IN THE MISSOURI SUPREME COURT

SUPREME COURT NO. SC94212

22nd CIRCUIT NO. 1322-CC10008

CITY OF ST. LOUIS, *et al.*, APPELLANTS

v.

SARAH K. TUPPER AND SANDRA L. THURMOND, RESPONDENTS

Appeal from the Circuit Court of the City of St. Louis
22nd Judicial Circuit, Division 7
Circuit Judge The Honorable Steven R. Ohmer

AMENDED BRIEF OF RESPONDENTS / CROSS-APPELLANTS SARAH K. TUPPER AND SANDRA L. THURMOND

Respectfully submitted,

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RESPONDENTS' STATEMENT OF FACTS

Introduction and Procedural History

Respondents/Cross-Appellants Sarah Tupper and Sandra Thurmond filed suit against the City of St. Louis, its Mayor, its Chief of Police, American Traffic Solutions, Inc. (an Arizona-based red light camera contractor, "ATS"), Linebarger Goggan Blair & Sampson, LLP (a Texas-based collections law firm, "the law firm"), and the Missouri Department of Revenue, to collectively enjoin them from prosecuting Respondents for their red light camera tickets (with the exception of one such ticket which was then on appeal, as will be discussed below), and to declare illegal and void the entire red light camera ticket program. Tupper and Thurmond prayed for a Motion for Temporary Restraining Order.

The City's red light camera ticket program started in 2005 with the passage of Ordinance 66868, codified at 17.07.010&c., L.F. 240, Stipulated Exhibit 1, ("the Ordinance"). The City had already had for many years an Ordinance making it a violation to run a red light, Ordinance 57831, L.F. 223, codified at 17.08.130, L.F. 244, Stipulated Exhibit 2.

Tupper and Thurmond asserted in the Petition that the City's red light camera ticket program is unlawful for the following reasons:

1. Failure to assess points for a moving violation, Petition, para.55&c, L.F. 24
2. Improper Rule Making regarding the creation of the charge codes for red light camera tickets, Petition, para. 80&c, L.F. 28, (dismissed the morning

of trial because Tupper and Thurmond learned that the problems with the original rulemaking process had been corrected), Tr. 7,

3. Inadequate Form of Notice, Petition, para. 108&c, L.F. 32, (dismissed by Tupper and Thurmond the morning of trial, although ruled on in their favor by the Circuit Court), Tr. 7,

4. Unlawful "rebuttable presumption" assuming the owner of a vehicle is the driver of the vehicle when the vehicle is caught in a violation, Petition, para. 102&c and 116&c, L.F. 18 and 20 respectively.

5. Unconstitutional burden shifting "Rat Out Provision", in which a Defendant in a red light camera ticket case may escape liability by signing an affidavit naming the true perpetrator of the crime, Petition, para. 119&c, L.F. 33.

Tupper and Thurmond sought attorney's fees under the equitable, special circumstances exception to the American Rule.

On November 27, 2013, two days after the suit was filed, counsel for all parties appeared before The Honorable Steven R. Ohmer for a hearing on the Motion for Temporary Restraining Order. At the conclusion of the hearing Judge Ohmer indicated orally from the bench that he was going to grant the TRO. Trying to moot the case via an "end run", the City then dismissed the tickets pending against Tupper and Thurmond (other than the first one against Tupper which was then on appeal), L.F. 314-316, Stipulated Exhibit 20.

Extensive briefing on mootness ensued, which resulted in a ruling from Judge Ohmer that despite the dismissals the cases were not moot under the public interest

exception to the mootness rule, "capable of repetition yet evading review." The City has not challenged this ruling in its Opening Brief.

About these dismissals the Court stated in its Judgment:

> Here, it is clear that the City dismissed the Petitioners' tickets for the sole reason of avoiding an injunction in this matter, which the Court was poised to enter following the November hearing, L.F. 458 (p. 4 of Judgment).

Because of the court's duty to examine its own jurisdiction, Tupper and Thurmond will discuss this issue in the Argument section.

On January 13, 2014 Judge Ohmer heard the merits of the case in a bench trial. On February 11, 2014 he issued an 18 page judgment granting preliminary and permanent injunctions against the City primarily based the unlawfulness of the "rebuttable presumption" but also based on the notice issue, L.F. 455.

Three days later, on February 14, 2014, Judge Ohmer stayed his order pending appeal, L.F. 487. For bond he ordered all fines received by the City held in escrow pending further order of the court, L.F. 487.

On March 7, 2014, in response to post judgment motions, Judge Ohmer amended his judgment by awarding costs in favor of Tupper and Thurmond. He also declined to enjoin the other Defendants because they "lack the power or authority to take the actions prohibited by the Order and Judgment", and denied attorney's fees. L.F. 536. He also clarified that any party could challenge the stay, L.F. 538, although none have done so.

Appellants appealed and this Court accepted transfer before opinion by the Court of Appeals.

Sources of the Evidence

Before trial counsel for the parties devoted several hours to creating two Stipulations of Facts, the first between Tupper and Thurmond and all Defendants except the Department of Revenue, ("the City Stip") and the second between Tupper and Thurmond and the Department of Revenue ("the DoR Stip"). Those documents are signed by counsel for the respective parties and appear at L.F. 221 and 235. Counsel for Respondents first mentioned the stipulations to the Court at Tr. 25 and the Court then admitted both stipulations into evidence at Tr. 56. In this Brief counsel will quote liberally from those stipulations by paragraph, because, of course, the facts therein are undisputed. There was also disputed evidence offered by the City and ATS over timely objection by Respondents, and Respondents cross-examined adverse witnesses.

Additionally, the parties agreed on a stipulation for the admission of most of the exhibits. Hence at Tr. 58 the trial court admitted Exhibits 1-27, (including "14A" making a total of 28), see list at L.F.238, with Exhibits following.

The balance of the evidence on the merits consisted of 75 pages of witness testimony.

Tupper and Thurmond's evidence regarding their trial court attorney's fees appears in their attorney's fees application at L.F. 494.

How the Respondents' Red Light Camera Ticket Program Works

The parties have stipulated to the basic methodology of the issuance of red light camera tickets, City Stip, para. 26-34, L.F. 224. In short, ATS has installed cameras at intersections, and ATS staff members watch videos of cars passing through those

intersections. Upon noting a violation, an ATS staff member uses Department of Revenue license plate records to identify the owner of the vehicle. The staff member forwards the video and ownership data to a City of St. Louis police officer. If the Police Officer believes there is probable cause that a violation has occurred (setting aside for now the probable cause issue relating to the identity of the driver versus the identity of the owner), the Police Officer affixes an electronic signature and forwards a directive to ATS to issue an "Information/Notice of Violation" to the owner of the vehicle. ATS sends out that document.[1] If there is no payment or other response, (such as an affidavit naming another driver, as will be discussed below), the City files the information in its Municipal Court, and ATS then sends a "Summons and Supplemental Notice of Violation" with a court date. If there is still no payment or response then the collections

[1] There is a significant equal protection issue as to who is cited, an issue not included in the petition here and for which a better record is laid below in the now pending Roeder v. City of St. Peters**,** SC94379. The fact that the City cites cars (1) titled in more than one person's name, (2) in the name of a government entity, or (3) in the name of a trust, company or other type of entity, suggests that the police officer signing a notice of violation lacks probable cause as to the identity of the driver and the rebuttable presumption could not work even if held legal. Here, Tupper received a notice made out to herself and her domestic partner Alexander Carlson, who is not an owner of the car but rather appears on the title as Title on Death—that is to say, Carlson has no ownership interest whatsoever. The City dismissed Carlson in Tupper 1 on the eve of trial.

law firm, Linebarger Goggan Blair and Sampson, LLP, begins sending out collection letters. All notices and letters demand payment of $100.00.

ATS's Cut

Some payments come to the City, and then the City, pursuant to contract, remits to ATS 31.33% of all amounts actually collected. City Stip, para. 34, L.F. 226. But a substantial number of payments are made online via an ATS contractor website.[2]

The Ordinance's Rebuttable Presumption

The Ordinance reads at 17.07.040, L.F. 242:

> In a prosecution for violation of the Traffic Code Ordinance as codified in Title 17 of the Revised Code of the City of St. Louis based on an automated traffic control system record:
>
> A. If the City Proves:
>
> 1. That a *motor* vehicle was being operated or used,
>
> 2. That the operation or use of the motor vehicle was in violation of the Traffic Code Ordinance as codified in Title 17 of the Revised Code, and

[2] The Notices of Violation, L.F. 264-67, Stipulated Trial Exhibits 7 and 8, also instructs the accused to call the ATS 1-800 Customer Service number if the accused has questions, which means that non-attorney ATS employees in Arizona are potentially giving legal advice to the accused. *See Damon*, below, 419 S.W.3d at 191, fn 23.

3. That the defendant is the owner of the motor vehicle in question, then:

B. A rebuttable presumption exists that such owner of a motor vehicle operated or used in violation of the Traffic Code Ordinance as Codified in Title 17 of the Revised Code was the operator of the vehicle at the time and place the violation was captured by the automated traffic control system records.

Tupper and Thurmond suggest that in context and in plain English § "B." means that if the cameras capture a car going into an intersection when the light has already turned red (even for an instant as is commonly the case), the owner is presumed to be the driver and so the owner is presumed to be guilty of running the light. The owner, nevertheless, has the right to rebut the presumption, including by filing an affidavit "ratting out" the true perpetrator.

Forms for exercise of the rebuttable presumption by Defendants appear (a) on the back of each of the four initiating documents for Tupper and Thurmond's four tickets, L.F. 248, 253, 265 and 267, and (b) on the back of the three summonses (there being no summons for Tupper1 because she responded to that Notice of Violation in court), L.F. 309, 311 and 313. In each of those documents there is at the bottom of the page a box titled "Affidavit of Non-Responsibility". That portion of the document states as follows:

I am not responsible because at the time of the violation the vehicle depicted was in the custody or control of another person. You must

identify the actual driver in the space provided below (with full mailing information):

_____

Printed Name of the Driver

_____

Driver Street City State Zip Code

Sign below: I declare under penalty of perjury that the information provided above is true and correct. All information I have submitted is true to the best of my knowledge.

