *Id.* at 593. It has further been held that when the time for filing an administrative appeal is relatively short, the notice of the right to a hearing should "have included notice of the ability to appeal and opportunity to be heard, i.e., the time frame within which that appeal must be taken." *Crawford-Cole v. Lucas Cty. Dept. of Job & Family Servs.*, 6th Dist. Lucas No. L-11-1177, 2012-Ohio-3506, ¶ 16.

{¶ 29} At the time Vlcek was first served with a notice of violating Section 1331.14 of the Riverside Codified Ordinances, the local ordinance provided that the time for filing an administrative appeal was only forty-eight hours. None of the violation notices issued in 2010 contained any notice of the right to file an administrative appeal. The second set of violation notices, issued in February 2011, inaccurately listed the time for filing an administrative appeal within ten days. In March, 2011, Sections 1331.05 and 1331.06 of the Riverside Codified Ordinances were amended increasing the time for appeal to ten days, and requiring any notice of violation to include the time for filing an administrative appeal. The third set of violation notices issued to Vlcek on Sept. 7, 2011 did not contain any notice of the right to file an administrative appeal.

{¶ 30} In the case before us, we agree with the trial court that Vlcek is not barred from pursuing his constitutional claims based on evidence supporting a finding that Vlcek was not provided notice of his administrative appeal rights, that the first seizure occurred prior to the requested hearing, that an administrative hearing was not scheduled after Vlcek challenged, in

writing, the second set of violation notices, that no administrative process was made available for the third notice of violation, that seizures occurred without a court order or any adjudication of whether Vlcek's property met the definition of a "junk vehicle" or constituted a nuisance, or whether seizure was permitted pursuant to the previous court approved settlement agreement

{¶ 31} We conclude that the trial court correctly found that the actions of Williams and DuBose depriving Vlcek of his right to due process were objectively unreasonable. Therefore, the record supports the trial court's conclusion that Williams and DuBose failed to establish, as a matter of law, that they are protected by qualified immunity.

IV. The Cross-Appeal Is Not from a Final Appealable Order

{¶ 32} In his cross-appeal, Vlcek's first and second assignments of error allege as follows:

> THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GRANTING SUMMARY JUDGMENT TO DEFENDANTS POLICE OFFICERS BRODNICK, GENTRY, SCHMIDT, AND WATSON.
>
> THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FAILING TO GRANT SUMMARY JUDGMENT AGAINST POLICE OFFICERS BRODNICK, SCHMIDT, AND GENTRY FOR THEIR PARTICIPATION IN THE DECEMBER 15, 2010 SEIZURES.

{¶ 33} The Supreme Court of Ohio has declared that an order that denies the benefit of an alleged immunity is a final appealable order under R.C. 2755.02(C). *Hubbell v. City of Xenia*, 115 Ohio St. 3d 77, 2007-Ohio-4839, 873 N.E. 2d 878, ¶ 2; *Summerville v. City of Forest Park*, 128 Ohio St. 3d 221, 2010-Ohio-6280, 943 N.E. 2d 522, ¶ 33. Generally, a trial

court's denial of a motion for summary judgment based on the existence of genuine issues of fact, is not a final appealable order.

{¶ 34} The Fourth District Court of Appeals has addressed the reviewing court's role in an appeal involving statutory and qualified immunity by stating:

> Generally, the denial of summary judgment is not a final, appealable order. However, a trial court's order to deny summary judgment on the basis of statutory immunity constitutes a final order. (Citations omitted). R.C. 2744.02(C) explicitly states that an order denying _a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order." However, appellate review under R.C. 2744.02(C) is limited to the denial of immunity. See *Nagel v. Horner,* 162 Ohio App.3d 221, 2005-Ohio-3574, 833 N.E.2d 300, _ 21 (stating that R.C. 2744.02(C) limits appellate review to denial of immunity and does not authorize court to review merits of the action); *Makowski v. Kohler*, Summit App. No. 25219, 2011-Ohio-2382, _ 7 (stating that an R.C. 2744.02(C) appeal _is limited to the review of alleged errors in the portion of the trial court's decision which denied the political subdivision the benefit of immunity_); see, also, *Essman* [*v. Portsmouth,* 4th Dist. Scioto No. 08CA3244, 2009-Ohio-3367]; *CAC Bldg. Properties v. City of Cleveland*, Cuyahoga App. No. 91991, 2009-Ohio-1786, _ 9, fn. 1; *Carter v. Complete Gen. Constr. Co.,* Franklin App. No. 08AP-309, 2008-Ohio-6308, _ 8. Thus, a party may not raise other alleged errors concerning the denial of summary judgment.

Long v. Hanging Rock, 4th Dist. Lawrence No. 09CA30, 2011-Ohio-5137, ¶ 10

{¶ 35} We have held that, "an appeal from an order denying immunity is limited to the review of alleged errors in the portion of the trial court's decision which denied the political subdivision the benefit of immunity." *Guenther v. Springfield Twp. Trustees*, 2012-Ohio-203, 970 N.E.2d 1058 ¶ 24 (2d Dist.).

{¶ 36} The summary judgment rendered in favor of defendants Brodnick, Gentry, Schmidt, and Watson is not an order denying a summary judgment motion on the basis of statutory immunity, and therefore does not constitute a final order by virtue of R.C. 2744.02(C). Although the summary judgment does adjudicate the liability of those defendants, in an action involving multiple claims against multiple parties, the adjudication of some, but less than all, of the claims is not immediately appealable unless the trial court has certified that there is no just reason for delay, pursuant to Civ. R. 54(B). *Carter v. Lake Cty. Govt.*, 11th Dist. Lake No 2014-L-049, 2014-Ohio-4742, ¶ 6. There is nothing in the record to indicate that the trial court in the case before us has certified that there is no just cause for delay. Therefore, the summary judgment rendered in favor of defendants Brodnick, Gentry, Schmidt, and Watson is not a final appealable order, and the cross-appeal from that judgment must be Dismissed.

{¶ 37} The trial court's failure to have rendered summary judgment against Brodnick, Gentry, Schmidt, and Watson, is not an order denying a summary judgment on the basis of statutory immunity, and is therefore not a final order by virtue of R.C. 2744.02(C).

{¶ 38} The matters addressed in Vlcek's First and Second Assignments of Error do not involve final appealable orders. Neither do the issues raised in his Third, Fourth and Fifth assignments of error. In these assignments of error, Vlcek is attempting to have this court prematurely review the trial court's ruling denying his motion for summary judgment on his

claims for deprivation of his constitutional right to be free from unreasonable search and seizure, to his claims arising out of the city's unsuccessful criminal prosecution against him, and on his official-capacity claims against the City Manager, Chodkowski, and the Chief of Police, Reiss, for their participation in the deprivation of his constitutional rights. Each of these claims will continue to be litigated below, and only when genuine issues of material fact are resolved will the trier of fact be able to reach a conclusion whether the plaintiff has proven all elements of his claim by the preponderance of the evidence, including facts to support an exception to governmental immunity.

{¶ 39} The summary judgment and orders from which Vlcek cross-appeals not being final appealable orders, his cross-appeal is Dismissed, for lack of a final appealable order.

V. Genuine Issues of Fact Preclude a Finding that the Riverside Officials Acted in a Manner that Would Entitle Them to Statutory Immunity on the Malicious Prosecution Claim

{¶ 40} The defendants-appellants' Second Assignment of Error is as follows:

> THE TRIAL COURT ERRED BY DENYING APPELLANTS PETER J. WILLIAMS AND VONCILE DUBOSE STATUTORY IMMUNITY.

{¶ 41} R.C. 2744.03 (A)(6) provides statutory immunity to individuals sued in their official capacity as governmental employees for actions based on state law. The only state-law claim at issue is Vlcek's common-law action for malicious prosecution against Williams and DuBose in connection with their attempt to criminally prosecute Vlcek for the condition of his property. The Ohio immunity statute creates a presumption of immunity for official government

acts, carried out by political subdivisions and their employees. *Cook v. Cincinnati,* 103 Ohio App.3d 80, 90, 658 N.E.2d 814 (1st Dist. 1995). The Ohio immunity statute provides three exceptions to the general rule favoring governmental immunity. The exception in dispute is based on R.C. 2744.03(A)(6)(b), which eliminates a state employee's immunity defense if "the employee's acts or omissions were with malicious purpose, in bad faith or in a wanton or reckless manner." The trial court concluded that genuine issues of material fact exist as to whether Williams or DuBose acted with a malicious purpose, in bad faith, or in a wanton or reckless manner.

{¶ 42} In *Winkle v. Zettler Funeral Homes, Inc.*, 182 Ohio App.3d 195, 2009-Ohio-1724, 912 N.E.2d 151, ¶ 22 (12th Dist.), the Butler County Court of Appeals reviewed the legal standards to apply for determining whether a public official's conduct falls under the applicable statutory immunity exception as follows:

> "Malice" is defined as the willful and intentional design to harm another by inflicting serious injury without excuse or justification. "Bad faith" denotes a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive, or ill will, and embraces actual intent to mislead or deceive another. "Wanton" misconduct is the failure to exercise any care whatsoever and implies a disposition to perversity and a failure to exercise care toward those to whom care is owed. "Recklessness," distilled to its essence, and in the context of R.C. 2744.03(A)(6)(b), is a perverse disregard of a known risk. Recklessness, therefore, necessarily requires something more than mere negligence. The actor must be conscious

> that his conduct will in all probability result in injury. As a result, recklessness necessarily requires something more than mere negligence, as mere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor. (Citations omitted).

Winkle at ¶ 22.

{¶ 43} The trial court did not find that Williams and DuBose acted in a willful, wanton or reckless manner, but found that genuine issues of fact remained for a jury to determine this issue. The Supreme Court of Ohio has recognized that the issue of wanton misconduct is normally a jury question. *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 356, 639 N.E.2d 31 (1994). We agree that the record supports genuine issues of fact precluding summary judgment on this issue. In construing the exception for malicious purpose, bad faith, or wanton or reckless behavior under R.C. 2744.03(A)(6)(b), it has been recognized that the determination "explicitly focuses on the employee's state of mind." *Chesher v. Neyer*, 477 F.3d 784, 797 (6th Cir. 2007) (applying Ohio law). A jury can listen to the testimony of Williams and DuBose and determine their state of mind when they chose to pursue criminal prosecution over at least two alternative paths to enforcement: (1) invoking the court's jurisdiction to pursue enforcement of the settlement agreement; or (2) pursuing the administrative hearing process to allow Vlcek to appeal to the property maintenance board. A factual issue must be resolved by a trier of fact as to whether Williams and DuBose engaged in reckless behavior when they chose not to utilize the City Attorney to pursue the criminal charges, when their statutory authority directed them to do so. A factual issue must be resolved by a trier of fact as to whether Williams and DuBose acted in bad faith, with an intent to deprive Vlcek of his appeal rights, when they deliberately chose to

use a notice of violation form that did not refer to appeal rights. A factual question must be resolved as to whether Williams and DuBose acted in bad faith or engaged in reckless behavior when they prepared the criminal complaint without specifying any factual basis for the alleged criminal violation. There is a factual issue whether Williams and DuBose's course of conduct in processing the criminal complaint was done with such reckless disregard of their duties that they knew in all probability Vlcek would suffer a loss from their actions. These factual disputes must be resolved by a trier of fact, and preclude summary judgment on the issue of statutory immunity.

{¶ 44} The defendants-appellants' Second Assignment of Error is overruled.

VI. Conclusion

{¶ 45} The defendants-appellants' assignments of error having been overruled, the order of the trial court from which their appeal is taken is Affirmed. The judgment and orders from which plaintiff-appellee/cross-appellant appeals not being final appealable orders, his cross-appeal is Dismissed.

. . . . . .

DONOVAN, J., concurs.

WELBAUM, J., dissenting:

{¶ 46} I very respectfully dissent. "The fundamental requirements of procedural due process are notice and an opportunity to be heard before the government may deprive a person of a protected liberty or property interest." *Conner v. City of Santa Ana*, 897 F.2d 1487, 1492 (9th Cir.1990), citing *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). "There is no requirement, however, that a court must be involved in the process in order to comply with the constitution." *Id.* at 1492-1493, citing *Jordan v. City of Lake Oswego*, 734

F.2d 1374, 1376, fn. 1 (9th Cir.1984).

