

**Summary of SC94212, Sarah Tupper, et al. v. City of St. Louis, et al.**

Appeal from the St. Louis circuit court, Judge Steven R. Ohmer

Argued and submitted December 2, 2015; opinion issued August 18, 2015

**Attorneys:** The city was represented by Michael A. Garvin, Erin K. McGowan and Christine L. Hodzic of the city counselor's office in St. Louis, (314) 622-3361; the director of revenue was represented by Solicitor General James R. Layton of the attorney general's office in Jefferson City, (573) 751-3321; and Tupper and Thurmond were represented by W. Bevis Schock, an attorney in St. Louis, (314) 726-2322, and Hugh A. Eastwood, another attorney in St. Louis, (314) 809-2343.

Several entities filed briefs as friends of the Court: Hazelwood, Ferguson and Creve Coeur were represented by Kevin M. O'Keefe, Carl J. Lumley, Stephanie E. Karr and Edward J. Sluys of Curtis, Heinz, Garrett & O'Keefe PC in St. Louis, (314) 725-8788; St. Peters was represented by V. Scott Williams and Nicholas J. Komoroski of Hazelwood & Weber LLC in St. Charles, (636) 947-4700; and the Missouri Municipal League was represented by B. Allen Garner, an attorney in Independence, (816) 478-3848.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** This consolidated appeal involves a circuit court's determination that a city's red light camera ordinance is invalid. In a decision written by Chief Justice Patricia Breckenridge and joined by four other judges, the Supreme Court of Missouri affirms the circuit court's judgment. The circuit court did not err in finding the women who challenged the ordinance could maintain their action for a declaratory judgment and injunctive relief because they had no adequate legal remedy otherwise. The ordinance is unconstitutional because it creates a rebuttable presumption that shifts the burden of persuasion onto the defendant to prove the defendant was not operating the motor vehicle at the time of the violation. The circuit court did not abuse its discretion in not awarding the women attorney fees. They fail to show that they are entitled to the fees or that the city engaged in intentional misconduct sufficient to justify awarding such fees.

In an opinion joined by one other judge, Judge George W. Draper III concurs in part and dissents in part. He agrees with the principal opinion's holding except to the extent that it assumes the validity of the red light camera ordinance in SC94379, *City of St. Peters v. Roeder*, also decided today.

Judge Paul C. Wilson dissents. He would dismiss the women's petition, finding there is no presently existing controversy that requires or is subject to specific declaratory relief. If the city reinstates a prosecution against them for alleged past violations, they will be entitled to assert their defenses then.

Judge Roger M. Prokes, presiding judge of the 4th Judicial Circuit (Atchison, Gentry, Holt, Nodaway and Worth counties), sat in this case by special designation in place of Judge Zel M. Fischer.

**Facts:** St. Louis enacted an ordinance in 2005 authorizing the creation and operation of a red light camera enforcement system. The city subsequently entered into a contract with American Traffic Solutions Inc. (ATS) under which ATS employees watch videos of motor vehicles driving through intersections with red light cameras to identify possible red light violations. When a possible violation is observed, the employee uses department of revenue license plate records to identify the owner of the offending vehicle and then forwards the video and the owner's identity to the city's police department. If a police officer determines there is probable cause to issue a violation, the city sends a notice of violation to the vehicle owner stating that a red light camera captured the vehicle failing to stop at a red light and stating the fine for the violation is \$100. The notice includes a photograph of the rear of the vehicle that committed the violation. The parties stipulate the driver of the vehicle is not photographed. Between March 2012 and September 2013, Sarah Tupper and Sandra Thurmond received notices of violations stating there was probable cause to believe they violated the ordinance by failing to stop at a red light. The notices advised they could pay the \$100 fine or could dispute the notice without appearing in court by completing an "affidavit of non-responsibility" stating why they are not responsible for the violations or naming the individuals who were. When she received her first notice of violation, Tupper appeared in court and asked that her case be certified to the circuit court, which found her guilty. After the court of appeals issued decisions invalidating other red light camera ordinances, Tupper filed a renewed motion for acquittal based on those decisions. The circuit court granted her motion and acquitted her. Tupper did not respond to her second notice of violation, and Thurmond did not respond to either of her two notices. They were summoned to appear, but neither did so. They later were advised they owed the city fines.