_____ _____

Signature Date Print Your Name

NOTE: The affidavit and supporting documentation will be reviewed and a determination made regarding the vehicle owner's responsibility. Keep in mind that providing an affidavit may NOT automatically result in a dismissal of this matter. If further information is required, you will be notified by the St. Louis City Court. Any false representation may subject you to criminal penalties.

(There is no place for notarization, so one would have to question whether any prosecution for perjury would have legs, because the City would lack proof that it was actually the Defendant who signed the document, and a reasonably informed Defendant would take the Fifth Amendment and make no statement).

Tupper and Thurmond's Prior Tickets

Tupper and Thurmond filed this case on November 25, 2013, L.F.14. By then each had received two camera tickets from the City, which the parties have referred to throughout the matter as "Tupper 1" and "Tupper 2", and "Thurmond 1" and "Thurmond 2".

The history of each of those tickets is as follows:

Tupper 1 On or about May 21, 2012 Tupper received an "Information/Notice of Violation" of a red light camera violation occurring on May 12, 2012, City Stip, para. 44, L.F. 227, Stipulated Exhibit 3, L.F. 247. She certified the case to Circuit Court, had a bench trial and was found guilty, L.F. 249. A few days later, however, the Court of Appeals issued its decision in *Unverferth v. City of Florissant*, 419 S.W.3d 76, 98 (Mo App. 2013), and so on her Motion the Circuit Court reversed itself and granted an acquittal based on the points issues as discussed in that case, L.F. 24&c, Stipulated Exhibit 16. (The City appealed but after Judge Ohmer's ruling in this case the City dismissed its appeal, Docket Sheet, Trial Exhibit 20, A12). On December 10, 2013, in a startling moment, the Clerk of the City of St. Louis Municipal Court, Catherine Ruggeri-Rea, sent Tupper the following letter about the ticket, L.F. 291, Stipulated Exhibit 12, City Stip, paras. 41-42:

> This letter is to notify you that the above referenced case(s) have been reset to the 14th day of January, 2014 in Courtroom (1) One at 8:05 a.m.

Your failure to appear in court at the designated time will result in a warrant being issued for your arrest. (Emphasis in original).

Undersigned counsel drew this to the attention of the City's attorney and soon thereafter Clerk Ruggeri-Rea sent Tupper a letter retracting the notice and stating that it had been sent in error due to the "unique circumstances" of her case, L.F. 292, Stipulated Exhibit 13. The letter also said:

> The December 10, 2013 letter also contained an inaccurate reference to the possible issuance of an arrest warrant for failure to appear. The City does not, under any circumstances, arrest red light camera program offenders or cause a warrant to be issued for their arrest. Since the inception of the red light camera program in 2006, no one accused of a red light camera infraction has been arrested. Nor has a warrant ever been issued for an alleged red light camera offender (including those who fail to appear for their court dates).

After the appeal was dismissed Tupper's victory in the case was final.

Tupper 2 On or about September 27, 2013 Tupper received another "Information/Notice of Violation" of a red light camera violation occurring on September 6, 2013, City Stip, para. 50, L.F. 228, Stipulated Exhibit 5, L.F. 252. Tupper did not respond in any manner, (other than filing this suit), City Stip, para. 53, L.F. 228. On or about October 30, 2013 Tupper received a follow-up "Summons and Supplemental Notice of Violation" to appear in the City of St. Louis Municipal Court on January 22, 2014, City

Stip, para. 54, L.F. 228, Stipulated Exhibit 17, L.F. 308. Again, Tupper did not respond in any manner, (other than filing this suit). Tupper is the owner of the vehicle described in the two documents, City Stip, para. 51, L.F. 228, and the vehicle did run the light, City Stip, para. 53, L.F. 228. In her trial testimony Tupper stated that she remembered the incident, that she was a passenger at the time of the violation, and that the driver was her domestic partner, Alex Carlson, Tr. 126.

Thurmond 1 A few days after March 12, 2012 the Thurmond home received an "Information/Notice of Violation" of a red light camera violation occurring on March 12, 2012, City Stip, para. 57, L.F. 228, Stipulated Exhibit 7, L.F. 264. She did not respond in any manner, (other than eventually filing this suit), City Stip, para. 66, L.F. 230. A few days after April 30, 2012 the Thurmond home received a "Summons and Supplemental Notice of Violation" to appear on Thurmond 1 in the City of St. Louis Municipal Court on May 29, 2012, City Stip, para. 59, L.F. 229, Stipulated Exhibit 18, L.F. 310. Again, she did not respond in any manner, (other than eventually filing this suit), City Stip, para. 66, L.F. 230. Thurmond owns the car described in the two documents, City Stip, para. 60, L.F. 229. In her trial testimony Thurmond stated that she believed her daughter was driving at the time of the violation "because she used my car a lot", Tr. 129.

Thurmond 2 A few days after May 19, 2012 Thurmond received an "Information/Notice of Violation" for a red light camera violation occurring

on May 19, 2012, City Stip, para. 62, L.F. 229, Stipulated Exhibit 8, L.F. 266. She did not respond in any manner, (other than filing this suit), City Stip, para. 66, L.F. 230. A few days after July 2, 2012 Thurmond received a "Summons and Supplemental Notice of Violation" to appear on Thurmond 2 in the City of St. Louis Municipal Court on August 8, 2012, City Stip, para. 64, L.F. 229, Stipulated Exhibit 19, L.F. 312. Again she did not respond in any manner, (other than filing this suit), City Stip, para. 66, L.F. 230. Thurmond owns the car described in the two documents, City Stip, para. 65. In her trial testimony Thurmond stated that she was not sure who was driving at the time of the violation.

In reference to Thurmond 1 and 2 Thurmond received six letters from the collection law firm, City Stip, para. 67, L.F. 230 Stipulated Exhibit 10, L.F. 269&c.

Tupper received no such letters, City Stip, para. 68, L.F. 230.

As noted above, at the conclusion of the Temporary Restraining Order hearing on November 27, 2013 the City of St. Louis City Counselor dismissed the prosecutions of Tupper 2 and Thurmond 1 and 2, City Stip, para. 69, L.F. 230.

Both Tupper nor Thurmond acknowledge that red light infractions (setting aside whether the infractions were only for parts of a second), occurred in all four cases, City Stip, para. 73, L.F. 230.

No Points

On each of Tupper and Thurmond's "Notices of Violation" and "Summons and Supplemental Notices of Violation", there appears the following language on the back of

each page at the bottom of the upper box, L.F. 248, 253, 265 and 267, L.F. 309, 311 and 313:

> The State of Missouri does not assess points for red light camera infractions.

The red light camera ticket Ordinance itself, 66868, L.F. 240, Stipulated Exhibit 1, is silent on the question of whether points are assessed. Up through the date of the stipulation (and to undersigned counsel's knowledge up through the present), "no person has been assessed points by the State of Missouri on his or her driver's license for a red light camera ticket violation that occurred in the City of St. Louis", City Stip, para. 21, L.F. 224.

The State of Missouri "assesses two points for red light violations observed and issued by officers at the scene of the offense", RSMo. 302.302.1, City Stip, para. 22, L.F. 224. (There has been no evidence about tickets for accident cases, where commonly the witnesses are the participants and not police officers, but Tupper and Thurmond ask the Court to take judicial notice that upon conviction in such cases points are always assessed).

The parties stipulated to the City's methodology of reporting of red light tickets, both camera and non-camera, to the Department of Revenue as follows, City Stip, para. 9&c, L.F. 223:

> 9. Regional Justice Information Services (REJIS) is a quasi-governmental entity created by St. Louis County and the City of St. Louis. It provides information technology services for reporting criminal justice information.

10. After a conviction is entered in a case involving a violation of the City's red light camera ordinance, the Clerk of the Municipal Court enters a record of that conviction into the data system operated by REJIS in a format that enables REJIS to determine that the conviction is one for a violation of a red light camera ordinance.

11. After a conviction is entered in a case in the City involving a red light violation that was not captured by a red light camera system, the Clerk of the Municipal Court enters a record of that conviction into the data system operated by REJIS in a format that enables REJIS to determine that the conviction is one that is for a red light ordinance violation other than one captured by a red light camera system.

12. After the Clerk of the Municipal Court of the City of St. Louis enters the record of a red light camera conviction into the database operated by REJIS, REJIS assigns the record of conviction the corresponding State charge code for violations of red light camera ordinances that is published by OSCA and the Missouri Highway Patrol. REJIS then transmits that record of conviction to the Missouri Department of Revenue.

The stipulation between Tupper and Thurmond and the Department of Revenue, details the role of the DoR in this process, stating in relevant part, L.F. 236:

2. The Department of Revenue is responsible for keeping driving records, including records of points assessed by law based on reported violations of state laws and municipal ordinances.

3. The Supreme Court created the State Judicial Records Committee and appoints its members, and that Committee approves charge codes that are assigned by the Office of State Courts Administrator (OSCA), as provided in RSMo. 43.500.

5. There exists an OSCA charge code for red light camera tickets. The only OSCA charge code that expressly references red light cameras is:

Charge Code 9342799.0

Public safety violation – red light camera (no points)

6. The Department of Revenue does not assess points for "red light camera violations" that are reported under the OSCA red light camera charge code, # 9342799.0.

8. The Director of Revenue does not upload from REJIS any reports of any red light camera violations that are reported using the State's red light camera charge code, # 9342799.0, and the Director of Revenue therefore has no knowledge of what information the City reports about such violations through REJIS.

Tupper and Thurmond suggest that this methodology can be summarized as follows. When the City obtains a conviction for a red light camera ticket the City's personnel make a conscious choice to report the ticket to REJIS under a charge code for red light violations which is labeled "Public Safety Violation – red light camera (no points)". REJIS reports the conviction to DoR, but DoR ignores this communication and does not assess points. When the City obtains a conviction for a red light in person ticket

the City's personnel make a conscious choice to report the ticket to REJIS under a charge code for red light violations for which points are assessed. REJIS reports such tickets to DoR, and DoR assesses points.