{¶ 47} In the case before us, parking violation stickers were originally placed on Kevin Vlcek's vehicles on July 23, 2010, by a police officer of the City of Riverside ("City"). Around that time, Riverside police officers had been assigned specific sets of streets for zoning enforcement, and the officers were told to conduct daily active enforcement for vehicles, tall grass, and junk. *See* Ex. 3 attached to the Bryan Chodkowski Deposition, p. 2.[2]

{¶ 48} The stickers on Vlcek's vehicles indicated that they were being parked in violation of Riverside Codified Ordinances Section 1331 (pertaining to location of junk, inoperable, or unlicensed vehicles on property), and Section 1173.25 (prohibiting parking of commercial vehicles or heavy equipment in residential areas). The stickers also stated that the vehicles must be moved immediately to avoid the possibility of further action such as "abatement and cost recovery, fines, and/or court proceedings against the owner, agent, or occupant of the property." Exs. 5, 6, 7, 8, and 9 attached to the Williams Deposition. In addition, the stickers provided a contact number for the City of Riverside. *Id.* The stickers did not discuss appeal procedures.

{¶ 49} The ticketed items were as follows: (1) a 2000 Chevrolet Tracker that Vlcek purchased in 2001; (2) a 1988 Red Ford Escort GL that Vlcek had owned since 1988; (3) a 1971 silver Chevy Camaro, that Vlcek purchased in 1992; (4) a red flatbed trailer on which the Camaro was sitting; and (5) a black trailer. None of the items had current license plates and registration. The Camaro had never been licensed and had not been operable from the time that

[2] The City's planning and zoning administrator was not aware of the identity of the officer who ticketed the cars, but indicated that it would have been a police officer. Peter Williams Deposition, pp. 14-15.

Vlcek purchased it. The Escort had last been registered in 2005, and the Chevrolet Tracker had last been registered in 2009. Kevin Vlcek Deposition, pp. 14-17, 20-22, 25-26, and 31-32. Vleck was also ticketed for outside storage of debris.

{¶ 50} At the time the vehicles were ticketed, Section 1331.14 of the Riverside Codified Ordinances provided, in pertinent part, as follows:

> (a) The presence of a dismantled, partially dismantled, or inoperable motor vehicle, machinery, or equipment, or any part thereof, which remains uncovered or outside of a wholly enclosed building or structure for a period greater than seventy-two (72) consecutive hours is in violation of the terms of this chapter, and is declared a nuisance per se.
>
> (b) The term junk vehicle shall not apply to collector's vehicles or historic vehicles as defined by Ohio R.C. Section 4501.01.
>
> (c) All dismantled, partially dismantled, or inoperable motor vehicles, machinery, or equipment shall be stored or remain in a wholly enclosed garage or structure. * * *
>
> (d) All unlicensed or inoperable collector's and historic vehicles shall be screened by means of buildings, fences, vegetation, terrain, or other suitable obstruction if such vehicles are stored or kept in the open.
>
> (e) The Enforcement Officer may serve upon an owner * * * not in compliance with * * * Section 1331.14 by issuing a notice of violation pursuant to Section 1331.08. Such notice shall order the owner * * * to take such measures as may be reasonably necessary to remove the dismantled, partially dismantled, or

inoperable vehicle, machinery, or equipment in accordance with this Section.

(f) The owner, agent, or occupant shall have the right to file an appeal with the Property Maintenance Appeals Board within forty-eight (48) hours of this notice.

(g) If no appeal is filed, the owner, agent, or occupant shall within ten (10) days of service of the notice [sic] shall remove or cause to be removed the dismantled, partially dismantled, or inoperable motor vehicle, machinery, or equipment in accordance with this Section.

(h) In case the owner * * * refuses or fails to carry out the order within the timeframe specified herein, the Enforcement officer shall remove or cause to be removed the * * * inoperable motor vehicle, machinery or equipment and shall recover the cost of each pursuant to Section 1131.08.

Exhibit 14 attached to the Chodkowski Deposition; Doc. #64, Appendix of Exhibits, Ex.14, p. 33.

{¶ 51} The first awareness that Defendant, Peter Williams, had of the ticketing was a July 26, 2010 letter that Vlcek sent to the City of Riverside. Williams Deposition, pp. 15-16. The letter mentioned that Vlcek's property had been ticketed, and also mentioned prior litigation between Vlcek and the City in 1997, some thirteen years earlier. *See* Williams Deposition, Ex. 10. Williams was unsure when he became aware of the letter (which was not addressed to him personally), but he did contact Vlcek and speak with him on the telephone. Williams Deposition, pp. 16 and 20.

The terms of the settlement in the 1997 litigation stated that:

> 2. On or before December 1, 1997, the Plaintiff [Vlcek] will remove from the premises at 2405 Harshman Road, Riverside, Ohio all unlicensed motor vehicles.
>
> 3. The Plaintiff will not park or store outside of an enclosed structure any unlicensed motor vehicle which was not parked or stored on the premises at 2405 Harshman Road as of February 6, 1997.
>
> This matter is hereby dismissed with prejudice. However, this Court shall retain jurisdiction of this matter so as to enforce the terms of this settlement in the event there is a need to do so.

Ex. 11, pp. 1-2 (Nunc Pro Tunc Final Dismissal Entry, filed in Montgomery County Common Pleas Case No. 96-2692 on November 13, 1997), attached to the Chodkowski Deposition; Doc. #64, Appendix of Exhibits, Ex. 11, pp. 1-2.

{¶ 52} Between 1999 and 2009, Vlcek left the area and no longer lived at the location on Harshman Road that was the subject of the 1997 litigation. In 2009, Vlcek moved back to the Harshman property, and eventually brought the items to the property that were subsequently ticketed in 2010 and 2011. Vlcek Deposition, pp. 7-8, 14, 16, 17, and 21.

{¶ 53} According to Vlcek, the Chevrolet Tracker was moved to Harshman Road in the summer of 2009, and was parked outside. The Camaro was also brought up to that address on a trailer in early 2009, and sat on the trailer outside. Likewise, the Ford Escort was brought to the property on a trailer and was stored outside. *Id*. at pp. 14, 16, 17, and 21. The vehicles were also visible from the street, i.e., they were not obscured by fences, buildings, or enclosures. Voncile DuBose Deposition, p. 18.

{¶ 54} After speaking with Vlcek, who expressed interest in an appeal, Williams scheduled a meeting of the Property Maintenance Appeals Board ("Board") for August 24, 2010. Vlcek subsequently contacted Williams and told him that he would not be available on that date. Williams Deposition, p. 22. In addition, Vlcek told Williams that he did not feel an appeal would do him any good. *Id.*[3]

{¶ 55} It is clear that, at this point, a misunderstanding occurred. Williams interpreted Vlcek's remarks to mean that he was not proceeding with the appeal; however, Vlcek actually intended to proceed on a different date. *See* Ex. 21 attached to the Williams Deposition (a subsequent letter from Vlcek to Williams, indicating that Williams must have misunderstood their conversation and that Vlcek intended to proceed with his appeal). *See, also,* Chodkowski Deposition, p. 42 (indicating that Vlcek's vehicles were returned after it was discovered that Vlcek's reason for failing to attend the first scheduled hearing was because Vlcek had an out-of-town assignment). The letter that Vlcek wrote Williams is dated July 19, 2010, but Williams testified that he did not receive the letter until after the cars and trailers were towed on August 25, 2010. Williams Deposition, p. 26. There is no evidence to the contrary, i.e., that Williams received the letter prior to the time the cars were towed.

{¶ 56} Williams was not present when the vehicles were towed from Vlcek's property on August 25, 2010. The City's code enforcement officer, Voncile DuBose, was present. *Id.* at p. 23. Neither Williams nor DuBose had any specific recollection of discussing the towing. *Id.* In fact, DuBose had no recollection of being at Vlcek's property on that date, because she had

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[3] Vlcek did not comment on Williams' assertion about abandonment of the appeal either in his deposition or in the affidavit he filed with the trial court. Vlcek did say that he was unable to attend the August 2010 hearing because he was scheduled to be out of town. See Doc. # 56, Affidavit of Kevin Vlcek, ¶ 14.

been involved in many towing situations. DuBose Deposition, pp. 8-10. DuBose's normal procedure was to knock on the door of the property where a vehicle was located. After receiving no response at the address, the vehicles would be towed. *Id.* at p. 13.

{¶ 57} After receiving Vlcek's August 19, 2010 letter, which explicitly stated that an appeal was being requested pursuant to Section 1331.06 of the Riverside Codified Ordinances, Williams scheduled a Board hearing for November 2, 2010. Williams Deposition, p. 28, and Ex. 21 attached to the Williams Deposition. All of Vlcek's vehicles were also returned to him in late September or early October 2010, and a letter dated October 19, 2010, was sent to Vlcek, informing him of the hearing date. Williams Deposition, p. 28, and Vlcek Deposition, pp. 68-69. After the vehicles were returned, the city manager, Bryan Chodkowski, also had a conversation with Vlcek, in which Vlcek claimed that some of the vehicles had been damaged during towing. Chodkowski told Vlcek to provide him with a list of issues in writing and estimates, and the City would refer the matter to its insurance company. Chodkowski Deposition, pp. 43-44. The record does not indicate if Vlcek ever provided such a written list.

{¶ 58} The October 19, 2010 letter informed Vlcek of his right to appear and to present his case before the Board, and Vlcek acknowledged receiving the letter some time prior to the hearing. Williams Deposition, p. 28; Vlcek Deposition, pp. 68-69, and Ex. E attached to the Vlcek Deposition. The letter that Vlcek acknowledged receiving stated that:

> The Property Maintenance Board is composed of five members and is a quasi-judicial body. As such, The Board's procedure in conducting your appeal will be similar to the presentation of a matter in a judicial court. When convened, the City of Riverside will first present its information on this matter to

> the Board. Concluding this presentation, you will be entitled to cross-examine the City's representatives at this meeting. Conversely, when your cross-examination is concluded; you will be allowed to present your information on this matter to the Board and be cross-examined by City Staff. A decision from the Board will be forthcoming after the conclusion of evidence submittal and cross-examination. For clarification, I have included the Board's official Rules of Procedure.

Exhibit E (EPMAB Case No. 10-0001) attached to the Vlcek Deposition.

{¶ 59} Vlcek did appear at the board hearing on November 2, 2010. *See* Vlcek Deposition, pp. 45 and 69, and Doc. #56, Vlcek Affidavit, ¶ 19. The Board's decision is dated November 23, 2010, and was sent to Vlcek by certified mail. Vlcek's wife signed for the certified mail, and Vlcek acknowledged receiving the Board's decision on November 29, 2010. Vlcek Deposition, pp. 46-47; Ex. A attached to the Vlcek Deposition; and Doc. #56, Vlcek Affidavit, ¶ 19. Although the majority opinion focuses on the lack of evidence verifying that Vlcek was sent copies of minutes of a board meeting on November 23, 2010, there is nothing in the record to indicate that Vlcek was required to be present at such a meeting. In addition, the majority opinion ignores the fact that Vleck was sent a copy of the board's decision by certified mail on November 29, 2010.

{¶ 60} The Board's decision sustained the notices of violation with respect to the Escort, Camaro, and Chevrolet Tracker, concluding that the vehicles were inoperable because they were unlicensed, and that Vlcek had failed to store them in an enclosed garage or structure in violation of Section 1331.14 of the Riverside Ordinances. The Board further held that Vlcek had failed to

comply with the violation notices by abating the violations or bringing the use into compliance with the City's Exterior Property Maintenance Code, in violation of R.C. 1331.06(c)(3). The violations regarding the black box trailer, red car trailer, and outside storage of debris were not sustained, because they fell under the Zoning Code rather than the Property Maintenance Code. Vlcek was given ten days to remove the cars or bring them into compliance with the Property Maintenance Code. *Id.* at Ex. A attached to the Vlcek Deposition, pp. 1-2.