In November 2013, Tupper and Thurmond sued a number of defendants – including the city and certain city officials as well as the state director of revenue – asserting a number of challenges to the ordinance and seeking attorney fees. While their challenge to the ordinance was pending, the city dismissed its pending red light violation prosecutions against Tupper and Thurmond. Following a January 2014 trial before a judge, the court in February 2014 entered its judgment that: Tupper and Thurmond did not have an adequate remedy at law and that enforcement of the red light camera ordinance is an issue of general public interest, and there is a reasonable expectation the city would continue enforcing the ordinance even though it dismissed the tickets against Tupper and Thurmond. The court determined the ordinance is invalid and enjoined the city from enforcing it. It also denied Tupper and Thurmond's request for attorney fees. The city, Tupper and Thurmond, and the director of revenue all appeal.

**AFFIRMED.**

**Court en banc holds:** (1) The circuit court did not err in finding that Tupper and Thurmond could maintain their action for a declaratory judgment and injunctive relief. While the municipal division proceedings may have provided an adequate legal remedy sufficient to preclude a declaratory judgment, the city dismissed the pending prosecutions against Tupper and Thurmond before filing its motion to dismiss their challenge to the ordinance, leaving them with no

adequate legal remedy. Although Tupper and Thurmond currently are not facing prosecution under the ordinance, their claims regarding the ordinance's validity present predominantly legal questions and they still are subject to the ordinance because the city currently is enforcing the ordinance.

(2) The ordinance is unconstitutional because it creates a rebuttable presumption that shifts the burden of persuasion onto the defendant to prove the defendant was not operating the motor vehicle at the time of the violation. The ordinance states that a rebuttable presumption exists that the owner of a motor vehicle operated in violation of the ordinance was operating the vehicle at the time and place the violation was captured by the automated traffic control system. Although the ordinance does not define "rebuttable presumption," this term is understood at common law to be a mandatory presumption, rather than a permissive inference, that requires the other party to produce sufficient evidence to rebut. Rebuttable presumptions in civil cases generally are permitted, but prosecutions for municipal ordinance violations have quasi-criminal aspects. For example, Rule 37.33 requires the notice of violation must state facts supporting a finding of probable cause to believe the accused violated the ordinance, and the burden is on the city to produce evidence sufficient to convince the trier of facts, beyond a reasonable doubt, that the defendant is guilty of the offense charged. Further, a violation of the ordinance requires the assessment of two points against the owner's driver's license because running a red light is a moving violation. *See Roeder v. City of St. Peters*, SC94379, also decided today. Based on these and other factors, this Court applies the law regarding presumptions in criminal cases. The fact that the ordinance contemplates that the municipal division would terminate proceedings if a vehicle owner proves the owner was not the driver demonstrates the city's intent to enact an ordinance creating a rebuttable presumption shifting the burden of persuasion to the owner. Such a presumption relieves the prosecution from proving, beyond a reasonable doubt, an element of the violation charged, which is impermissible under United States Supreme Court precedent. Because this Court affirms the circuit court's judgment on this basis, it need not consider the city's other points on appeal.

(3) The circuit court did not abuse its discretion in not awarding attorney fees. Tupper and Thurmond fail to show they fall within an exception to the general rule requiring each party to pay his or her own attorney fees. They could have raised their claims about the ordinance as defenses in the municipal division proceedings regarding their ordinance violations without having to incur attorney fees to file a separate action. Tupper and Thurmond also fail to show the city engaged in intentional misconduct sufficient to justify awarding attorney fees. By the time they filed their petition in this case, the appeals court had considered the validity of similar red light ordinances in four other cases. After one decision, the city revised its notice of violation form to remedy the issue the appeals court found. Two others did not hold that the ordinances at issue were invalid. In the fourth, the ordinance at issue properly could be distinguished from the one at issue in Tupper and Thurmond's case.

(4) The director of revenue lacks standing to appeal the circuit court's judgment. The right to appeal exists only for a party "aggrieved" by the judgment – when the judgment will operate directly and prejudicially on the party's rights or interests with immediate effect. While the circuit court overruled the director's motion to dismiss, it denied Tupper and Thurmond's claims against the director. As such, the director has failed to show he has a right to appeal.

**Opinion concurring in part and dissenting in part by Judge Draper:** The author agrees with the principal opinion's holding except to the extent that it assumes the validity of the red light camera ordinance in SC94379, *City of St. Peters v. Roeder* (also decided today), which the author would hold invalid on the same grounds as those expressed in the principal opinion here.

**Dissenting opinion by Judge Wilson:** The author would hold that Tupper and Thurmond are not entitled to bring this declaratory judgment action and would dismiss their petition. He would find they had adequate remedies at law because they could have raised their claims in response to the city's prosecutions in the municipal division. Although they lost their adequate remedies at law when the city dismissed their cases, they would not be prejudiced by dismissal. If the city reinstates a prosecution against one or both for alleged past violations, they will be entitled to assert their defenses then. If not, there is no presently existing controversy that requires or is subject to specific declaratory relief.