Loaning Out Cars – Percentage of Time When Driver is the Owner

Tupper testified that she is the owner of the car which went through the red lights in her tickets but that she has loaned the car both to her above mentioned domestic partner, Alex Carlson, and to a "friend named Nicole Kasper {ph}", Tr. 60-61.

Thurmond testified that she is the owner of the car in her tickets but that she has loaned the car to her daughter, her daughter's boyfriend, and to an office mate, Tr. 76. She also testified that auto mechanics sometimes drive her car, Tr. 76.

City of St. Louis Police Officer Sherri Sue Bruns testified that her duties included reviewing videos in connection with red light camera tickets, Tr. 85. She also testified that she had made 300-400 in person traffic stops in her career and in all cases asked for both a driver's license and proof of registration or insurance information, Tr. 85-86. In this case Bruns first testified that for in-person stops the driver was the sole owner 70% of the time, Tr. 86. Then when being questioned by the City's attorney she increased that number to 90%. On redirect she removed from the mix fleeing felons and bank robbers and settled at 80%, Tr. 87-88. Chief Dotson backed up the 80% figure in his testimony, Tr. 99. Tupper and Thurmond do not concede that 80% is the correct percentage of time the driver is the sole owner, because Bruns had testified at the Tupper 1 trial that it was "50/50", but for the purpose of this litigation Tupper and Thurmond accept 80% as an upper limit. When this case was tried, pre-dismissal of the appeal in Tupper 2, Tupper

and Thurmond expected there to be a transcript of Officer Bruns testimony in which she stated the percentage was "50/50". Because the City dismissed the Tupper1 appeal, however, that transcript has not been prepared and so that testimony is not part of the record.

Tupper and Thurmond Have No Control Over Permissive Drivers

Tupper and Thurmond both testified that they could not control whether someone to whom they loaned their cars would commit a red light violation, Tr. 61, 76, respectively.

Tupper and Thurmond on Limited Budgets, To Them $100 is Significant Money

Tupper and Thurmond both testified that they were on limited budgets, Tr. 63 and 77, respectively. Tupper and Thurmond ask the court to take judicial notice that a $100 fine is a significant amount of money to a person on a limited budget. *See also* discussion below at Response to Point 1, at p. 47.

Tupper and Thurmond Similarly Situated to Public

Both Tupper and Thurmond testified that with respect to red light camera tickets they were similarly situated to other members of the public, Tr. 61 and 76-77, respectively.

City's Response to Developing Case Law

The City asserts at 19 of its Brief that it "has strived to adapt to the developing case law". In support of this assertion it notes that it changed the language of its Notice of Violation after the decision in *Smith v. City of St. Louis*, 409 S.W.3d 404, 418 (Mo. App. E.D. 2013). Tupper and Thurmond quarrel with the City's assertion, however,

because after *Smith* the Courts of Appeal declared red light camera ticket ordinances void in five different cases:

> *Unverferth v. City of Florissant*, 419 S.W.3d 76 (Mo. App. E.D. September 10, 2013)
>
> *Ballard v. City of Creve Coeur*, 419 S.W.3d 109 (Mo App. E.D. October 1, 2013)
>
> *Edwards v. City of Ellisville*, 426 S.W.3d 644, 664 (Mo. App. E.D. November 5, 2013)
>
> *Damon v. City of Kansas City*, 419 S.W.3d 162 (Mo. App. W.D. November 26, 2013)
>
> *Brunner v. City of Arnold*, 427 S.W.3d 201, 229 (Mo. App. E.D. December 17, 2013)

Yet even though three of those cases, *Unverferth*, *Damon* and *Brunner*, involved the rebuttable presumption model of the City's Ordinance here, and even though those cases expressly overruled *City of Creve Coeur v. Nottebrok*, 356 S.W.3d 252 (Mo. App. 2011) which had previously approved these tickets, and even though those five cases strongly reject red light camera tickets for several reasons relevant to the City's practices, to this day City has continued the program:

- Police officers go right on issuing tickets,
- Clerks go right on processing cases and accepting payments,
- Municipal judges go right on hearing cases,
- ATS goes right on sending out notices and then summonses, and
- The Law Firm goes right on sending dunning letters.

Number of Tickets Issued in City – Likelihood of Recurrence

In their first Memorandum in Opposition to Appellants' Oral Motion to Dismiss for Mootness Tupper and Thurmond reviewed the vast numbers of these tickets being issued in the City of St. Louis. Tupper and Thurmond stated, L.F. 87:

> [Based on the City's Exhibit in reference to the possible bond on a TRO], the City receives payment on 225 tickets per day, or receives payment on 82,125 tickets per year. The court may take judicial notice that the population of the City in 2010, according to the census, was approximately 318,000. The court may also take judicial notice that according to the United States Department of Transportation, Federal Highway Administration, Office of Highway Policy Information, just over two thirds of all citizens have a driver's license. After rounding, one may then estimate that the City receives payment on 80,000 red light camera tickets per year for 210,000 City drivers. That is, on average, about 40% of the City's drivers receive red light camera tickets *every year*. (This calculation ignores that a significant portion of the people ticketed are to non-residents of the City, but it also ignores that some portion of those ticketed, a portion unknown to Petitioners but well known to Respondents, does not pay or respond to these tickets. If one assumes that number of non-payors and the number of non-City residents are a wash, an assumption that must be made cautiously but which can be made with at least some reasonableness based on the "back of the envelope estimation test", one can support the

> conclusion that around 40% of all City residents who drive get one of these tickets each year)[3]. (When one examines these numbers in light of Respondents' safety claims, one would think that the City's streets were a demolition derby before the red light camera ticket program and are now a picture of Norman Rockwell tranquility).
>
> *See* City TRO Motion Exhibit 1, Affidavit from Yvette Mayham, November 26, 2013, and accompanying table, submitted by the City earlier in the case, A5.

Even if the court finds that the old tickets cannot be reissued roughly 40% of City residents are getting red light camera tickets every year. Tupper and Thurmond assert that the threat of their obtaining new red light camera tickets is a real one. There is, therefore, a likelihood of recurrence.

[3] This parenthetical was in a footnote in the original Motion.

ARGUMENT

STANDARD OF REVIEW

Tupper and Thurmond agree with Appellants that the Standard of Review applicable to the appeals of the City of St. Louis and the Director of Revenue in this civil case without a jury is that of the thoroughly established standard of *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976):

> [T]he decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. Appellate courts should exercise the power to set aside a decree or judgment on the ground that it is "against the weight of the evidence" with caution and with a firm belief that the decree or judgment is wrong.

Additionally, Tupper and Thurmond note that the burden is on the appealing party to demonstrate error, *State ex rel. Ashcroft, ex rel. Plaza Properties, Inc. v. City of Kansas City*, 687 S.W.2d 875, 876 (Mo. 1985).

Tupper and Thurmond agree with Appellants that questions of law are reviewed *de novo*, *Eisel v. Midwest BankCentre*, 230 S.W.3d 335, 338 (Mo. 2007) and that ordinances are presumed constitutional, *Pearson v. Koster*, 367 S.W.3d 36, 43 (Mo. 2012).

Tupper and Thurmond disagree with Appellants' assertion that none of the evidence at trial was challenged. Tupper and Thurmond objected to the City's evidence that the red light camera ticket program enhanced safety because such evidence was

beyond the scope of the pleadings, and as stated in their Statement of Facts section, Tupper and Thurmond contested by cross examination the various assertions by the City's witnesses as to the percentage of time in which the driver is the sole owner of the car.

MOOTNESS, ADEQUATE REMEDY AT LAW, STANDING, WAIVER, CLASS

Since this court will presumably examine its own jurisdiction and authority to adjudicate the matter, Respondents will address the issues of mootness, adequate remedy at law, standing, waiver and class action status.

Mootness

As is well established, issues that are moot are not subject to consideration. *State ex. Rel. Missouri Cable Television Association v. Missouri Public Service Commission*, 917 S.W.2d 650, 652 (Mo.App. 1996). Filling out the law surrounding mootness, however, is the "mootness exception doctrine". That doctrine is outlined in *Gramex Corp. v. Von Romer*, 603 S.W.2d 521, 523 (Mo. banc 1980), and see *In re Dunn*, 181 S.W.3d 601, 604 (Mo.App. E.D. 2006).

Under those cases the mootness exception doctrine applies when a case presents an issue that: (1) is of general public interest; (2) will recur; and (3) will evade review in future live controversies. The doctrine is also called the "general public interest" exception. (There is also an exception when a case becomes moot after briefing and argument in the Court of Appeals, but that exception is, of course, inapplicable to this case).

Tupper and Thurmond assert that this case meets the three tests for the mootness exception doctrine.

(1) Public Interest: Red light camera tickets are of great public interest, as is demonstrated by the heavy press coverage of this and related cases, the citizenry's discussion of the topic in the community, and the high number of such tickets issued. Also red light camera tickets are a novel method of traffic enforcement raising substantial questions of law, procedure, evidence, and the rights of the accused, and as such these tickets are of public interest and concern.

(2) Recurrence: Arithmetic based on the City's bond Affidavit of November 26, 2013, A5, indicates that on average the City is receiving payment on 225 tickets per day at $100 per ticket. While the number of tickets issued per day which are not paid is as yet unknown, common sense indicates it is a heady number in addition to the 225 per day for which the City is receiving payment. It is undisputed that Tupper and Thurmond have received two tickets each, and since each owns and uses a car in the City, then each has a reasonable expectation of receiving future tickets.

(3) Evading Review in Future Live Controversies: The only reason this mootness question has arisen is that at the conclusion of the Temporary Restraining Order hearing the Court orally announced that it would issue the TRO. The City then attempted an "end run" by dismissing the pending red light camera ticket cases against Tupper and Thurmond (excepting

> Tupper 1 which was on appeal). In light of the City having engaged in this tactic once it is a reasonable supposition that the City will engage in the same tactic again even if new Plaintiffs arise to make the same argument. As things are postured it thus appears that unless the court hears the case the issues will evade review in future live controversies.