{¶ 61} After receiving the Board's decision, Vlcek did not remedy the violations, nor did he appeal from the decision to the common pleas court. Vlcek Deposition, pp. 47-49. In this regard, R.C. 2506.01(A) provides for appeals of final orders, adjudications, and decisions of any agency of any political subdivision to the common pleas court. In such an appeal, the common pleas court "must consider 'the "whole record," including any new or additional evidence admitted under R.C. 2506.03, and determine[ ] whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence.' " *Rockford Homes, Inc. v. Canal Winchester City Council*, 2014-Ohio-3609, 18 N.E.3d 788, ¶ 17 (10th Dist.), quoting *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 735 N.E.2d 433 (2000).

{¶ 62} When Vlcek failed to remedy the conditions within ten days, the Escort and Chevy Tracker were towed from his property on December 15, 2010. Williams Deposition, pp. 30-31, and Vlcek Deposition, p. 49. The conditions of the vehicles could be observed from the right-of-way, and Williams documented these conditions on December 13 and 14, 2010, before the vehicles were towed. Williams Deposition, pp. 31-32.

{¶ 63} Williams was present when the vehicles were towed, along with various City

police officers. Chodkowski Deposition, pp. 35 and 39, and Williams Deposition, p. 35. Williams also coordinated with Vlcek prior to the removal, to have it done at a time when Vlcek could be present. Williams Deposition, p. 33. Prior to the removal, Vlcek could have prevented removal either by placing the vehicles in the garage, or by licensing the vehicles. *Id.* He failed to do either. He also failed to file an appeal from the administrative decision.

{¶ 64} Subsequently, on February 23, 2011, Voncile DuBose, the city's code enforcement officer, placed additional parking violation notices on the Camaro and red trailer. Vlcek Deposition, p. 50; Voncile DuBose Deposition, p. 14; and Williams Deposition, p. 35.[4] These violation notices indicated that Vlcek's vehicles were in violation of Section 1331.14 of the Riverside Ordinances. They further stated that the violator had 10 days to establish compliance, and 10 days to provide a written appeal of the violation to the Property Maintenance Appeals Board at Riverside City Hall. Exs. 36 and 37 attached to the Williams Deposition.

{¶ 65} After receiving this notice, Vlcek did not provide a written appeal to the Board. Although Vlcek contended in his deposition that he appealed (see Vlcek Deposition, p. 53), the letter that he wrote says nothing about requesting an appeal with respect to the February 23, 2011 violation notices. *See* Ex. D attached to the Vlcek Deposition. In pertinent part, the letter, which is dated March 3, 2011, states as follows:

> By now you are (or should be) fully aware that I am not in violation of your ordinances, and *any discussion to the contrary outside of court must be delayed* until after my vehicles are returned and the damages are repaired at

[4] Again, DuBose had little recollection of dates or events that occurred, because she issues many citations. DuBose Deposition, pp. 14, 17, and 23. She did recall seeing unlicensed vehicles and being able to see the vehicles from the street. She also recalled going onto Vlcek's property to make the determination that the license tags were expired or that the vehicles did not have tags. *Id*. at pp. 17-18.

> Riverside's expense as Bryan Chodkowski and I had earlier agreed.
>
> It makes no sense that you should continue to harass me given that you haven't made right your previous damage to my vehicles and property and given that Bryan Chodkowski admitted to reviewing the earlier court settlement. I haven't even had my case properly heard before your appeals board as required nor has a court ordered removal of anything from my property.
>
> * * *
>
> I must insist that *until such time as a court authorizes the removal* of anything on my property, you are to stay off my property.

(Emphasis added.) Exhibit D attached to the Vlcek Deposition.

{¶ 66} Contrary to Vlcek's assertion in his deposition, the letter says nothing about pursuing an administrative appeal regarding the February 23, 2011 violation notices. Also contrary to Vlcek's assertion, the letter dictates that any discussion of Vlcek's vehicles would not occur outside court proceedings. This negates any intent to pursue an administrative appeal before the Board. The majority opinion ignores the content of Vlcek's letter, and stresses that Williams did not call Vlcek to ascertain his intent after receiving this letter. However, Williams was not required to do so, and Vlcek's intent not to pursue any appeal is clear from the letter. Furthermore, in contrast to the statements in the letter, Vlcek had already been provided an appeal with the Board, and those proceedings had concluded several months before. The fact that Vlcek was dissatisfied with the outcome does not mean that the appeal hearing did not occur.

{¶ 67} At the time, if Vlcek believed the City's actions were in violation of a prior court settlement, which occurred 13 years earlier, he could have invoked the jurisdiction of the

Montgomery County Common Pleas Court in Case No. 96-2692, to contest the matter. Notably, the trial court in that case had reserved jurisdiction over the settlement. Vlcek could also have requested an appeal with the Board pursuant to Section 1331 of the Riverside Ordinances. He was well aware of his ability to do so, since he had previously specifically requested such an appeal in connection with the July 2010 violation notices. *See* Vlcek Deposition, p. 52, and Ex. 21 attached to the Williams Deposition (the August 19, 2010 letter from Vlcek to Williams, requesting an appeal pursuant to Section 1331.06 of the Riverside Ordinances).

{¶ 68} No hearing was scheduled before the Property Maintenance Appeals Board and the City moved forward with processing the violation. Williams Deposition, pp. 43-44. The Camaro and red trailer were then towed from Vlcek's property on March 10, 2011. Williams Deposition, pp. 44-45.

{¶ 69} In view of the above evidence, I would conclude that the trial court erred in granting summary judgment to Vlcek on the issue of whether Williams and DuBose are entitled to qualified immunity for Vlcek's due process claims regarding the proceedings that led to the August 25, 2010 and December 15, 2010 removal of vehicles. I would also conclude that the trial court erred in finding factual issues concerning whether these officials were entitled to qualified immunity in connection with the March 10, 2010 removal of vehicles. My reasoning regarding these matters follows.

I. Alleged Due Process Violations

{¶ 70} "To establish a 1983 claim against an individual public official, two elements are required: (1) the conduct complained of must be committed by a person acting under color of state law, and (2) the conduct must deprive the plaintiff of a federally protected right, either

constitutional or statutory." *Cook v. Cincinnati*, 103 Ohio App.3d 80, 85, 658 N.E.2d 814 (1st Dist.1995), citing *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). (Other citations omitted). "Public officials * * * who perform discretionary functions are entitled to be shielded from liability for civil damages in a 1983 claim as long as their conduct does not violate clearly established federal rights of which a reasonable person would have known." *Id.* at 85, citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). "The test is an objective one. * * * This right is known in law as qualified immunity." *Id.*

{¶ 71} Qualified immunity is an affirmative defense, but the plaintiff has the ultimate burden of showing that a defendant is not entitled to qualified immunity. *Id.*, citing *Wegener v. Covington*, 933 F.2d 390, 392 (6th Cir. 1991). "A defendant bears the initial burden of coming forward with facts to suggest that he was acting within the scope of his discretionary authority during the incident in question. Thereafter, the burden shifts to the plaintiff to establish that the defendant's conduct violated a right so clearly established that any official in the defendant's position would have clearly understood that he was under an affirmative duty to refrain from such conduct." *Id*. at 85-86, citing *Wegener* at 392. "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law. * * * Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." (Footnote and citation omitted.) *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (interpreting qualified immunity in the context of a wrongful arrest case).

{¶ 72} As was noted, due process requires "notice and an opportunity to be heard before the government may deprive a person of a protected liberty or property interest." *Conner*, 897 F.2d at 1492, citing *Mathews*, 424 U.S. at 333, 96 S.Ct. 893, 47 L.Ed.2d 18.

{¶ 73} As a preliminary matter, before the issue of qualified immunity even arises in the due process context, one would have to find that Vlcek was deprived of notice and an opportunity to be heard. In my view, Vlcek was not deprived of these rights.

{¶ 74} With respect to the initial removal of the vehicles that occurred on August 25, 2010, Vlcek was not deprived of property rights because his vehicles were returned to him. He was, thereafter, afforded all process to which he was due. Furthermore, even if one assumes, for the sake of argument, that a temporary deprivation of property rights occurred, there is no indication that a reasonable official in the position of Williams or DuBose would have clearly understood that he or she should refrain from the conduct of removing the vehicles. As was stressed above, Williams was under the impression that Vlcek had abandoned his appeal. Even Vlcek acknowledged that Williams may have misunderstood his intent. Under these circumstances, Williams cannot be said to have been plainly incompetent or to have knowingly violated the law. Furthermore, DuBose was simply performing routine duties as she had in many other cases. There is no evidence that she even knew of Vlcek's conversation with Williams.

{¶ 75} More importantly, with respect to the proceedings that led to the actual deprivation, i.e., the removal of vehicles on December 15, 2010, Vlcek was afforded all process that was due. Vlcek requested a hearing, received a hearing, which he attended, and received the Board's decision, which he chose not to appeal. The Board was not required to advise Vlcek of

his right to appeal its order, as that right is a matter of public record in R.C. 2506.01. *See, e.g., City of W. Covina v. Perkins*, 525 U.S. 234, 241, 119 S.Ct. 678, 142 L.Ed.2d 636 (1999). For the same reasons, the City was not obliged to advise Vlcek of his initial right to appeal to the Board; this was a matter of public record in the Riverside Codified Ordinances.

{¶ 76} In *Perkins*, the police had seized property pursuant to a warrant and had left information about the items seized, as well as the name of the judge authorizing the warrant, the court from which the warrant was issued, and the name and phone number of police investigators. *Id.* at 236. Rather than filing a motion with the issuing court, the plaintiff filed a lawsuit in federal court against the city and police officers, alleging that they had violated his Fourth Amendment rights. *Id.* at 237-238. The district court granted summary judgment in the city's favor on the search and seizure issues, and also concluded that California's remedies for return of the property satisfied due process. *Id.* at 238. However, the court of appeals reversed. *Id.* Although the court of appeals agreed that California's post-deprivation remedies satisfied the requirements of due process, the court held, based on the Supreme Court's prior decision in *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978), that " 'the City was required to give respondents notice of the state procedures for return of seized property and the information necessary to invoke those procedures (including the search warrant number or a method for obtaining the number).' " *Perkins* at 239, quoting *Perkins v. City of W. Covina*, 113 F.3d 1004, 1012 (9th Cir.1997) (*Perkins I).*

{¶ 77} After making the above observation, the court of appeals set forth the following description of the required notice:

> "In cases where property is taken under California law ... the notice should

> include the following: as on the present notice, the fact of the search, its date, and the searching agency; the date of the warrant, the issuing judge, and the court in which he or she serves; and the persons to be contacted for further information. In addition, the notice must inform the recipient of the procedure for contesting the seizure or retention of the property taken, along with any additional information required for initiating that procedure in the appropriate court. In circumstances such as those presented by this record, the notice must include the search warrant number or, if it is not available or the record is sealed, the means of identifying the court file. It also must explain the need for a written motion or request to the court stating why the property should be returned."

Perkins at 239, quoting *Perkins I* at 1013.

{¶ 78} On further appeal, the United States Supreme Court reversed the court of appeals, noting that "[t]his expansive requirement lacks support in our case law and mandates notice not now prescribed by the Federal Government or by any one of the 50 States." *Perkins*, 525 U.S. at 239, 119 S.Ct. 678, 142 L.Ed.2d 636. In discussing the matter, the Supreme Court observed that:

> Individualized notice that the officers have taken the property is necessary in a case such as the one before us because the property owner would have no other reasonable means of ascertaining who was responsible for his loss.
>
> No similar rationale justifies requiring individualized notice of state-law remedies which, like those at issue here, are established by *published, generally available* state statutes and case law. Once the property owner is informed that his

> property has been seized, he can turn to these public sources to learn about the remedial procedures available to him. The City need not take other steps to inform him of his options. *Cf. Reetz v. Michigan*, 188 U.S. 505, 509, 23 S.Ct. 390, 47 L.Ed. 563 (1903) (holding that a statute fixing the time and place of meetings of a medical licensing board provided license applicants adequate notice of the procedure for obtaining a hearing on their applications because: "When a statute fixes the time and place of meeting of any board or tribunal, no special notice to parties interested is required. The statute is itself sufficient notice"); *Atkins v. Parker*, 472 U.S. 115, 131, 105 S.Ct. 2520, 86 L.Ed.2d 81 (1985) (noting that "[t]he entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny"). In prior cases in which we have held that postdeprivation state-law remedies were sufficient to satisfy the demands of due process and the laws were public and available, we have not concluded that the State must provide further information about those procedures. *See, e.g., Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984).