Since the case meets the three tests for the mootness exception doctrine, the case is not moot and this court should proceed.

Additionally, in *Bratton v. Mitchell*, 979 S.W.2d 232, 235-36 (Mo. Ct. App. 1998), a case in which an inmate challenged her parole status, the Missouri Court of Appeals focused on an area of the mootness exception doctrine called the voluntary cessation doctrine. This doctrine applies in those cases in which the government dismisses an underlying action in order to avoid an impending loss. It is directly applicable here. The court said:

> The unique facts in this case are similar to the fact pattern in *Kandlbinder v. Reagen*, 713 F.Supp. 337, 339 (W.D.Mo.1989), where, pursuant to federal legislation, the plaintiff's federal income tax refund was intercepted by the government for unpaid state child support. He objected and sought declaratory relief. The government returned his check, declared he was no longer delinquent, and moved to dismiss his case relying on the doctrine of mootness. The District Court noted that a case is moot when there are no viable issues or the parties lack a valid interest in the outcome. It then noted the exceptions to the mootness doctrine, "for disputes that are

> 'capable of repetition, yet evading review'." Even though the government returned the check and took the plaintiff's name off the intercept list, the court should still have the power to determine the legality of the alleged practice, for there was in that case a "reasonable likelihood of future arrearages and future tax intercepts" as to this person. *Id.* at 339.
>
> In a similar vein, the court in *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099 (8th Cir. 1973), stated the general principle that voluntary cessation of certain conduct does not render a case moot if there is a "reasonable expectation," the wrong will be repeated, and where the actions of government may impact on the "same objecting litigants," an appellate court could still review the objects of the declaratory judgment. Although this court does not believe respondents will at a later date switch gears on Bratton's parole status, the court will not declare her request for declaration of her parole status moot under these circumstances. Bratton is entitled to have the judgment changed to show her status the same as agreed to in the memo.

Tupper and Thurmond note that the City did "switch gears" in this case, and in light of the fact that each has already received two camera tickets and at the time of trial the City was receiving payment for around 225 of such tickets per day, it is a reasonable supposition that the city's red light camera ticket program will affect these litigants again. It is undisputed that the program will affect an enormous percentage of the City' licensed drivers. The voluntary cessation doctrine is on four squares with this situation.

This court should find that the case falls within the mootness exception doctrine, and that the court therefore has jurisdiction to review the matter.

No Adequate Remedy At Law

See argument below in Response to the City's Point 3

Standing

Judge Ohmer gave no quarter to the City's standing argument ruling that Tupper and Thurmond were not affected by the Ordinance, L.F. 460 (p. 6 of Judgment). Tupper and Thurmond suggest he got it right. In *City of Bridgeton v. Ford Motor Cr. Co.*, 788 S.W.2d 285, 290 (Mo. banc 1990) this court ruled that a party has standing to challenge the validity of an ordinance only if standing is conferred by statute or another applicable ordinance or if the party can demonstrate that he is directly and adversely affected by the ordinance. Here Tupper and Thurmond received the tickets pursuant to the Ordinance. Tupper and Thurmond are therefore directly affected by the Ordinance and have standing. *See also Dae v. City of St. Louis*, 596 S.W.2d 454, 455 (Mo. Ct. App. 1980) holding that one who is charged with an Ordinance violation has standing to challenge the validity of the Ordinance.

Further, as the *Brunner* court held, if an Ordinance itself is void and thus the municipal court lacks subject matter jurisdiction, Tupper and Thurmond have standing to challenge the Ordinance and its enforcement in circuit court because they are not required to subject themselves to invalid procedures in municipal court and the judgment (i.e., admission of guilt by a paying fine) rendered therein would be void. *Brunner*, 427 S.W.3d at 214-15.

Waiver

The City asserts that Tupper and Thurmond waived their right to raise their constitutional issues because they did not raise the issues in municipal proceedings. (This will be discussed in more detail in connection with the City's Point 3). Judge Ohmer noted at L.F. 463, (p. 9 of Judgment), that a party cannot be charged with failing to raise an issue in a proceeding in which that party did not participate. Tupper and Thurmond add that if they were required to raise issues in municipal proceedings then they actually would not have a right to seek injunctive relief in this court, and the doctrines below regarding not having an adequate remedy at law in the municipal would be nonsensical.

Class Action

In their briefing in the trial court the City argued that Tupper and Thurmond were seeking class action status without complying with the requirements of a class action lawsuit. The City has not pursued this argument in this court and so it is abandoned, but pursuant to the belts and suspenders approach Tupper and Thurmond briefly note that Judge Ohmer also got this right. Tupper and Thurmond did not seek class status, and had no obligation to seek class status, because, as Judge Ohmer said:

> It has long been established that a citizen may seek to enjoin the enforcement of an invalid ordinance which consequently provides relief to all citizens without joining all such citizens. *Bhd. Of Stationary Engineers v. City of St. Louis*, 212 S.W.2d 454, 458 (Mo. App. 1948), L.F. 470, (p. 10 of Judgment).

Class action law is irrelevant, and should Tupper and Thurmond prevail in this appeal the ruling shall be to the benefit of all drivers in the City of St. Louis.

RESPONDENTS' ARGUMENT IN RESPONSE TO CITY OF ST. LOUIS

RESPONSE TO POINT 1: REBUTTABLE PRESUMPTION

Tupper and Thurmond agree with Respondents that camera violation ordinances fall into two broad categories, first those ordinances which purport to make owners liable for letting others drive their cars in violation of the law, and second, those ordinances which limit liability to the driver, but which presume the owner is the driver at the time of the violation and then allow the owner to rebut this presumption if it is factually false.

This court now has pending before it in the first category *Moline Acres v. Brennan,* SC94085 and in the second category both this case and *City of St. Peters v. Roeder,* SC94379.

In this case the trial court made quick work of the rebuttable presumption. In the opinion, L.F. 469, (p. 15 of Judgment), the court stated:

> Importantly, these recent cases have shifted the Court's prior position on the validity of the "rebuttable presumption," a prime feature of the City's red light camera ordinance. *See Brunner v. City of Arnold,* 427 S.W.3d 201 (Mo. App. E.D. December 17, 2013) (finding that the Ordinance's rebuttable presumption violates the rights afforded by Article I, Section 10 of the Missouri Constitution, which prohibits the deprivation of life, liberty, or property without due process); *Damon v. City of Kansas City,* 419 S.W.3d 162 (Mo. App. W.D. November 26, 2013) ("if the ordinance is determined to be criminal in nature, then the rebuttable presumption is invalid"); *Unverferth v. City of Florissant,* 419 S.W.3d 76,

> 108 (Mo. Ct. App. 2013) ("[finder of fact] is not free to infer beyond a reasonable doubt that the registered owner was the driver based solely on the vehicle's registration because such an inference is unreasonable" (J. Mooney, dissenting)).

Let us now examine the logic of those Appellate opinions. In *Brunner v. City of Arnold*, 427 S.W.3d 201 (Mo. App. E.D. December 17, 2013) the court stated that the analysis should begin with a determination of the nature of the action, that is, whether the action was civil, quasi criminal or criminal, because only after the nature of the action had been determined will the court be able to state the level of due process to which the Defendant is entitled. The *Brunner* court at 231-232 stated:

> Under Missouri law, municipal ordinance violations are considered civil actions, while prosecutions of municipal ordinances are "quasi-criminal in nature" because the rules of criminal procedure apply. *City of Webster Groves v. Erickson,* 789 S.W.2d 824, 826 (Mo.App. E.D.1990); *see also City of Stanberry v. O'Neal,* 150 S.W. 1104, 1105 (1912) ("Thus it has been ruled, time and again, by the Supreme Court, that such cases are quasi criminal, which is no less than saying that they are like criminal cases in many respects."). Thus, constitutional protections afforded to an alleged-municipal-ordinance-violator are dependent upon the classification of the ordinance as either civil, criminal or quasi-criminal. *Damon v. City of Kansas City*, 419 S.W.3d 162, 188 (Mo. App. W.D. November 26, 2013) ("A determination that the ordinance is criminal and not civil would require

heightened procedural protections required by the Fifth, Sixth, and Eighth Amendments to the U.S. Constitution and their accompanying provisions in the Missouri Constitution.") (analysis of the constitutional claims at issue depended upon whether the red light camera ordinance was criminal or civil in nature).

The court then cited *City of Creve Coeur v. Nottebrok*, 356 S.W.3d 252, 257-258 (Mo App. 2011) for the proposition that determination of the character of the action should be determined by an analysis of the following factors:

(1) The ordinance includes express language indicating a municipality's intention to consider a violation of the ordinance to be civil in nature;

(2) The ordinance imposes a sanction that does not involve an affirmative disability or restraint on the individual but merely imposes a fine without assessing points against an individual's driver's license;

(3) The civil, non-point penalty for violating the ordinance is assessed without regard to the individual's knowledge or state of mind at the time of the violation;

(4) The presence of the deterrent purpose of the sanction may serve civil as well as punitive goals;

(5) The behavior to which the sanction applies is not already a crime;

(6) The ordinance is rationally connected to the broader, legitimate non-punitive purpose of promoting public safety; and

(7) The sanction imposed by the ordinance does not appear excessive in relation to the ordinance's purpose of promoting public safety.

The *Brunner* court then concluded that the Arnold camera ticket program was a system for imposing a penalty and stated:

> Arnold has acted as if the Ordinance was criminal in nature, presumably to coerce violators into paying the fine. Arnold may not use the Ordinance as a weapon and then ask to be shielded by the Ordinance. Moreover, because of the threat of imprisonment, the Ordinance imposes an additional penalty.
>
> These factors tip the scale in favor of a finding that the Ordinance is, indeed, criminal in nature. Because we find the Ordinance criminal in nature, we hold that the Ordinance is unconstitutional insomuch as it creates a rebuttable presumption. *Damon v. City of Kansas City*, 419 S.W.3d 162, 187-191 (Mo. App. W.D. November 26, 2013. Finding the Ordinance unconstitutional because of the criminal nature of the Ordinance and the Ordinance's rebuttable presumption, the Ordinance, thereby, violates the rights afforded by Appellants' Article I, Section 10 of the Missouri Constitution, which prohibits the deprivation of life, liberty, or property without due process.

Let us now apply these factors to the City's red light camera ticket program in this case.

(1) Whether the Ordinance states that it is civil or criminal.

There is no indication in the text if the Ordinance as to whether it is criminal or civil. But ordinary statutory construction finds the Ordinance to be criminal because absent a specific prescribed penalty provision, the City's General Penalty applies, that is, a fine of up to $500 or 90 days in jail, or both. City Rev. Code 17.40.020 (Ord. 57831 § 1 (part), &c.). That the City's Municipal Judges may in their discretion have an enforcement policy of not issuing arrest warrants for red light cameras is irrelevant to what its own Ordinance holds, *cf.* Clerk letter, Stipulated Trial Exhibit 13, A10.

(2) Whether the Ordinance imposes an affirmative disability or restraint on the individual or merely imposes a fine without assessing points.

The Ordinance is silent as to points, but in practice no points are assigned. The City's language is threatening, and the letter from the Clerk unequivocally states that a warrant will issue.

(3) Whether state of mind is an element of the prosecution.

It appears that the state of mind of the Defendant is absolutely irrelevant to the City. (Interestingly the videos in question show that the violations were technical and not flagrant violations, that is, running through the light a scant portion of a second after the light has turned from yellow to red. In such circumstances one may reasonably conclude that the driver made a conscious albeit quick decision to go on through because he or she thought he could make it

without the light turning red, and/or felt there was no material concern for safety because there is always a short gap in time between the light turning red and traffic starting up in the other direction).

(4) Whether the deterrent purpose of the sanction may serve civil as well as punitive goals.

Tupper and Thurmond hotly dispute whether this issue is properly before the court. As stated above, Tupper and Thurmond objected to the testimony about safety as irrelevant to the pleadings, and therefore Tupper and Thurmond were not prepared to rebut the testimony. Sufficeth to say that Tupper and Thurmond believe the red light camera ticket program in fact has no effect on safety and is merely a money grab.[4] Therefore whether the deterrent purpose

[4] *See, e.g.*, Reply Brief of Plaintiffs/Appellants, 2013 WL 3811377 at *3-6, filed in *Edwards v. City of Ellisville*,426 S.W.3d 644 (Mo. Ct. App. 2013) (red light cameras are "intended simply to generate revenue by exploiting split second violations caused by deficient traffic engineering without regard to whether cameras actually improve public safety"); *see also* Reply Brief of Plaintiffs/Appellants, 2013 WL 1234129 at *5, filed in *Brunner v. City of Arnold*, 427 S.W.3d 201 (Mo. Ct. App. 2013) ("comprehensive studies conclude cameras actually increase crashes and injuries, providing a safety argument not to install them.").

serves the goal of safety is unknown. Tupper and Thurmond note that in *Brunner v. City of Arnold* and *Damon v. City of Kansas City*, in which the petitioners cited Federal Highway Administration guidance on red-light enforcement[5], as well as engineering studies by expert authorities, the Missouri Court of Appeals discussed these issues at length. For example, in *Brunner*, the Court said "[a]s did the couple in Aesop's Fable, Arnold seems to have killed [sic, by context meaning "found"] the 'elusive goose that lays the golden egg,'[internal citation omitted], for the primary and fundamental purpose of the Ordinance seems to be just that—profit. Profit for Arnold and profit for ATS …. 'The legislature never envisioned that municipalities could raise revenue under the guise of traffic law enforcement at the expense of safer highways.'[internal citation omitted]" 427 S.W.3d at 226; *see also Unverferth v. City of Florissant*, 419 S.W.3d 76, 108 (Mo. Ct. App. 2013) finding: "We

[5] In fact, the all-red clearance interval (the safe one to two second window of time where all lights in an intersection are red), is a period of time the Federal Highway Administration (FHWA) has found red-light photo enforcement should <u>not</u> be used, and yet <u>the all-red clearance interval is where approximately 94% of camera revenue is generated</u>. S*ee e.g.*,Brief of Plaintiffs/Appellants, 2013 WL 489722 at *12, filed in *Brunner v. City of Arnold*, 427 S.W.3d 201 (Mo. Ct. App. 2013).

remand this issue for further proceedings consistent with this opinion, including discovery related to the issue of whether the Ordinance is a valid exercise of Florissant's police power or an unlawful revenue-generating measure." (The trial court here made no finding of the credibility of the testimony of the witnesses who claimed that the program is designed to promote safety).

(5) Whether the behavior to which the sanction applies is not already a crime.

Running a red light is already a crime under both the City of St. Louis Code, 17.08.130, L.F. 244, Stipulated Exhibit 2, and under Missouri statutes, RSMo. 304.281.1(3).

(6) Whether the ordinance is rationally connected to the broader, legitimate non-punitive purpose of promoting public safety.

See No. 4 above: Tupper and Thurmond dispute all claims of public safety and assert there is no such rational connection between the Ordinance and public safety.

(7) Whether the sanction imposed by the ordinance is excessive in relation to the ordinance's purpose of promoting public safety.

As just stated, the City claims the Ordinance promotes public safety, and while Tupper and Thurmond of course are aware of the danger of running red lights and of course do not favor running red lights, for any Ordinance to survive the rational basis test it must not be a mere money grab.

Let us now turn to the language of the Ordinance, the language of the tickets, and the letter from the Clerk of the City of St. Louis Municipal Court, Catherine Ruggeri-Rea, in reference to Tupper 1.

At several locations the Ordinance and the City's Forms include the word "prosecution". Further the Ordinance and the Forms have other related, threatening language.

In the Ordinance, L.F. 240, 242, Stipulated Exhibit 1, see:

- 17.07.040, third word "prosecution",
- 17.07.050, third word "prosecution",
- 17.07.050.B.1, first portion of sentence (in reference to the contents of the summons): "A statement that the automated traffic control system record will be submitted as evidence in the municipal court proceeding for prosecution of the violation of the Traffic Control Ordinance", and
- 17.07.050.B.2, middle section "If an owner furnishes satisfactory evidence pursuant to this paragraph, the City Court or City Counselor's office may terminate the prosecution of the citation issued to the owner.

In the Information/Notices of Violation, L.F. 248, 253, 265 and 267 (all emphasis in original), see:

- In the box on the front page in the middle there appears: "DID THEN AND THERE COMMIT THE FOLLOWING OFFENSE in violation of…" (Capitals in original).

- On the front page at the bottom of the box there appears: "ON INFORMATION, THE UNDERSIGNED PROSECUTOR CHARGES THE DEFENDANT AND INFORMS THE COURT THAT ABOVE FACTS ARE TRUE AND PUNISHABLE BY: FINE OF $100."
- On the front page at the bottom there appears: "Payment is admission of guilt or liability".
- On the back page at the top of the middle box there appears: "video of your violation will be submitted as evidence in the municipal court proceeding for the prosecution of the violation".
- On the back page at the bottom of the middle box there appears: "FAILURE TO RESPOND to this notice will result in the service of a Summons and a required court appearance. At this court appearance you may enter a plea of not guilty and request a trial. Other legal penalties prescribed by law may be imposed for failure to appear and dispose of the violation.

The Summonses have similar language, L.F. 309, 311 and 313.

Also, the municipal court clerk Catherine Ruggeri-Rea sent the letter threatening a warrant to Tupper, L.F. 291, Stipulated Trial Exhibit 12, City Stip., paras. 41-42, A9:

> This letter is to notify you that the above referenced case(s) have been reset to the 14th day of January, 2014 in Courtroom (1) One at 8:05 a.m.
>
> **Your failure to appear in court at the designated time will result in a warrant being issued for your arrest.** (Emphasis in original).

One may note the ever increasingly threatening tone. The original notice stated only: "Other legal penalties prescribed by law may be imposed for failure to appear and dispose of the violation." This is not like the language of a routine civil matter where (a) there are no threats of prosecution, and (b) the summons simply states that failure to appear will result in a default judgment.

In this case we of course also have the City threatening letter stating unequivocally that a failure to appear will result in a warrant. (This letter was retracted, but the story is likely apocryphal as what will happen if this court allows this Ordinance to stand).

As stated above the *Brunner* court concluded that the red light camera tickets were criminal. While counsel for Tupper and Thurmond have enough experience to know that they will face a steep hill if their case depends on over-turning over a century of established precedent holding that municipal prosecutions for ordinance violations are quasi-criminal, to counsel's knowledge no past cases have distinguished the list of rights an accused has in a criminal case and the list of rights which an accused has in a quasi-criminal case. The following is a partial list with partial citations of the rights guaranteed to criminal Defendants under the United States Constitution and the Missouri Constitution:

1. The right to remain silent and so not incriminate oneself, United States Constitution, Fifth Amendment; Missouri Constitution, Article I § 19,
2. The right to be presumed innocent, *In re Winship*, 397 U.S. 358, 364 (1970), *State v. Waller*, 163 S.W.3d 593, 596 (Mo. Ct. App. 2005),

3. The right to be represented by an attorney, United States Constitution, Sixth Amendment; *Howell v. State*, 357 S.W.3d 236, 240 (Mo. Ct. App. 2012),

4. The right to be informed of the cause and nature of the charge, United States Constitution, Sixth Amendment; Missouri Constitution, Article I **§** 18(a),

5. The right to a speedy and public trial, United States Constitution, Sixth Amendment, Missouri Constitution, Article I **§** 18(a),

6. The right to have the prosecution have the full burden to prove the charge, *State v. Waller*, 163 S.W.3d 593, 595 (Mo. Ct. App. 2005),

7. The right to have proof be beyond a reasonable doubt, *State v. Waller*, 163 S.W.3d 593, 595 (Mo. Ct. App. 2005),

8. The right to present evidence in one's own favor, Missouri Constitution, Article I § 18(a),

9. The right to compel witnesses to come to court in one's own favor, United States Constitution, Sixth Amendment; Missouri Constitution, Article I § 18(a),

10. The right to confront and cross examine the witnesses for the prosecution, United States Constitution, Sixth Amendment; Missouri Constitution, Article I § 18(a),

11. The right not to be deprived of life, liberty or property without due process of law, United States Constitution, Fifth Amendment; Missouri Constitution, Article 1 § 10,

12. The right to appeal to a higher court as stated in the statutes and Rules (as no such right existed at common law). *State ex rel. Garnholz v. La Driere*, 299 S.W.2d 512, 515 (Mo. 1957),

13. The right to have a jury trial with the jurors being impartial, United States Constitution, Sixth Amendment; Missouri Constitution, Article I **§** 18(a), [6]

14. The right to have the jury's verdict be unanimous for either guilty or not guilty, United States Constitution, Sixth Amendment; Missouri Constitution, Article I § 18(a); *see also* Rule 37.61 granting right to certify municipal ordinance case for jury trial.