(Emphasis added.) *Perkins* at 241.

{¶ 79} Consistent with these principles, the Tenth District Court of Appeals has rejected the contention that a zoning inspector deprived a property owner of due process by failing to advise him of his right to appeal. In this regard, the court of appeals noted that "the inspector had no duty, by statute or otherwise, to advise the appellant of his right of appeal of the judgment of the zoning resolutions." *Prairie Tp. Bd. of Trustees v. Stickles*, 10th Dist. Franklin No.

93AP-824, 1994 WL 30263, *5 (Feb. 3, 1994).

{¶ 80} In the case before us, there is no statute or other regulation, nor has Vlcek cited any such authority, including the City's own ordinances, indicating that the Board was required to advise parties of their right to further appeal its decisions. As was stressed in *Perkins*, Vlcek, as the property owner, could have turned to published, generally available sources, such as statutes and caselaw, to learn about available remedial procedures. The City of Riverside was not required to inform him about his right to appeal the Board's decision.

{¶ 81} Furthermore, with respect to the initial right to appeal to the Board, the Supreme Court in *Perkins* distinguished its own prior decision in *Memphis Light*, which had required public utilities to inform customers about opportunities to discuss billing disputes before termination, and about "the availability and general contours of the internal administrative procedure for resolving the accounting dispute." *Perkins*, 525 U.S. at 242, 119 S.Ct. 678, 142 L.Ed.2d 636, citing *Memphis Light*, 436 U.S. at 13-15, 98 S.Ct. 1554, 56 L.Ed.2d 30. In this regard, the Supreme Court observed that in *Memphis Light*:

> [W]e relied not on any general principle that the government must provide notice of the procedures for protecting one's property interests but on the fact that the administrative procedures at issue were not described in any publicly available document. A customer who was informed that the utility planned to terminate his service could not reasonably be expected to educate himself about the procedures available to protect his interests:
>
> "[T]here is no indication in the record that a written account of [the utility's dispute resolution] procedure was accessible to customers who had

> complaints about their bills. [The plaintiff's] case reveals that the opportunity to invoke that procedure, if it existed at all, depended on the vagaries of 'word of mouth' referral." [*Memphis Light*] at 14, n. 14, 98 S.Ct. 1554.
>
> While *Memphis Light* demonstrates that notice of the procedures for protecting one's property interests may be required when those procedures are *arcane and are not set forth in documents accessible to the public, it does not support a general rule that notice of remedies and procedures is required*.

(Emphasis added.) *Perkins* at 242.

{¶ 82} In this regard, I observe that there is no dispute that the City of Riverside's own appeal procedures were publicly available to Vlcek, nor is there any dispute that Ohio's statutory provisions pertaining to administrative appeals were also publicly available. In fact, as I noted, Vlcek specifically cited his appeal rights under Riverside's Codified Ordinances when he asked for an appeal in his August 19, 2010 letter. As a result, I simply see no evidence of due process violations.

{¶ 83} The observations I just made in connection with the December 15, 2010 removal are also applicable to the proceedings that led to the March 10, 2011 removal of property from Vlcek's premises. By his own admission, Vlcek rejected any administrative appeal from the violation order, and he was well-aware of his right to appeal, since he had previously invoked that right. Having declined to pursue an appeal before the Board, Vlcek cannot now complain that he was deprived of notice and an opportunity to be heard. In addition, as was indicated, neither the City nor its employees had any obligation to further advise Vlcek of his rights.

{¶ 84} I note that the majority opinion cites *Crawford-Cole v. Lucas Cty. Dept. of Job &*

Family Servs., 6th Dist. Lucas No. L-11-1177, 2012-Ohio-3506, in support of its conclusion that Vlcek's due process rights were violated because he was not informed of his right to appeal from the Board's decision. However, *Crawford-Cole* is consistent with the holding in *Stickles*, and supports the conclusion that the Board was not required to advise Vlcek of a right to further appeal.

{¶ 85} In *Crawford-Cole*, the Lucas County Department of Job and Family Services (LCDJFS), had denied Crawford-Cole's administrative appeal of the revocation of her day-care license because her initial appeal was filed beyond the agency's own 10-day period for requesting an appeal. *Id.* at ¶ 1-2. Crawford-Cole then appealed to the common pleas court, which held that the agency had violated her due process rights because it did not include the Ohio Administrative Code Section containing her appeal rights with the decision revoking the day-care license. *Id.* at ¶ 2. LCDJFS subsequently appealed to the Sixth District Court of Appeals, which affirmed the trial court. *Id.* at ¶ 1.

{¶ 86} In discussing this issue, the court of appeals noted, as I have, that "[t]o comply with the requirements of procedural due process, administrative agencies must, at a minimum, provide notice and an opportunity for a hearing before depriving individuals of their protected liberty or property interests." (Citations omitted.) *Id.* at ¶ 13. The court of appeals went on to note that " 'due process is flexible and calls for such procedural protections as the particular situation demands.' " *Id.*, quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

{¶ 87} In concluding that due process required the agency to provide notice of the 10-day appeal time, the court of appeals relied on an Ohio Administrative Code regulation which

required the agency to inform applicants in writing of their right to request a county appeal review when questioning the agency's actions regarding their certification. *Id.* at ¶ 14. The court of appeals also noted that the agency's letter, while purporting to include a copy of the regulation, which would have provided notice of the time-limit, did not do so. *Id.* at ¶ 16. In addition, the court stressed that even though no statutory requirement existed for the notice, the absence of the information, particularly where the time-limit was so short (10 days), violated "the right to due process and unfairly diminishes the right to appeal." *Id.*

{¶ 88} As I noted, there is no requirement, by statute, administrative regulation, or any other source, that would require the Board to notify appellants of their right to appeal its decisions to the common pleas court. Furthermore, unlike *Crawford-Cole*, this case does not involve a shortened time limit for appeal, as R.C. 2505.07 allows parties thirty days to perfect appeals from final orders of administrative agencies or boards. Vlcek's right to appeal was not diminished in any way, and was the same right that any applicant has to appeal decisions of agencies to common pleas courts.

{¶ 89} I do agree that the original notice of violation failed to advise Vlcek of his right to appeal violations to the Board within ten days, as specified by Section 1331.05(c)(1)(e) of the Riverside Codified Ordinances. However, this omission did not deprive Vlcek of any potential remedy, as he did receive an administrative hearing. Vlcek was well aware of his rights to an appeal, and asserted them. More importantly, under *Perkins* and *Memphis Light*, the City was not required to advise Vlcek of his appeal rights. The appeal procedures were outlined in the Riverside Ordinances, and there was no contention in the trial court that these procedures were either "arcane" or were not "set forth in documents accessible to the public." *Perkins*, 525 U.S.

at 242, 119 S.Ct. 678, 142 L.Ed.2d 636.

{¶ 90} I would additionally point out that a federal district court case is actually fatal to Vlcek's due process and takings claims. See *Crow v. City of Springfield,* S.D. Ohio No. C-3-96-010, 2000 WL 988246 (Mar. 16, 2000), which granted summary judgment against a property owner on his Section 1983 claims.

{¶ 91} In *Crow*, the City of Springfield had notified J. Harvey Crow that his property was a nuisance and had ordered him to abate the nuisance within 15 days by removing various items, including an accumulation of tires. *Id.* at *1. The notice also told Crow that any appeal was required to be filed with the code enforcement manager within 10 days. *Id.*

{¶ 92} Instead of filing an appeal, Crow exchanged correspondence with the City of Springfield over a long period of time about efforts he intended to make to clean up the property. *Id.* Eventually, the city commission adopted an ordinance authorizing the city manager to enter into a contract with a waste disposal company to remove the tires and other material, and to seek to recover the funds expended. *Id.* at *2.

{¶ 93} Crow then filed suit in federal district court against the city pursuant to 42 U.S.C. 1983, alleging that passage of the ordinance had deprived him of due process and equal protection under the Fourteenth Amendment. He also asserted claims under the Takings Clause of the Fifth Amendment, and alleged that the ordinance violated the Ex Post Facto Clause of Article I, Section 10 of the U.S. Constitution. *Id.* In response, the City filed a counterclaim, seeking to recover the cost of the cleanup. *Id.*

{¶ 94} The district court initially overruled the City's motion for summary judgment in part, and denied it in part. The court agreed with the City that "as a matter of Ohio law,

principles of *res judicata* prevent a person from challenging, in a subsequent lawsuit, an unappealed administrative finding that his property constituted a nuisance." (Citations omitted; italics in original.) *Crow*, S.D. Ohio No. C-3-96-010, 2000 WL 988246, at *2. However, the court noted that:

> [T]he Defendant was not entitled to summary judgment, because it had not established, as a matter of law, that this Plaintiff had a right of appeal. In addition, the Court questioned whether such a right of appeal would prevent, as a matter of federal law, the Plaintiff from litigating the question of the existence of a nuisance in the context of resolving his federal law claim under § 1983. This Court noted that, under *University of Tennessee v. Elliott*, 478 U.S. 788, 794, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986), the unreviewed final decision of a state administrative body would be given preclusive effect, only when "acting in a judicial capacity ... [it] resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *Id.* at 799 (quoting *United States v. Utah Construction & Mining Co.*, 38[4] U.S. 394, 422 (1966)). Herein, there was neither evidence that the Defendant had been acting in a "judicial capacity" when the abatement order was issued, nor evidence that the order had been made after the Plaintiff had an opportunity to litigate the question of whether his property constituted a nuisance.

Id.

{¶ 95} In view of these concerns, the district court ordered the City to file a supplemental motion for summary judgment to resolve those and other issues. *Id.* After the

City filed the motion, the district court again overruled the summary judgment motion, noting that the evidence the City had provided was still insufficient to resolve the issue. *Id.* at *3. Ultimately, the district court directed the parties to provide stipulations concerning the right of appeal from the decision declaring a nuisance, and the nature of the appeal, i.e., whether presentation of witnesses and oral argument were permitted. *Id.* After receiving this evidence, the court then sustained the City's motion for summary judgment. In this regard, the district court stated that:

> In particular, this Court concluded that the Plaintiff had a right of appeal which would have provided him "a full and fair opportunity to argue his version of the facts and an opportunity to seek out review of any adverse findings" and that, therefore, principles of *res judicata* prevented him from litigating in this lawsuit the issue of whether his property constituted a nuisance. *See* Doc. # 26 at 14. This Court also noted that its ruling meant that the Defendant was entitled to summary judgment on its counterclaim and that it appeared that the ruling meant that none of the Plaintiff's claims remained viable, since they were predicated upon the theory that his property did not constitute a nuisance, at the time the Defendant's City Commission adopted Ordinance No. 95-406, authorizing the City Manager to enter into a contract with Rumpke to remove and to dispose of the tires and shredded rubber which were located upon his property.

(Italics in original) *Crow*, S.D. Ohio No. C-3-96-010, 2000 WL 988246, at *3.

{¶ 96} Although the district court concluded that the City was entitled to summary judgment, the court noted that the parties had not addressed in their cross-motions for summary

judgment whether the City was entitled to summary judgment on Crow's claims, "because principles of *res judicata* prevented him from litigating herein the issue of whether his property constituted a nuisance * * *." (Italics in original) *Id.* As a result, the court again asked for further briefing, which the City again provided. *Id.*

{¶ 97} After considering applicable summary judgment principles, the district court granted summary judgment to the City on all claims, awarded the City the costs of its abatement, and dismissed the plaintiff's complaint against the City. *Id*. at *8.

{¶ 98} First, the court rejected Crow's Takings Clause claim. The court concluded that the City did not violate the Takings Clause by passing the ordinance to remove the tires. After reciting authority pertaining to the traditional power of government to abate nuisances, the court noted that:

> In sum, the Plaintiff's property constituted a nuisance. He was given well over one year in which to abate that nuisance and informed that his failure to act would cause the Defendant to take cleanup action itself and to collect the amount expended from him. When the Plaintiff failed to act, the Defendant passed an ordinance, whereby its administrators were permitted to enter into a contract to abate the nuisance that existed on Plaintiff's property. Under those circumstances, and in accordance with the foregoing authority, there was no violation of the Takings Clause.

Id. at *6.