[6] Rule 37.62(c) states that "The judge shall determine all issues of fact in ordinance violation cases unless a jury trial is authorized by law and requested by the Defendant." Respondents acknowledge the line of cases which state that a jury trial is constitutionally guaranteed for "petty offenses", often described as crimes for which the maximum sentence is no more than six months, *City of Kansas City v. Darby*, 544 S.W.2d 529, 531 (Mo. 1976). Tupper and Thurmond question whether in modern times a six month stint in jail would be so "petty" as to fail to meet the standard for a right to a jury trial under the Sixth Amendment. Tupper and Thurmond also ask the court to take judicial notice that regardless of the legal niceties, it is the custom of municipal Prosecuting Attorneys facing Defendants demanding jury trials to disavow seeking jail time, in order to take away Defendant's right to a jury. In St. Louis County anyway, this tactic works.

In *City of Webster Groves v. Erickson*, 789 S.W.2d 824, 826 (Mo. Ct. App. 1990) the court said:

> Municipal ordinance violations are said to be "quasi-criminal in nature". *Strode v. Director of Revenue*, 724 S.W.2d 245, 247 (Mo. banc 1987). In legal effect, this means a prosecution for the violation of a municipal ordinance is "a civil action ... resembling a criminal action in its effects and consequences." *City of Clayton v. Nemours*, 237 Mo.App. 167, 164 S.W.2d 935, 937 (1942). The action is criminal "in the sense that its primary object is to punish ...". *Id.* at 938. However, even when an ordinance authorizes incarceration as a punishment, violation of the ordinance is not usually regarded as a crime. "[I]n the accurate legal sense of the term [,] ... a crime is an act committed in violation of public law, that is, a law co-extensive with the boundaries of the state which enacts it, while an ordinance, on the contrary, is no more than a mere local police regulation passed in pursuance of and in subordination to the general or public law for the preservation of peace and the promotion of good order in a particular locality." *Id.*
>
> As a result, in a prosecution for an ordinance violation, the rules of criminal procedure apply, *City of Cameron v. Stinson*, 633 S.W.2d 437, 439 (Mo.App.1982), including the criminal standard of proof beyond a reasonable doubt. *City of Cape Girardeau v. Jones*, 725 S.W.2d 904, 907 (Mo.App.1987). And, our Rules regarding ordinance violations expressly

provide that trials "shall proceed in the manner provided for the trial of a misdemeanor by the rules of criminal procedure." Rule 37.61(e); Rule 37.74 (1990).

Moreover, "ordinance provisions imposing penalties are to be strictly construed against the prosecuting authority and are not to be extended by implication." *Levin v. Carpenter*, 332 S.W.2d 862, 865 (Mo.1960).

As a preliminary response Tupper and Thurmond note that running a red light is a crime under Missouri law so a red light offense caught by a camera is "co-extensive with the boundaries of the state which enacts it."

Additionally, it is a fair question whether a Defendant in a Municipal Ordinance prosecution gives up any of these specific rights, and if so, specifically which ones? Tupper and Thurmond suggest regardless of the niceties of the terminology, Defendants give up none of the above listed rights in municipal prosecutions, (except perhaps a jury trial), and that is all this Court need confirm in order to clarify what is at least a somewhat muddy area of the law.

Further, there is an irreconcilable conflict between the rebuttable presumption and several of these rights. The rebuttable presumption violates the right to remain silent and so not incriminate oneself. The rebuttable presumption violates the right to be presumed innocent. The rebuttable presumption violates the right to have the prosecution bear the full burden of proof.

Let us now turn to the City's argument on this issue. The City asserts that the 70-80% figures we have been using in this case for the percentage of time in which the sole owner is the driver justifies the presumption. Yet the well-established standard for probable cause in this state for an officer to make an arrest, (which by logic should be at a lower threshold than the standard for issuance of an actual charge), is that "probable cause exists where the facts and circumstances within the police officers' knowledge, and of which they have reliable and trustworthy information, would warrant a person of reasonable caution to believe that the person being arrested had committed the offense," *State v. Johnson*, 354 S.W.3d 627, 634 n. 6 (Mo. 2011). The standard is not that the officer has a 70-80% chance of being right. The standard is that the cautious arresting officer believes this subject committed this offense. While this issue is usually not discussed in percentages, Tupper and Thurmond simply ask this court to conclude that a 70-80% chance is not enough to justify a presumption that this particular person committed the offense. Rule 37 governs municipal court proceedings and Rule 37.33(a)(5) echoes the analysis. That Rule only allows an officer to issue a charge when he has "facts that support a finding of probable cause to believe the ordinance violation was committed and that the accused committed it". The percentage analysis applies here in the same way.

In this aspect of his opinion Judge Ohmer drew attention to the right not to be deprived of property without due process. Citing Judge Mooney's dissent in *Unverferth v. City of Florissant*, 419 S.W.3d 76, 108-109 (Mo App. 2013), Judge Ohmer found that the "finder of fact is not free to infer beyond a reasonable doubt that the registered owner

was the driver based solely on the vehicle's registration because such an inference is unreasonable." Tupper and Thurmond suggest this is correct, and so the rebuttable presumption violates the right not to be deprived of property without due process of law. The rebuttable presumption is unreasonable because the $100 fine deprives Tupper and Thurmond of their property without due process of law.

The City cites *City of St. Louis v. Cook*, 221 S.W.2d 468 (Mo. 1949), a parking ticket case, in support of its position. The first sentence in *Cook* describes a rebuttable presumption which is materially the same as the rebuttable presumption at issue here: "Ordinance No. 41240 of the City of St. Louis [City of St. Louis Rev. Code 17.62.280] *** provides, 'The presence of any vehicle in or upon any public street * * * in violation of any ordinance regulating the parking of such vehicle * * * shall be prima facie evidence that the person * * * in whose name such vehicle is registered on either the records of the City License Collector or the records of the Secretary of State of the State of Missouri, committed or authorized such violation.'"

Tupper and Thurmond suggest that the three central points of *Cook* are:

1. There is a distinction between shifting the burden of proof and shifting the burden of evidence, and the former is not lawful but the latter may be lawful where a shown fact may support an inference of the ultimate or main fact to be proved, p. 469.
2. "Giving a regard to due process, the power to provide such an evidentiary rule is qualified in that the fact upon which the presumption or inference is to rest must have some relation to or natural connection with the fact to be

inferred, and that the inference of the existence of the fact to be inferred from the existence of the fact proved must not be purely arbitrary or wholly unreasonable, unnatural, or extraordinary. And it is clearly beyond the legislative power to prescribe what shall be conclusive evidence of any fact. It is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed (or inferred), and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." (Citations and internal quotations omitted), p. 470.

3. "Even where there had been no legislative action enacting such a rule of evidence the inference that the owner parked or was responsible for the parking of a vehicle has been held to be reasonable and sufficient, *City of Chicago v. Crane*, 49 N.E.2d 802; *People v. Rubin*, 31 N.E.2d 501", p. 470.

From these points one may conclude first, that while rebuttable presumptions may occur in the law such presumptions must be reasonable, and second, it is a fair question to ask whether the presumption authorized in *Cook* may be pushed beyond parking and into cars entering intersections while the light is red.

As to the reasonableness issue in this case, in contrast to *Cook*, we have actual numbers. The percentage of time in which the driver is the sole owner is 70-80%. As stated above, that takes away the reasonableness of the presumption.

As to whether Cook may be extended beyond parking one first notes that the *Cook* court took pains to note that it was dealing with a parking case. Tupper and Thurmond

suggest that parking truly is different from moving into an intersection when the light is red, because there is no safety issue attached to parking – it relates to relief of congestion - but there is a safety issue attached to moving into an intersection when the light is red. Further, the fine is much higher than that of a parking ticket. Where the conduct and penalties are higher, the right to due process ratchets up:

> The length and consequent severity of a deprivation are considered in determining what procedural protections are constitutionally required", *Jamison v. State, Dep't of Soc. Servs., Div. of Family Servs.*, 218 S.W.3d 399, 409 (Mo. 2007).

Also, the idea that $100 is a *de minimis* property deprivation and that lower due process can apply is belied by common experience. Recent experience suggests that many citizens have problems with paying municipal court fines, and fear incarceration as a result. In the context here, lawful due process must be granted before any such fine is even assessed.[7]

[7] This Court is currently considering a proposed revision to Rule 37.65, which governs fines for municipal ordinance violation, so that the rule will reflect RSMo. 560.026(1) and 560.031(3) and the U.S. Supreme Court's holding on equal protection grounds that indigent defendants cannot be imprisoned for failure to pay a fine due solely to financial inability. *See* Letter from Michael Wolff, Dean of St. Louis University Law School, *et al.* to Bill Thompson, Clerk of this Court (Sept. 3, 2014) (on file with the Clerk's Office),

Further, in favor of the supposition that Cook should not extend beyond parking, Tupper and Thurmond draw the court's attention to *City of Kansas City v. Hertz Corp.*, 499 S.W.2d 449, 452 (Mo. 1973) where the court faced a rental car company disputing liability for its lessee's parking violations pursuant to a similar rebuttable presumption. The court noted that Massachusetts and New York allow a presumption in parking cases and said:

> In the field of automobile parking violation this court believes that the Massachusetts and New York holdings are sound and meet the needs of today without violating the constitutional due process rights of the people, p. 453.