{¶ 99} Additionally, with respect to the due process claim, the district court stated that:

* * * [T]he Defendant is entitled to summary judgment on the Plaintiff's claim that he was deprived of property without due process of law, in violation of the Fourteenth Amendment. The Due Process Clause of the Fourteenth Amendment does not prohibit every deprivation of due process, only those which occur without due process of law. *See e. g., Harris v. City of Akron*, 20 F.3d 1396, 1401 (6th Cir.1994). It is axiomatic that "[t]he fundamental elements of procedural due process are notice and an opportunity to be heard." *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir.1992). *Accord In re Julien Co.*, 146 F.3d 420, 425 (6th Cir.1998). Herein, before he suffered any sort of deprivation of property, the Plaintiff was given notice and an opportunity to be heard. In particular, the October 10, 1994, nuisance abatement order informed him that he had the right to appeal that order. *In its Decision of March 6, 1999, this Court concluded that such a hearing would have afforded the Plaintiff the opportunity of presenting evidence and arguments and that the order would have been subject to a de novo review.* Doc. # 26 at 12-14. *The Plaintiff did not receive such a hearing, because he declined to take advantage of his right of appeal. Therefore, this Court concludes that the Plaintiff has not suffered a deprivation of property without due process of law. Accord, Samuels v. Meriwether*, 94 F.3d 1163, 1166–67 (8th Cir.1996) ("We have held that where a property owner is given written notice to abate a hazard on his or her property and has been given an opportunity to appear before the proper municipal body considering condemnation of the property, no due process violation occurs when

> the municipality abates the nuisance pursuant to the condemnation notice."). *Moreover, his failure to pursue his appellate rights would prevent this Court from adjudicating his due process claim.* In *Platt v. City of Dayton*, 1991 WL 186642 (6th Cir.1991), the Sixth Circuit reached such a conclusion in an analogous case. Therein, the plaintiff alleged, inter alia, that he had suffered a deprivation of property without due process of law, when the defendant condemned several structures that he owned, pursuant to its nuisance abatement program. The Sixth Circuit affirmed the grant of summary judgment in favor of the defendant on that claim, because the plaintiff had failed to challenge the condemnation order, in accordance with the procedures afforded by state law.

(Emphasis added.) *Crow*, S.D. Ohio No. C-3-96-010, 2000 WL 988246, at *6.

{¶ 100} The district court went on to also reject Crow's Equal Protection and Ex Post Facto claims. *Id.* at *7. However, since the case before us does not involve these types of claims, there is no reason to repeat that part of the discussion in *Crow*.

{¶ 101} I noted above that Vlcek was given the right to a quasi-judicial hearing before the Board, with the opportunity to present evidence and cross-examine witnesses. He also had the ability to appeal from that decision to the common pleas court, which would have had the power under R.C. 2506.01(A) to consider the entire record, including any new or additional evidence admitted under R.C. 2506.03. Like the plaintiff in *Crow*, Vlcek failed to pursue his rights after the hearing in November 2010, and failed to pursue any of his appeal rights (both administrative and court appeals) following his February 23, 2011 citations. I would, therefore, conclude, under *Crow*, that Vlcek is precluded, based on principles of res

judicata, from re-litigating whether his property was a nuisance, and is also precluded from contending that his property was taken without proper notice and an opportunity to be heard.

{¶ 102} I also note that the district court's decision in *Crow* was affirmed by the Sixth Circuit Court of Appeals pursuant to an unpublished opinion in *Crow v. City of Springfield*, 15 Fed. Appx. 219 (6th Cir.2001). Among other things, the Sixth Circuit Court of Appeals held that "[i]t is undisputed that Crow failed to take any action in regard to his right to appeal the abatement order, and he cannot now say that the notice provided inadequate instructions on how to appeal the order." *Id.* at 223. The Sixth Circuit also stated that "the district court correctly held that the question whether Crow's property constituted a public nuisance has been fully and finally litigated by Crow's failing to avail himself of a right of appeal to a hearing which would have provided a full opportunity to litigate that question." *Id.* at 224.

{¶ 103} Notably, my dissent is not based on a failure to exhaust administrative remedies, at least in the due process context. The issue is not whether Vlcek exhausted his state remedies; it is whether he was deprived of due process, and, is, therefore, entitled to pursue a Section 1983 claim. Accordingly, the case cited by the majority in ¶ 25-26, which discusses exhaustion of administrative remedies, is irrelevant. *See AMM Peric Property Invest., Inc. v. Cleveland*, 8th Dist. Cuyahoga No. 99848, 2014-Ohio-821 (concluding that a property owner's due process claim was not barred by the affirmative defense of exhaustion of administrative remedies). Furthermore, unlike *AMM Peric*, which concerned demolition of a building prior to notice being given to the property owner, Vlcek was given prior notice and an opportunity to be heard before removal. *See, id.* at ¶ 2. In addition, unlike *AMM Peric*, the case before us involves property that was not demolished and could have been returned to Vlcek, as it was after it had

been removed in August 2010. *Id.* at ¶ 1.[5]

{¶ 104} Since pre-deprivation procedures were provided, Vlcek had all the process to which he was due. However, courts have also held that "[t]o assert a federal claim under 42 U.S.C. § 1983 and the Fourteenth Amendment for deprivation of a purely economic interest without due process, a plaintiff must allege and prove the inadequacy of post-deprivation remedies." *Collins v. City of Cleveland*, N.D. Ohio No. 1:11CV2221, 2012 WL 5304092, *2 (Oct. 24, 2012), citing *1946 St. Clair Corp. v. City of Cleveland*, 49 Ohio St.3d 33, 36, 550 N.E.2d 456 (1990). *Accord State ex rel. Rohrs v. Germann*, 3d Dist. Henry No. 7-12-21, 2013-Ohio-2497, ¶ 63-64; *Edwards v. Madison Tp.*, 10th Dist. Franklin No. 97APE06-819 ,1997 WL 746415, *4 (Nov. 25, 1997); *Foster v. Wickliffe*, 175 Ohio App.3d 526, 2007-Ohio-7132, 888 N.E.2d 422, ¶ 86-87 (11th Dist.); *Cahill v. Lewisburg*, 79 Ohio App.3d 109, 118, 606 N.E.2d 1043 (12th Dist.1992); and *Leasor v. Kapszukiewicz*, 6th Dist. Lucas No. L-08-1004, 2008-Ohio-6176, ¶ 16-17. In *St. Clair*, the Supreme Court of Ohio held that:

> When the interest is purely economic, the Constitution demands only that the challenging party be given a meaningful opportunity to be heard. If the state provides adequate post-deprivation state tort remedies for unauthorized intentional property deprivations, the state has provided all the "process" required

[5] Vlcek's deposition, which was taken in August 2013, indicates that the vehicles in question were still located at the towing company. Vlcek Deposition, pp. 18, 19, and 20. Unlike the owner of the demolished building in *AMM Peric*, Vlcek could have obtained recovery of his property. This is significantly different from a situation in which a building has been demolished without prior notice to the owner. In fact, as has been discussed, Vclek had prior notice and an opportunity to be heard. Vlcek could also have filed a motion with respect to the 1997 settlement, and the common pleas court could have sanctioned the City's alleged failure to comply with the settlement. Again, Vlcek chose not to proceed with this avenue, and I would conclude, for reasons that will be discussed in the main text, that Vlcek waived his rights in this regard.

under the Fourteenth Amendment.

St. Clair at 36, citing *Parratt v. Taylor*, 451 U.S. 527, 543-544, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), and *Hudson v. Palmer*, 468 U.S. 517, 533, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). (Other citations omitted.).

{¶ 105} The Supreme Court of Ohio also held in *St. Clair* that "R.C. 2744.03, on its face, provides remedies to the appellant for its claims." *Id.* However, even if this were otherwise, additional potential state post-deprivation remedies in the case before us would have included the right to appeal from the Board's decision and remedies that I discuss below in connection with the claim for just compensation. Furthermore, whether or not Vlcek's vehicles were seized prior to the expiration of time for filing a notice of appeal to the common pleas court is irrelevant; Vlcek never attempted to appeal, and he has not provided any authority indicating that pursuit of the administrative process would have been inadequate. Notably, although the majority relies on *AMM Peric* and contends that the City's ordinances do not provide the Board with the ability to compensate Vlcek for alleged damages to his vehicles, the majority fails to address why the remedies outlined in *St. Clair* and in the discussion below would not have been adequate. *See* Majority Opinion, ¶ 25-26. Finally, as was noted above, Vlcek failed to pursue the remedy of providing the City with a list of the alleged damage to his cars so that an insurance claim could be processed.

{¶ 106} As a final matter in this regard, I also note that under a Takings Clause analysis, courts have held that a plaintiff must exhaust state remedies. *See Home Builders Assn. of Dayton & Miami Valley v. Lebanon*, 167 Ohio App.3d 247, 2006-Ohio-595, 854 N.E.2d 1097, ¶ 42 (12th Dist.), citing *Williamson Cty. Regional Planning Comm. v. Hamilton Bank of Johnson*

City, 473 U.S. 172, 194, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). (Other citations omitted.) As a result, to the extent Vlcek requests "just compensation" under the Takings Clause, this claim would be precluded as well.

II. The Prior Court Action and Waiver

{¶ 107} Even if the above facts and discussion indicated otherwise, I conclude that Vlcek waived his rights, based on his failure to resort to another avenue that could have been used, i.e., the prior Montgomery County Common Pleas Court action between Vlcek and the City, in which the court had reserved jurisdiction to enforce the settlement. "Waiver is a voluntary relinquishment of a known right and is generally applicable to all personal rights and privileges, whether contractual, statutory, or constitutional." *Arnett v. Bardonaro*, 2d Dist. Montgomery No. 25371, 2013-Ohio-1065, ¶ 42, citing *Glidden Co. v. Lumbermans Mut. Casualty Co.*, 112 Ohio St.3d 470, 2006-Ohio-6553, 861 N.E.2d 109, ¶ 49.

{¶ 108} In view of the common pleas court's retained jurisdiction, Vlcek could have petitioned for enforcement of the settlement agreement, at least with respect to the 1971 Camaro and the 1988 Escort, which he claims to have possessed prior to the 1997 decree. Although the 1997 settlement may not have applied to the vehicle that Vlcek acquired in 2001, Vlcek could have attempted to protect his rights to his other property. However, he made no attempt to do so. Vlcek, therefore, cannot now contend that he was deprived of his rights. He had another avenue available for asserting his rights and could have filed a motion to enforce the settlement. However, he chose not to avail himself of this separate remedy.

{¶ 109} Finally, I would conclude, under the waiver doctrine, that Vlcek waived his search and seizure and just compensation claims as well, since he had an existing vehicle for

asserting any argument that he wished to make in connection with the enforcement actions against his vehicles.

III. Alleged Search and Seizure Claims

{¶ 110} In its original decision, which was issued on January 7, 2014, the trial court denied both sides' motions for summary judgment on qualified immunity with respect to the claims for the right to be free from unlawful search and seizure. In this regard, the trial court concluded that genuine issues of material fact existed concerning the reasonableness of Defendants' actions in removing the vehicles, "with consideration of a careful balancing of governmental and private interests." Doc. #88, p. 37. The trial court did not discuss what facts it weighed, nor did it indicate what facts presented genuine issues of material fact. The court also did not specifically discuss the factual issues in its amended decision. However, even if the court had discussed these issues in the amended decision, we could not consider them.

{¶ 111} Following a defense motion for reconsideration, the trial court issued an amended decision on February 3, 2014. To the extent the trial court's prior decision was a final appealable order (which it was with respect to the immunity decisions under 42 U.S.C. 1983 and Ohio's statutory immunity), the amended decision is a nullity, because the trial court did not have the ability to reconsider its decision on those points. *See, e.g., Green Tree Servicing, L.L.C. v. Kramer*, 193 Ohio App.3d 140, 2011-Ohio-1408, 951 N.E.2d 146, ¶ 34 (2d Dist.) (holding that trial courts may not reconsider final appealable orders, and orders of reconsideration are nullities); and *Mandusky v. Woodridge Local School Dist.*, 9th Dist. Summit No. 24787, 2009-Ohio-6943, ¶ 9-10 (holding that trial court orders denying immunity are final appealable orders and are not subject to motions for reconsideration. Requests for reconsideration,

therefore, are nullities). The majority opinion does not address this point.

{¶ 112} Accordingly, in addressing the search and seizure issue, I will consider only the trial court's original order. As I said, this order held that, for Fourth Amendment purposes, there are genuine issues of fact concerning the reasonableness of the removal of the vehicles.

{¶ 113} In their brief, Williams and DuBose argue that in deciding whether a seizure violates the Fourth Amendment, the seizure must be examined for its overall reasonableness. In this regard, they contend that the seizure was reasonable in light of: (1) the preclusive finding that the property was a public nuisance; (2) the ability of local governments to summarily abate nuisances without warrants; and (3) the fact that Vlcek was given notice of the seizure and an opportunity to protest the decision before his vehicles were seized. Finally, Defendants argue that Vlcek exposed his unlicensed vehicles to the public, and had no reasonable expectation of privacy in what he had knowingly exposed to the public. The majority opinion does not address these points, other than to note in the context of the due process discussion, that an abatement case cited by Defendants does not extend to seizure of property to abate a nuisance. Majority Opinion at ¶ 27.

{¶ 114} "The government has a legitimate interest in maintaining the aesthetics of a community and in protecting real estate from impairment of value." *Mayfield Hts. v. Cardarelli*, 63 Ohio App.3d 812, 816, 580 N.E.2d 457 (8th Dist.1989), citing *Hudson v. Albrecht, Inc.*, 9 Ohio St.3d 69, 458 N.E.2d 852 (1984). Thus, a city may prohibit outside storage under its police power " 'where such outside storage could become a nuisance or interfere with the character and integrity of the single-family residential neighborhood * * *.' "

Id., quoting *Pepper Pike v. Landskroner*, 53 Ohio App.2d 63, 371 N.E.2d 579 (1977).

{¶ 115} "Under common law, the State of Ohio has the authority to abate public nuisances. This authority is extended to Ohio municipalities by the Home Rule provision of the Ohio Constitution." *McClanahan v. City of Cleveland*, 8th Dist. Cuyahoga No. 40633, 1980 WL 354634, *1 (Apr. 3, 1980), citing *Solly v. City of Toledo*, 7 Ohio St.2d 16, 218 N.E.2d 463 (1966).

{¶ 116} In *Solly*, the Supreme Court of Ohio stated that "[a] charter city may enact legislation, not in conflict with general laws, authorizing the summary abatement of public nuisances and the destruction of property used in maintaining such nuisances when reasonably necessary to effectuate their abatement." *Solly* at paragraph one of the syllabus. The Supreme Court further observed in *Solly* that:

> Anyone who destroys or injures private property in abating what legislative or administrative officials have determined to be a public nuisance does so at his peril, where there has been neither a previous judicial determination that such supposed nuisance is a public nuisance nor even an opportunity provided to the owner for an administrative hearing (with a judicial review thereof) on the question as to whether there is a public nuisance.

Solly at paragraph three of the syllabus.

{¶ 117} Consistent with the authority to abate nuisances, Section 1331.14 (g) and (h) of the Riverside Codified Ordinances provide instructions to property owners and enforcement officers regarding vehicles that have been declared public nuisances. If the owner fails to remove an inoperable vehicle (the definition of which includes unlicensed vehicles), the

City's enforcement officer is permitted to remove the offending vehicle and recover the costs from the owner.

{¶ 118} After *Solly*, courts have permitted buildings to be razed (which is certainly a "seizure" of the property) where the legislative authority has merely provided the owner with a constitutionally recognized manner of notice, such as posting a notice of violations on the door of the property and giving the owner an opportunity to be heard. This is without any requirement that the property owner actually see the notice. *See Markee v. Village of New Boston*, 4th Dist. Scioto No. 92 CA 2043, 1992 WL 353850, *4 (Nov. 19, 1992). The important consideration, as previously stressed, is that the affected party have notice and an opportunity to be heard.

{¶ 119} As was noted, Section 1331.14 of the Riverside Codified Ordinances indicates that dismantled or inoperable vehicles that remain uncovered or outside of wholly enclosed buildings for more than 72 hours are declared nuisances per se. Upon issuance of notices of violation and a failure of the owner to remedy or appeal the violation, the City is entitled to remove the offending property. *Id.*

{¶ 120} "A vehicle may be impounded when 'it is evidence in a criminal case, used to commit a crime, obtained with funds derived from criminal activities, or unlawfully parked or obstructing traffic; or if the occupant of the vehicle is arrested; or *when impoundment is otherwise authorized by statute or municipal ordinance*.' " (Emphasis added.) *State v. Huddleston*, 173 Ohio App.3d 17, 2007-Ohio-4455, 877 N.E.2d 354, ¶ 14 (10th Dist.), quoting *State v. Taylor*, 114 Ohio App.3d 416, 422, 683 N.E.2d 367 (2d Dist.1996). (Other citations omitted.) *See, also,* R.C. 4513.61 (providing at the time of the events in question that "[t]he *

* * chief of police of a municipal corporation * * * may order into storage any motor vehicle, including an abandoned junk motor vehicle as defined in section 4513.63 of the Revised Code, that has come into the possession of the * * * chief of police * * * as a result of the performance of the * * *chief's * * * duties * * *. * * * The * * *chief of police shall designate the place of storage of any motor vehicle so ordered removed.")[6]

{¶ 121} I have previously concluded that the City did not violate appropriate due process requirements, since Vlcek received notice and an opportunity to be heard, but chose not to avail himself of his right to judicial appeal, or in the case of the March 2011 removal, of either his right to an administrative hearing or his right to judicial review. Therefore, Vlcek is now precluded from claiming that his vehicles were not nuisances and were improperly impounded.

{¶ 122} In arguing that they did not violate the Fourth Amendment, Defendants note that Vlcek did not have a reasonable expectation of privacy because the vehicles were exposed to public view. They also cite *Beganskas v. Town of Babylon*, E.D. N.Y. Nos. 03-CV-0287, 04-CV-5693, 2006 WL 2689611 (Sept. 19, 2006), for the proposition that governments have the power to summarily abate nuisances without a warrant. Appellants' Brief, pp. 17-18. During its discussion of *due process*, the majority states that:

> This reliance [of Defendants on *Beganskas*] is misplaced. The *Beganskas* holding is limited to the ability of a local enforcement officer to "search" private property for violations of local ordinances, and does not extend to the "seizure" of

[6] R.C. 4513.61 was amended during and shortly after the events at issue in this litigation, but the amendments did not substantively change the statute. *See* Am. Sub. H.B. 114, 2011 Ohio Laws File 7, and Am. Sub. H.B. 153, 2011 Ohio Laws File 28.

> personal property to abate a nuisance. *Id.* The nexus of Vlcek's fourth amendment claim is not based on the official's search of his property; it is the seizure of his personal property that is the basis of his damage claim.

Majority Opinion at ¶ 27.

{¶ 123} In *Beganskas*, the plaintiff sued the defendants, claiming they had violated her constitutional rights when they tried to enforce town code provisions that governed storage of waste on private property. *Beganskas* at *1. After a magistrate recommended that summary judgment be granted to the defendants, the plaintiff filed objections with the district court. *Id*. One such objection was to the magistrate's finding that "the visit of Andrew Golddapper, a Suffolk County Department of Health Services employee, to plaintiff's house in December 2002 did not constitute a warrantless search of her property." *Id.* at *2.

{¶ 124} In rejecting this objection, the district court observed that "[a] Fourth Amendment search occurs when the 'government violates a subjective expectation of privacy that society recognizes as reasonable.' " *Id.*, quoting *Kyllo v. United States*, 533 U.S. 27, 33, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). (Other citation omitted.) The court then stressed that:

> Society does not regard as reasonable a person's subjective expectation of privacy to that which he knowingly exposes to the public. *See Katz*, 389 U.S. [347,] at 351[, 88 S.Ct. 507, 19 L.Ed.2d 576]. For instance, the "route which any visitor to a residence would use," such as along a driveway or walkway, is not private in the Fourth Amendment sense. *See United States v. Reyes*, 283 F.3d 446, 465 (2d Cir.2002) (quoting 1 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 2.3(e), at 499 (3d ed.1996) (footnotes

omitted)). A mere "visual observation" of an object already exposed to public view is no search at all. *Palmieri v. Lynch*, 392 F.3d 73, 81 (2d Cir.2004). *Beganskas*, E.D. N.Y. Nos. 03-CV-0287, 04-CV-5693, 2006 WL 2689611, at *2.

{¶ 125} I agree with the majority that the focus of this case is not an unconstitutional search. Specifically, Vlcek's vehicles were exposed to public view and he did not have a reasonable expectation of privacy.

{¶ 126} However, if the Fourth Amendment concern is with the fact that the vehicles were towed, i.e., seized, the Defendants' actions were permitted because they had provided Vlcek with notice and an opportunity to be heard, and they were permitted to impound the vehicle pursuant to Section 1331.14(h) of the Riverside Ordinances. *Huddleston*, 173 Ohio App.3d 17, 2007-Ohio-4455, 877 N.E.2d 354, at ¶ 14. *See, also, Embassy Realty Investments, Inc. v. City of Cleveland*, 572 Fed.Appx. 339, 345 (6th Cir.2014) (noting that "a warrantless entry to abate a nuisance after the entry of remedial orders does not violate the Fourth Amendment provided such entry does not invade a constitutionally-protected privacy interest.")

{¶ 127} In *Embassy Realty*, the Sixth Circuit Court of Appeals rejected the plaintiffs' assertion that the city had violated the Fourth Amendment by entering their property and seizing it without a warrant. *Id.* at 345. The property in question was a building that was demolished. *Id.* at 341-342. The Sixth Circuit Court of Appeals found the warrantless entry reasonable because the plaintiffs had been given adequate due process during the condemnation proceedings. *Id.* at 345. In the course of its discussion, the court distinguished our prior decision in *Englewood v. Turner*, 178 Ohio App.3d 179, 2008-Ohio-4637, 897 N.E.2d 213 (2d Dist.), which had found that the plaintiff did not have an opportunity to be heard at an

administrative level prior to demolition such that she was required to exhaust her administrative remedies. *Embassy Realty* at 346. In this regard, the Sixth Circuit Court of Appeals stated that:

> Unlike *Turner*, Plaintiffs received notice that the City intended to condemn the Property, rather than abate the nuisance, an administrative hearing, and the opportunity for judicial review. The instant case is more analogous to *Davet*, 456 F.3d [549,] at 552 [6th Cir.2006], where this court concluded the district court properly gave preclusive effect to the unappealed determination of the state administrative body that the property constituted a nuisance.

Embassy Realty at 346.

{¶ 128} In *Davet v. City of Cleveland*, 456 F.3d 549 (6th Cir. 2006), the Sixth Circuit Court of Appeals made the following observations about a plaintiff's claim against the City of Cleveland, which had demolished the plaintiff's building:

> In challenging the court's summary disposition of his claims, Davet argues that it incorrectly concluded that he had failed to exhaust his administrative remedies. But that is not what the court did. Because Davet did not appeal the Board's ruling on the validity of the condemnation order, the district court reasoned that the order became final and precluded further argument in a collateral proceeding about whether the structure posed a "danger to the community[ ] and did not constitute a public nuisance subject to condemnation." D. Ct. Op. at 10-11.
>
> Davet as an initial matter does not challenge that reasoning, and it is not clear how he could. "[W]hen a state agency acting in a judicial capacity resolves

disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 799, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986) (internal quotation marks, ellipses and citation omitted). Under Ohio law, "*res judicata*, whether claim preclusion or issue preclusion, applies to administrative proceedings that are of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceeding."_ *Grava v. Parkman Twp. Bd. of Zoning Appeals*, 73 Ohio St.3d 379, 653 N.E.2d 226, 228 (1995) (internal quotation marks omitted); see *Crow v. City of Springfield*, 15 Fed.Appx. 219 (6th Cir.2001) ("While it is true that as a general principle, parties may litigate constitutional deprivation claims in federal court regardless of whether they took advantage of a State court or State administrative procedure, ... that is not the principle being applied in this case.... The finding by an administrative body that Crow's property constituted a public nuisance is an established legal fact, which was not appealed. Thus, the district court gave the finding preclusive effect as the finding was an unreviewed final decision of a State administrative body ...."); *Flis v. Voinovich*, No. 96-4369, 1998 WL 552865, at *4 (6th Cir. Aug.13, 1998) (per curiam). Once the district court established the validity of the condemnation order and the preclusive effect of the Board's ruling on it, the court permissibly addressed and rejected each of Davet's claims as a matter of law: (1) The procedural due process claim failed because the Board had given him ample

notice and an opportunity to be heard; (2) the substantive due process claim failed because he could not establish that the city's actions (taken pursuant to a valid condemnation order and in accordance with the procedures mandated by city and state law) "shock[ed] the conscience" or were "arbitrary and capricious," D. Ct. Op. at 12-13 (internal quotation marks omitted); (3) the equal protection claim failed because he could not establish that demolishing a dangerous building as to this "class of one" (and dilapidated building of one) was an "irrational or arbitrary" act, *id.* at 14-15 (internal quotation marks omitted); and (4) the takings claim failed because "[d]emolition, compliant with local law and procedure, in order to enforce building codes or abate a public nuisance does not constitute a taking as contemplated by the federal and Ohio Constitutions," *id.* at 16; *see Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1022-24, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) ("[L]and-use regulation does not effect a taking if it substantially advances legitimate state interests ....") (internal quotation marks and brackets omitted); *id*. at 1030, 112 S.Ct. 2886 ("[T]he Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by [ ] existing rules or understandings.") (internal quotation marks omitted); *N. Ohio Sign Contractors Ass'n v. City of Lakewood*, 32 Ohio St.3d 316, 513 N.E.2d 324, 327 (1987) ("[T]he constitutional right of the individual to use private property has always been subservient to the public welfare ... [and] such use is subject to the legitimate exercise of local police power ...."). Because the validity of the condemnation order and the condition of the building were the

> crucial premises underlying each of these conclusions and because the court did not err in giving the Board's decision on those issues preclusive effect, the court properly granted summary judgment to the defendants on Davet's claims.