The *Hertz* Court thus explicitly echoed *Cook* from 24 years earlier and limited its holding to parking, implying that it is reasonable to have different rules for parking violations than for moving violations.

Tupper and Thurmond also ask the court to take judicial notice that in the real world no one gets arrested for parking tickets. Instead, cars are booted and people are inconvenienced. We may recall from our history studies the early Athenian legislator Draco who imposed severe penalties for all offenses, failing to distinguish the minor from the major, and whose justice system promptly collapsed.[8]

This court should feel comfortable limiting *Hertz* and *Cook* to parking.

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citing *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970); *Tate v. Short*, 401 U.S. 395, 397-98 (1971).

[8] So far neither the City nor ATS has sent out hemlock with their red light camera tickets.

The rebuttable presumption therefore violates the United States Constitution and the Missouri Constitutions, and so the red light camera ticket Ordinance fails and should be enjoined.

RESPONSE TO POINT 2: POINTS

As the City acknowledges in footnote 13 at the beginning of its discussion of the Points issue, Appellants' Brief, p. 36, Judge Ohmer did not discuss points in his decision. It is well established that an appellate court will "affirm the decision of the trial court if we can affirm it on any basis, even if it is not one of the bases argued by the respondent," *Miller v. Ho Kun Yun*, 400 S.W.3d 779, 785 (Mo. Ct. App. 2013), and questions of law are reserved for the independent judgment of the reviewing court, *All Star Amusement, Inc. v. Director of Revenue*, 873 S.W.2d 843 (Mo. 1994). In light of the City's concern, however, Respondents will respond to the City's Argument.

Tupper and Thurmond begin their discussion with a quarrel with the City's cast of the facts regarding non-assessment of points. While the parties agree (a) that the Ordinance is silent as to points, L.F. 240, Stipulated Exhibit 1, (b) that the following appears on the "Notices of Violation" and "Summons and Supplemental Notices of Violation", L.F. 248, 253, 265 and 267, L.F. 309, 311 and 313, "The State of Missouri does not assess points for red light camera infractions," and (c) that the City's municipal court reports red light camera convictions using the State's charge code for red light camera violations, the parties disagree on the methodology of execution of item "(c)". The City's Brief at 37 states: "The City makes no attempt to dictate whether points

should be assessed to the driver's license of red light camera program violators". But the stipulation states otherwise. City Stip, para.10, L.F. 223 reads

> After a conviction is entered in a case involving a violation of the City's red light camera ordinance, the Clerk of the Municipal Court enters a record of that conviction into the data system operated by REJIS in a format that enables REJIS to determine that the conviction is one for a violation of a red light camera ordinance.

Tupper and Thurmond conclude from this that City indeed does consciously dictate whether or not points are assessed, because nothing prohibits the City from entering the data into REJIS through the undifferentiated charge code for red light tickets, and for which DoR will assess two points, but the City elects to use the no points camera ticket charge code.

(One can imagine that if the City does start assessing points for camera tickets in that manner the Ordinance the result will be more overcrowded dockets, for Defendants would presumably follow current municipal court custom and hire counsel to plea bargain their moving violation tickets down by prosecutorial amendment to "Excessive Muffler Noise", "Improper Parking", etc.) Further the appropriate amount of due process will ratchet up, because the severity of the penalty will have increased. This will present its own problems because as discussed elsewhere in laborious detail the City does not actually know the identity of the driver.)

Tupper and Thurmond assert that the failure to assess points, as the City applies the Ordinance, makes the Ordinance unlawful. Particularly, Rule 71.010 requires that

municipal ordinances conform to state law. *State v. Ostdiek*, 351 S.W.3d 758, 766 (Mo App. 2011) stated that the state speeding Ordinance, RSMo. 304.010 "does not proclaim that a municipal ordinance regulating speed limits within a city, town or village renders state law devoid of application." Nothing about *Ostdiek* would lead one to think it does not apply equally to red light tickets. "A municipal ordinance is void if it conflicts with the general laws of the state", *McCollum v. Dir. of Rev.*, 906 S.W.2d 368, 369 (Mo. banc 1995). No ordinance is valid which contains provisions contrary to or in conflict with the state's traffic regulations, in this case RSMo. 304.120.3. The test for determining if a conflict exists is whether the ordinance permits what the statute prohibits or prohibits what the statute permits, *Cape Motor Lodge, Inc. v. City of Cape Girardeau*, 706 S.W.2d 208, 211 (Mo. banc 1986) (quoting *Page Western, Inc. v. Cmty. Fire Protection Dist.*, 636 S.W.2d 65, 67 (Mo. banc 1982)).

As the court stated in *Brunner v. City of Arnold*, 427 S.W.3d 201, 229 (Mo. Ct. App. 2013), the statutory analysis proceeds as follow: RSMo. 302.225.1 requires that courts report any moving violation offenses to the Department of Revenue within seven days of any plea or finding of guilty. Section 302.010(13) defines a "moving violation" as the character of traffic violation where at the time of violation the motor vehicle involved is in motion. Section 302.302.1(1) requires the Department of Revenue to assess two points against the driver's license of any person convicted of a moving violation. When a car runs a red light, the car is moving. Ergo points have to be assessed.

Tupper and Thurmond note that ordinances imposing penalties are "strictly construed" against the municipality and will not be extended by implication, *City of Kansas City v. Heather*, 273 S.W.3d 592, 595 (Mo.App. W.D.2009).

At page 38 of their Brief the City asserts that because the Ordinance is silent as to points it cannot be "expressly inconsistent or in irreconcilable conflict with the general laws of the state, as is required to render an Ordinance unlawful under *McCollum v. Department of Revenue*, 906 S.W.2d 368, 369 (Mo. 1995)". This argument reminds counsel of the murderer who admits shooting and killing the victim but asserts that the gun went off of its own accord. That would be a hard sell to a jury in a murder case, just as the City's argument here should be a hard sell to this court. In the murder case, generally, the gun went off because someone pulled the trigger. Here DoR is not assessing points because the City consciously elects to report the convictions under the no points charge code, not because of some amorphous reason pulled from the ether.

At p. 40 of its Brief the City asserts that Tupper and Thurmond did not explain their rationale for their points argument in their Petition. Tupper and Thurmond commend the court to paragraphs 55-67 of the Petition, L.F. 24&c, which analyze in detail the rationale for the "void for want of points" decisions in *Unverferth .v City of Florissant*, 419 S.W.3d 76 (Mo. App. E.D. September 10, 2013) and *Edwards v. City of Ellisville*, 426 S.W.3d 644, 664 (Mo. App. E.D. November 5, 2013). (Tupper and Thurmond also reviewed the issue in their Post-Trial Brief, which the court had asked for at the conclusion of the trial, Tr. 133, and which was filed on January 31, 2014, L.F. 7

(Minutes) before the date of Judge Ohmer's February 11, 2014 18 page Judgment, L.F. 455.[9]

This court should conclude that because the City is reporting red light camera ticket violations under a charge code for no points the City is permitting what the state law prohibits and so the Ordinance is void.

RESPONSE TO POINT 3: ADEQUATE REMEDY AT LAW

Appellants argue in Point 3 that instead of filing in Circuit Court for injunctive and declaratory relief based on constitutional arguments, Tupper and Thurmond should have fought their tickets in the municipal court.

Tupper and Thurmond of course agree with the basic principle of equity that a court will have equitable jurisdiction only if the parties have no adequate remedy at law. But Judge Ohmer got this exactly right at L.F. 459, (p. 5 of Judgment), where he cited a 129 year old case, *Sylvester Coal Co. v. City of St. Louis*, 32 S.W. 649, 650-651 (Mo. 1895).

> The fact that in each of such suits the plaintiffs might plead successfully the invalidity of the ordinances as a defense thereto does not give them an adequate remedy. They are entitled to be protected from the expense,

[9] The City apparently inadvertently omitted Tupper and Thurmond's Post Trial Brief from the Legal File, but managed to find and include both their Post-Trial Brief and ATS's Post Trial Brief. Without objection, Tupper and Thurmond are filing Supplemental Legal File to cure this omission.

> vexation, and annoyance of such a multiplicity of suits, in consequence of their continuance of a legitimate business, except upon compliance with the condition or ordinances which it is alleged are and may be utterly void. The prevention of vexatious litigation and of a multiplicity of suits constitutes a favorite ground for the exercise of the jurisdiction of equity by way of injunction." This has been frequently recognized as a ground for the exercise of such jurisdiction in this state and is an independent ground of equity jurisdiction, upon which such courts may interfere to prevent municipal authorities from transcending their powers. (Citations omitted).

At the time when Tupper and Thurmond filed this suit each faced two red light camera tickets for a total of four. Tupper and Thurmond therefore met the "multiplicity" requirement. Tupper and Thurmond therefore suggest that they lack an adequate remedy at law, and so have properly invoked the equitable jurisdiction of the Missouri courts to seek injunctive relief.

As stated above, Tupper and Thurmond also draw the Court's attention to *Dae v. City of St. Louis*, 596 S.W.2d 454, 455 (Mo. Ct. App. 1980) holding that only if the ordinance is found to be unconstitutional or invalid with its enforcement resulting in an irreparable injury to a property right will injunction lie, but Tupper and Thurmond point out that they have exactly such a property right at stake. Judge Ohmer found this to be so in his opinion, L.F. 469-470 (p. 15-16 of Judgment) where he concluded that the prosecutions affected Tupper and Thurmond's property rights. This is consistent with the endless paperwork, the notices, summons and finally numerous letters from the

collections law firm, each seeking $100.00. Therefore Tupper and Thurmond's property rights are affected by these tickets, and therefore the requirement of an injury to property is fulfilled.