Davet, 456 F.3d at 552-53.

{¶ 129} Based on the above authority, I conclude that Vlcek is bound by the preclusive effect of the determination that his property is a nuisance, and that he cannot now argue that the warrantless entry to dispose of the conditions causing the nuisance violated his constitutional rights.

{¶ 130} As an additional matter, even if the entry had violated the Fourth Amendment, "[p]ublic officials * * * who perform discretionary functions are entitled to be shielded from liability for civil damages in a 1983 claim as long as their conduct does not violate clearly established federal rights of which a reasonable person would have known." *Cook*, 103 Ohio App.3d at 85, 658 N.E.2d 814, citing *Harlow*, 457 U.S. at 818, 102 S.Ct. 2727, 73 L.Ed.2d 396. As I noted, "[d]efendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley*, 475 U.S. at 341, 106 S.Ct. 1092, 89 L.Ed.2d 271.

{¶ 131} In view of the fact that the Riverside Codified Ordinances permitted the removal of the vehicles upon an owner's failure to do so, I would conclude that officers of reasonable competence could have relied on this authority. I would not expect zoning officials to be constitutional law experts, nor would I expect them to conclude that the City's ordinances were inconsistent with constitutional requirements, particularly in light of the above discussion

regarding due process, Vlcek's failure to pursue his rights, and the police power to abate nuisances and impound vehicles. Accordingly, I would find that Williams and DuBose are entitled to qualified immunity with respect to any alleged illegal search and seizure claims.

{¶ 132} As a final matter in this regard, I note that the majority relies on the failure of the first set of violation notices to contain a statement of the right to file an administrative appeal, and the fact that the second set of violation notices inaccurately listed the time for filing a notice of administrative appeal. *See* Majority Opinion, ¶ 29. However, this argument fails to address the fact that the Supreme Court of the United States has rejected a general rule of notice of procedures for protecting one's property unless the procedures "are *arcane and are not set forth in documents accessible to the public* * * *." (Emphasis added.) *Perkins*, 525 U.S. at 242, 119 S.Ct. 678, 142 L.Ed.2d 636, discussing *Memphis Light*, 436 U.S. at 13-15, 98 S.Ct. 1554, 56 L.Ed.2d 30. As I have stressed, the requirements for filing administrative appeals were set forth in the Riverside Ordinances, and the City did not have to inform parties of the requirements for filing administrative appeals, since they were readily available to the public. This is an argument that the majority never addresses.

{¶ 133} The majority also notes that the remaining violation notice, which was issued in September 2011, does not contain a notice of the right to an administrative appeal, despite amendments to the ordinances that require notice to be provided. Majority Opinion, ¶ 29. This does not relate to any of the claims regarding the vehicles, but relates to the claim for malicious prosecution, which I discuss below.

IV. The Takings Claim

{¶ 134} I have already discussed the fact that plaintiffs are required to exhaust

administrative remedies in connection with claims brought under the just compensation clause of the Fifth Amendment. *See Home Builders Assn. of Dayton*, 167 Ohio App.3d 247, 2006-Ohio-595, 854 N.E.2d 1097, at ¶ 42, citing *Williamson Cty.*, 473 U.S. at 194, 105 S.Ct. 3108, 87 L.Ed.2d 126.

{¶ 135} In *Williamson Cty*., the United States Supreme Court rejected a property owner's claim for just compensation on two grounds. The first ground was that a final decision had not yet been made on how the property owner would be permitted to develop its property. *Id.* at 190-191. The Supreme Court further noted that:

> A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the State has provided for doing so. The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc*., 452 U.S., at 297, n. 40, 101 S.Ct., at 2371, n. 40. Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a " 'reasonable, certain and adequate provision for obtaining compensation' " exist at the time of the taking. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-125, 95 S.Ct. 335, 349, 42 L.Ed.2d 320 (1974) (quoting *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 659, 10 S.Ct. 965, 971, 34 L.Ed. 295 (1890)). [Other citations omitted.] If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just

> compensation," then the property owner "has no claim against the Government" for a taking. [*Ruckelshaus v.*] *Monsanto*, 467 U.S.[986], at 1013, 1018, n. 21, 104 S.Ct., at 2878, 2881, n. 21. Thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491. *Monsanto*, 467 U.S., at 1016-1020, 104 S.Ct., at 2880-2882. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

(Footnote omitted.) *Williamson Cty.* at 194-95.

{¶ 136} Adequate state remedies existed in the case before us, on several grounds. As was noted, Vlcek could have sought the return of his vehicles in the form of his administrative appeal under R.C. 2506.01. He could also have filed a motion in the existing common pleas court case. Additionally, he could have filed a state law claim under R.C. 2744.03.

{¶ 137} In *Turner*, we noted that " '[a]ny unreasonable or arbitrary exercise of the state's police power may rise to the level of a compensable taking under Section 19, Article I, Ohio Constitution.' " *Turner*, 178 Ohio App.3d 179, 2008-Ohio-4637, 897 N.E.2d 213, at ¶ 29, quoting *State v. Penrod*, 81 Ohio App.3d 654, 663-664, 611 N.E.2d 996 (4th Dist.1992). (Other citation omitted.) We concluded in *Turner* that the plaintiff was entitled to present a takings claim, based on the demolition of a building she owned, because she had never had "an opportunity to be heard at an administrative level with a judicial review of whether a public

nuisance existed." *Id.* at ¶ 54.

{¶ 138} In contrast, in the case before us, Vlcek had an opportunity to be heard at the administrative level, and also had an opportunity for judicial review of whether a public nuisance existed. As a result, he cannot now assert a claim for just compensation under Section 19, Article I of the Ohio Constitution or the Fifth Amendment to the U.S. Constitution. Vlcek would also be precluded from doing so due to the fact that his property's status as a nuisance may not now be challenged.

{¶ 139} Vlcek could also potentially have filed an action in conversion against the City employees or a mandamus action against the City for return of his property. *Compare Garrett v. City of Cleveland*, 8th Dist. Cuyahoga No. 84872, 2005-Ohio-1853, ¶ 2 (reversing summary judgment granted to City of Cleveland on plaintiff's claims, including conversion, based on City's demolition of house owned by plaintiff); *Davis v. Canton*, 5th Dist. Stark No. 2013CA00080, 2014-Ohio-195 (conversion action brought against prosecutor for unlawful retention of seized property); and *State ex rel. Hensley v. Columbus*, 10th Dist. Franklin No. 10AP-840, 2011-Ohio-3311, ¶ 19-24 (discussing mandamus remedies). As an additional remedy, Vlcek could have filed an action to enjoin enforcement of the ordinance. *See, e.g.*, *Foster*, 175 Ohio App.3d 526, 2007-Ohio-7132, 888 N.E.2d 422, at ¶ 87.

{¶ 140} However, even if this were not the case, I would conclude, for the reasons previously discussed in connection with due process and waiver, that the trial court erred in denying immunity to Williams and DuBose on Vlcek's Fifth Amendment claim for just compensation.

IV. Malicious Prosecution Claim

{¶ 141} The final issue addressed in the majority opinion is the denial of statutory immunity to Williams and DuBose in connection with Vlcek's malicious prosecution claim. This is a state law claim. "The tort of malicious prosecution in a criminal setting requires proof of three essential elements: '(1) malice in instituting or continuing the prosecution, (2) lack of probable cause, and (3) termination of prosecution in favor of the accused.' " *Froehlich v. Ohio Dept. Of Mental Health*, 114 Ohio St.3d 286, 2007-Ohio-4161, 871 N.E.2d 1159, ¶ 10, quoting *Trussell v. Gen. Motors Corp.*, 53 Ohio St.3d 142, 146, 559 N.E.2d 732 (1990).

{¶ 142} In the context of statutory immunity under Ohio law, R.C. 2744.03(A)(6) provides that employees of a political subdivision are immune from liability unless one of three exceptions applies. The exception involved in this case applies when "[t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner * * *." R.C. 2744.03(A)(6)(b).

{¶ 143} "Malice is the state of mind under which a person intentionally does a wrongful act without a reasonable lawful excuse and with the intent to inflict injury or under circumstances from which the law will infer an evil inent." (Citations omitted.) *Criss v. Springfield Tp.*, 56 Ohio St.3d 82, 84-85, 564 N.E.2d 440 (1990). Bad faith, " 'although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.' " *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 276, 452 N.E.2d 1315 (1983), quoting *Slater v. Motorists Mut. Ins. Co.*, 174 Ohio St. 148, 187 N.E.2d 45

(1962), paragraph two of the syllabus.

{¶ 144} Wanton misconduct and reckless misconduct "describe different and distinct degrees of care and are not interchangeable." *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, paragraph one of the syllabus. Explaining this distinction, the Supreme Court of Ohio stated in *Anderson* that:

> * * * Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result. * * *
>
> * * * Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct. * * *

(Citations omitted.) *Anderson* at paragraphs three and four of the syllabus.

{¶ 145} Again, referring only to the trial court's initial decision of January 7, 2014, the court concluded in this decision that genuine issues of material fact exist on the malicious prosecution claim. The court's decision was based on the historical facts between the parties, including the prior settlement, "about which DuBose and Williams knew or should have known," and the fact that City Ordinances gave the City Attorney the ability to prosecute offenders. Doc. #88, p. 48.

{¶ 146} The facts pertinent to this claim indicate that in September 2011, Williams signed a notice of outside storage and debris violations that was sent to Vlcek. Williams Deposition, p. 46, and Exhibit 31 attached to the Williams Deposition. The notice and

correction order was dated September 7, 2011, and indicated that it was being issued in accordance with Section 1331.12(D)(6) of the Riverside Codified Ordinances. The notice told Vlcek to remove all outside storage and debris, and ordered Vlcek to bring the exterior of his property into compliance within five days. *Id.* at Ex. 31.

{¶ 147} The form was stored in a computer database, and did not contain language regarding a right of appeal. Williams Deposition, pp. 46 and 48-49. Williams did not draft the form; it was the form he inherited when he took over his position in October 2008, and it was the City's practice to use that form. *Id.* at pp. 6 and 48-49. Williams was familiar with the fact that the City Code provided ten days for the right of appeal, but indicated that he did not notice at the time that the form did not discuss a right to appeal. *Id.* at pp. 49-52. Section 1331.06(b) of the Riverside Codified Ordinances allowed Vlcek to file an appeal within 10 days of the date of the violation notice. There is no indication that Vlcek attempted to appeal.

{¶ 148} Subsequently, on October 17, 2011, a complaint was filed in the Municipal Court for Montgomery County, Ohio, charging Vlcek with having violated Section 1331.12(D)(6) of the Riverside Code, which prohibited outside storage of any kind except as otherwise permitted in city regulations. Ex. 33 attached to the Williams Deposition. The complaint was signed by DuBose and was notarized by Williams. Williams Deposition, p. 46. DuBose indicated that she did not talk to anyone other than Williams before signing the complaint, and Williams did not recall any specifics about consulting with the City's attorney before the complaint was filed. DuBose Deposition, p. 22, and Williams Deposition, pp. 48 and 52-53.

{¶ 149} At the time, Section 1331.12 of the Riverside Ordinances provided that:

> (d) Exterior Property and Structure Exteriors. All buildings and the exterior of all premises shall be properly maintained to achieve a presentable appearance and to avoid blighting effects and hazardous conditions.
>
> * * *
>
> (6) Storage. All firewood shall be stacked in a compact and orderly fashion within the side or rear yard and shall be limited to amounts intended for use by the property occupant in the current or upcoming heating season. Such storage shall be subject to all fire regulations. Except as provided for here and in other regulations of the City, all other outdoor storage of any kind shall be prohibited.

Ex. 13 attached to the Chodkowski Deposition; Doc. #64, Appendix of Exhibits, Ex. 14, pp. 29-30.

{¶ 150} Vlcek was originally found guilty of the offense and the municipal court entered a finding to that effect. Prior to sentencing, however, Vlcek's counsel moved for acquittal, and the trial court entered a not guilty finding, based on the court's opinion that Vlcek did not receive proper notice of his administrative appeal in connection with the criminal charge. Williams Deposition, pp. 50-51, and Ex. 38 attached to the Williams Deposition.

{¶ 151} In support of their contention that the trial court erred in denying statutory immunity, Williams and DuBose argue that the municipal judge first found Vlcek guilty as charged, and only subsequently changed his mind based on a procedural technicality. Williams and DuBose, therefore, argue that they had probable cause for filing the criminal complaint. They also point out that the trial court's denial of summary judgment on the statutory issue of

qualified immunity was based on their failure to consult with the city's attorney before initiating prosecution. In this regard, they argue that if the city's attorney did not believe probable cause existed, the attorney would not have proceeded with the prosecution.

{¶ 152} The majority opinion agrees with the trial court that Williams and DuBose should be denied summary judgment on statutory immunity. In particular, the majority opinion focuses on jury questions as to the Defendants' state of mind when they chose to pursue criminal proceedings over two other possible avenues: (1) invoking the court's jurisdiction to pursue the 1997 settlement agreement; or (2) pursuing the administrative hearing process to allow Vlcek to appeal to the Board. Majority Opinion at ¶ 43. The majority also focuses on the Defendants' choice not to use the city attorney to pursue criminal charges, when their "statutory authority directed" them to do so; the Defendants' "bad faith" in preparing a criminal complaint without specifying any factual basis; and the Defendants' "course of conduct in processing the criminal complaint" with "such reckless discharge of their duties that they knew in all probability Vlcek would suffer a loss from their actions." *Id.*

{¶ 153} As a preliminary point, I believe that requiring local officials to choose an administrative process rather than criminal prosecution for violations – or face malicious prosecution claims – places an impossible burden on their ability to perform their jobs and impermissibly interferes with their discretion.

{¶ 154} As an additional matter, the pursuit of the administrative process is at the option of the appellant (in this case, Vlcek), not the City. Williams Deposition, pp. 40-41. Under Section 1331.06 of the Riverside Ordinances, once a notice of violation is sent, the recipient can ask for a hearing before the Property Maintenance Appeals Board. However, if a

hearing is not requested and the violation order is not complied with, "the Enforcement Officer *may* request the City Attorney to institute an appropriate action or proceeding at law to exact the penalty provided in Section 1331.99, and in addition thereto, may ask the City Attorney to proceed at law or equity against the person responsible for the violation for the purpose of ordering him/her to abate such nuisance." (Emphasis added.) Section 1331.07 of the Riverside Codified Ordinances.

{¶ 155} In addition to these ordinances, the city manager, Bryan Chodkowski, issued policies on April 4, 2011, which indicated that in situations where an abatement order has been sent to a property with a code violation and the owner fails to bring the property into compliance with the applicable code violation, "the *Planning and Zoning Administrator* shall either cause the identified code violation(s) to be abated pursuant to City policy or *file the necessary paperwork with the Municipal Court of Montgomery County, Eastern Division, for criminal prosecution*." Chodkowski Deposition, p. 62, and Ex. 30 attached to the Chodkowski Deposition, p. 3; Ex. 30 attached to the Williams Deposition, p. 3. (Emphasis added.) According to Chodkowski, a prior unwritten policy had been in effect and was substantially the same, with the only difference being that prior to the written policy, Riverside Police Department personnel were also assigned to identify issues of outdoor storage of junk and debris. Chodkowski Deposition, pp. 63-64. Under the written policy, the code enforcement officer would be responsible for inspection and enforcement of property maintenance codes not assigned to the police department (a distinction that is irrelevant for purposes of the case before us).

{¶ 156} In this regard, I also stress that Williams, the party responsible for instituting the complaint in municipal court, did not say that he failed to consult with the City's

attorney. Instead, his testimony was as follows:

> Q. Okay. But you don't recall consulting with the city's attorney at all.
>
> A. I don't say I don't recall consulting with her [the attorney] at all, I just don't recall any specifics * * *.

Williams Deposition, p. 48.

{¶ 157} Thus, to say that Williams failed to consult with the City's attorney is an incorrect construction of the testimony. It is true that DuBose consulted only with Williams before signing the complaint, but she was a low-level employee, and under the policy adopted in April 2011, Williams was the party responsible for filing the paperwork to institute criminal proceedings. Furthermore, even if I assume that Williams failed to consult with the City's attorney, I do not find evidence of malice, bad faith, or wanton or reckless conduct.

{¶ 158} The point is that; (1) the ordinance is permissive, indicating that the enforcement officer "may" ask the city attorney to institute proceedings; there is no prohibition against the officer, himself or herself, instituting proceedings (just as police officers can, and do, file complaints in municipal courts); (2) there is no requirement in the ordinance that the zoning officer consult with an attorney before filing in court; (3) the City's written policy at the time the complaint was filed was that the zoning administrator (in this case, Williams) would institute criminal proceedings; and (4) there was no evidence that Williams did not, in fact, consult with the City attorney; Williams simply could not recall specifics, nor could he recall whether he did, in fact, consult. In view of these facts, I attach no significance to the fact that the City's attorney did not either sign the complaint or "initiate" the prosecution. One would ordinarily expect that a criminal complaint would be signed by the party who issued a notice of violation or was

directly involved.

{¶ 159} With respect to the majority's assumption that the municipal court complaint was filed in bad faith because no factual basis was specified, I also see no evidence of that. The notice of violation states that the violation is for "Outside Storage and Debris." Williams Deposition Ex. 31, p. 1. Two photographs were also attached to the notice of violation, which would also have given Vlcek specific information about the factual basis for the complaint. *Id.*; DuBose Deposition, p. 21.

{¶ 160} Finally, the majority opinion refers to the course of conduct of Williams and DuBose in "processing the criminal complaint" with "such reckless discharge of their duties." Majority Opinion, ¶ 43. No facts are specified in this context, and I fail to see evidence of reckless disregard. Williams obtained a violation form that was already in the City's computer database and filled it out. He did not create the form, but inherited it when he took his position as zoning administrator in 2008. As was noted, Williams indicated that he had later realized that the form lacked a statement about an appeal before the Board, but he did not realize that at the time. If anything, this could have been evidence of negligence,[7] but I see no evidence of "conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." *Anderson*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, paragraph four of the syllabus.

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[7] I have already determined that the City was not required to advise Vlcek of his appeal rights, since they were not arcane and were published and readily accessible to citizens. *Perkins*, 525 U.S. at 242, 119 S.Ct. 678, 142 L.Ed.2d 636. If notice was not required for purposes of due process, I fail to see how Williams' actions could even be considered negligent.

{¶ 161} The testimony about the filing of the complaint was minimal, and it is fair to say that both DuBose and Williams had little specific recollection about the events. In this regard, when Williams was asked if he and DuBose discussed the complaint when it was filed, he said "I'm sure we did, We would usually discuss it before we went to court." Williams' Deposition, p. 46.

{¶ 162} DuBose generally had little recollection about most events connected to this case, because she does many citations. With respect to Vlcek's notice of violation, DuBose stated that she was familiar with the form, but was not familiar with the information and the date. DuBose Deposition, p. 20. DuBose also said she did not recall taking the pictures attached to the notice of violation. *Id.* at p. 21. She stated that she talked to Williams about filing the complaint, but no specifics were elicited about their discussion, and there is no indication in the record that their discussion was anything other than routine. *Id*. at pp. 22-23. After DuBose was asked about filing the complaint, the following exchange occurred:

> Q. Do you have any other recollections about anything that was handled at Mr. Vlcek's property other than what you have told us today?
>
> A. No, I don't, because I do so many in the course of a day, in the course of a week.

Id. at p. 23.

{¶ 163} I do not see how these facts can fairly be characterized as indicating a "reckless disregard." Again, the most the facts might possibly imply is negligence.

{¶ 164} I would also point out that Williams was not employed by Riverside until October 2008, and there is no indication that he had any knowledge of Vlcek prior to the time

that Vlcek contacted him after the first violation notice was issued. Likewise, DuBose had worked for Riverside since approximately 2005, and could not recall ever speaking with Vlcek. DuBose Deposition, pp. 4-5 and 16. Neither of these individuals, who are the parties being sued for malicious conduct, had any history with Vlcek.

{¶ 165} Furthermore, and more importantly, before one even arrives at the issue of whether immunity should apply, there would have to be an indication that the evidence fits the requirements of malicious prosecution. The first element, malice, is not present, for the reasons I have indicated. In this context, the Supreme Court of Ohio has said that:

> The requirement of malice turns directly on the defendant's state of mind. Malice is the state of mind under which a person intentionally does a wrongful act without a reasonable lawful excuse and with the intent to inflict injury or under circumstances from which the law will infer an evil intent. For purposes of malicious prosecution it means an improper purpose, or any purpose other than the legitimate interest of bringing an offender to justice.

Criss, 56 Ohio St.3d at 84-85, 564 N.E.2d 440 (Citations omitted). Again, I see no *evidence* of this state of mind on the part of Williams or DuBose.

{¶ 166} As an additional matter, the comments of the trial court and majority about the lack of probable cause (as evidenced by the alleged failure to consult the City's attorney) are simply not supported by the evidence in the record. As I stressed, there is no evidence, first, that Williams was required to consult with the attorney. However, even if this were otherwise, Williams did not say that he failed to consult with the attorney; he said he could not recall specifics, nor could he recall whether he either consulted or did not consult with an

attorney.

{¶ 167} As Williams and DuBose point out, the City's attorney actually accepted the filing of the complaint against Vlcek, and even conducted a trial on the charges, winning a conviction that was only set aside based on what the court perceived as inadequate notice. We have observed that:

> "In actions for malicious prosecution, while malice is an essential element, the want of probable cause is the real gist of the action. If want of probable cause be proven, the legal inference may be drawn that the proceedings were actuated by malice." *Melanowski v. Judy* (1921), 102 Ohio St. 153, 155, 131 N.E. 360, 19 Ohio Law Rep. 6. We have previously defined probable cause as "[a] reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged." *Quartman v. Martin*, Montgomery App. No. 18702, 2001-Ohio-1489, 2001 WL 929949, at *3 (citation omitted).

Hamilton v. Best Buy, 2d Dist. Montgomery No. 19890, 2003-Ohio-6068, ¶ 16.

{¶ 168} In order to conclude that Williams and DuBose lacked probable cause to believe that Vlcek was guilty of the offense with which he was charged, I would also have to conclude that the City's prosecutor, who prosecuted Vlcek, and the municipal judge, who found Vlcek guilty of the charge, lacked a reasonable ground of suspicion that Vlcek had committed the offense. I am unwilling to strain credibility this far. Consequently, I conclude that the trial court erred in denying DuBose and Williams summary judgment on Vlcek's malicious prosecution claim.

{¶ 169} Accordingly, for the reasons stated, I very respectfully dissent.

. . . . . .

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