Tupper and Thurmond also refer this Court to the *Brunner* court's analysis finding that when a municipal court lacks subject matter jurisdiction and therefore the presence of an adequate remedy at law is immaterial where a court patently and unambiguously lacks jurisdiction to act. Tupper and Thurmond accordingly need not subject themselves to municipal court proceedings for an alleged violation of a void and unenforceable municipal ordinance because "equity will enjoin the enforcement of an invalid ordinance to protect the individual citizen from multiple prosecutions, or to prevent irreparable harm to his [or her] property rights ...." *Brunner*, 427 S.W.3d at 216 (internal citations omitted).

As an additional argument, Tupper and Thurmond note that the City ignores what Tupper did in Tupper 1. In that case she started in the Municipal Court, transferred the case to Circuit Court, went to trial, was initially found guilty, but then pursuant to post trial motion, was acquitted. The City appealed and she began preparing to defend her acquittal in the higher court. The City, however, after Judge Ohmer ruled in this case, dismissed the Tupper 1 appeal prior to disposition. See Court of Appeals docket sheet,

Stipulated Trial Exhibit 20, A12.[10] It seems to Tupper and Thurmond that since the City dismissed the appeal of the process the City asserts Tupper should have taken, the City should now be estopped from asserting, as it does at 44, that the appropriate forum should be through that very process. In fact, the City's argument in Point 3 does not even acknowledge that Tupper did exactly what they suggest in Point 3 but that she was stopped from completing the process by the City's own action.

Finally, the City asserts at 43 that the situations of Tupper and Thurmond are "in the same posture" as Respondent Faith Morgan in *Smith v. City of St. Louis*, 409 S.W.3d 404, 418 (Mo. App. E.D. 2013), and whose claim the Court of Appeals dismissed because she had an adequate remedy at law in the Municipal Court. But the City ignores that Faith Morgan had only one ticket and so she did not meet the multiplicity requirement. Between them Tupper and Thurmond have four tickets—two each—and therefore they meet the multiplicity requirement, and are entitled to adjudication in this matter.

RESPONSE TO POINT 4: RELYING ON SMITH AND BRUNNER

The City's argument in Point 4 is that Judge Ohmer relied on precedent from the Missouri Court of Appeals.

[10] Another reason the City dismissed may have been to avoid preparation of a transcript of Tupper's trial in which Officer Burns' stated that the percentage of the time in which the driver is the sole owner during in-person traffic stops is "50/50".

The City's first argument in this point is that *Smith v. City of St. Louis*, 409 S.W.3d 404 (Mo. App. E.D. 2013) was only a decision, "as applied", and that *Smith* was therefore limited to the Notice received by Alexa Smith. While Tupper and Thurmond concede that the *Smith* court at 418 and 427 stated that its decision was "as applied", they note that rightly or wrongly the court did also flatly state that the Ordinance was void, 407 and 427.

But more importantly than arguing over the fine points of *Smith*, the real flaw with the City's argument is that it ignores the logic of other Court of Appeals cases with a rebuttable presumption: *Unverferth, Damon* and *Brunner*. The logic of those cases is discussed in Tupper and Thurmond's response to the City's Point 1, and Tupper and Thurmond incorporate those arguments herein.

Additionally, in this Point 4 the City argues that the *Brunner* court erred in finding that red light camera ticket prosecutions are criminal and not civil. The logic of that argument is discussed in Tupper and Thurmond's Response to Point 1, and Tupper and Thurmond simply restate here that the proper question is not what label we put on a particular prosecution, but instead is what rights a Defendant has in such a prosecution. Tupper and Thurmond restate here their argument in response to the City's Point 1 that all the rights listed in that argument (except perhaps the right to a jury) should apply in all municipal prosecutions.

In Point 4 the City reargues that Tupper and Thurmond should have filed in Municipal Court. First, Tupper and Thurmond incorporate by reference their arguments above in Response to Point 3, which addresses that issue directly. Additionally, in its last

section at p. 53 the City supports its position by arguing that it would be "beyond judicial reach" for Municipal Court judges to determine the constitutionality and validity of ordinances before them. This argument is countered by noting that every judicial officer takes an oath to "support the Constitution of the United States and of this state", Missouri Constitution, Article VII § 11. Does the City really think this Court should hold that a Municipal Judge who in good conscience finds an Ordinance to be unconstitutional should enforce it anyway? At the last Tupper and Thurmond had no adequate remedy at law and so had every right to by-pass the Municipal Court and bring this action for equitable relief.

RESPONSE TO POINT 5: CORRECTION OF DEFICIENCIES IN NOTICE

The form of the Notice of Violation was not the focus of Tupper and Thurmond's attack on the Ordinance, and although the forms were in evidence by stipulation there was no trial court argument or briefing on the issue. As the City correctly points out at 59 of their Brief, at p. 7 of the transcript Tupper and Thurmond acknowledged that the form in use by the City complied with the requirements of Rule 37.33. (There was a reason for this concession. After Tupper, a licensed attorney, received her Notice she retained counsel and fought the case. After Thurmond, an employee of a licensed attorney, received her notice she "knew her rights", Tr. 80. Factually this was not the case with which to challenge the form of the Notice.

Judge Ohmer stated that the City had revised its form yet again before the trial and yet he ruled that:

> The Notice still fails to contain a "court date". It does not advise the accused that he "must respond to the violate notice by either paying the fine or pleading not guilty and appearing at trial." L.F. 468, (p. 14 of Judgment).

Tupper and Thurmond suggest to this court that because there is no copy of the form the City was using at the time of trial in the record, and since Tupper and Thurmond, as Plaintiffs, essentially dropped the issue, that the form of the notice is not properly before this court. (The "requirement" to state a court date and other issues related to the form of the Notice is squarely before this Court in the Brennan matter, SC94085).

Also, it appears to Tupper and Thurmond that Judge Ohmer directed his interest away from the form of the Notice and toward the fact that the *Smith* court had declared the City's form so out of regulation that the Ordinance itself was invalid, and so that the City therefore was improperly continuing to enforce the Ordinance, L.F. 467-468, (p. 13-14 of Judgment).

Finally, as Tupper and Thurmond read Judge Ohmer's decision the form of the Notice was not a necessary condition to his ruling in Tupper and Thurmond's favor. He would have decided the case in their favor based on the rebuttable presumption issue even if the form of the Notice had not even been pled in the Petition.

RESPONDENTS' ADDITIONAL REASON TO AFFIRM – PRIVATE, FOR-PROFIT LAW ENFORCEMENT

As is known to the court, there are currently pending before it three camera ticket cases. In Respondent's Brief in *Brennan,* SC94085, undersigned counsel promised an analysis in this case of the concern that a private company has a stake in a criminal case. (As stated therein, counsel acknowledges the Western District's work in bringing this issue forth *sua sponte*, without help from attorneys for the parties.)

The discussion is ripe in this case because here the critical fact of the financial arrangements between the city and the camera company is part of the record. Paragraph 34 of the City Stip, L.F. 226, states:

> 34. Pursuant to the contract between them, the City collects the fine payments for all red light camera ticket tickets, and the City pays to ATS an amount equal to 31.33 percent of the fine amounts actually collected.

In *Damon v. City of Kansas City*, 419 S.W.3d 162, 181-82 (Mo. Ct. App. 2013) the court stated:

> The United States Supreme Court in *Tumey v. Ohio,* 273 U.S. 510, 523 (1927) recognized that to subject a defendant to criminal sanctions involving his liberty or property before a tribunal that has a direct, personal, and substantial pecuniary interest in convicting him is a denial of due process of law. Notably, ATS [American Traffic Solutions, the most well-known camera ticket company], is not a party to the underlying offenses

pending in the municipal court. Further, our Supreme Court has recognized that to allow private prosecutors, employed by private citizens, to participate in the prosecution of a defendant "is inherently and fundamentally unfair." *State v. Harrington*, 534 S.W.2d 44, 48 (Mo. banc 1976).

The *Harrington* court quoted *State v. Peterson*, 218 N.W. 367, 369 (Wis. 1928) for the rationale:

> In an early day in England private parties prosecuted criminal wrongs which they suffered. They obtained an indictment from a grand jury, and it became the duty and the privilege of the person injured to provide a prosecutor at his own expense to prosecute the indicted person. Our scheme of government has changed all this. It is now deemed the better public policy to provide for the public prosecution of public wrongs without any interference on the part of private parties, although they may have been injured in a private capacity different from the general public injury that accrues to society when a crime is committed. So under our system we have private prosecution for private wrongs and public prosecution for public wrongs. Our scheme contemplates that an impartial man selected by the electors of the county shall prosecute all criminal actions in the county unbiased by desires of complaining witnesses or that of the defendant.

Harrington related to a private prosecutor and not a private company assisting the prosecutor, but the interests line up the same way. It seems that ATS's private stake in camera tickets might make it just a little too interested in finding violations in close cases.

The United States Supreme Court precedent cited in *Damon*, *Tumey v. Ohio*, 273 U.S. 510, 523 (1927), seems instructive as well. "Direct, personal, and substantial pecuniary interest in convicting him" is exactly what ATS has in this situation.

Because of ATS's improper stake in each ticket, this Court may also affirm the Trial Court.

RESPONDENTS' ARGUMENT IN RESPONSE TO DIRECTOR OF REVENUE

Tupper and Thurmond interpret the Director of Revenue's appeal as asserting that the trial court erred in not dismissing the Director early in the case, because (a) the Director fills only the ministerial role of assessing points in the event that a red light conviction comes through the system via the generic charge code for red light violations, and not the charge code created specifically for these camera tickets, and (b) Tupper and Thurmond sought no specific relief against him.

In his February 11, 2014 Order and Judgment, L.F. 465 (p. 11 of Judgment), Judge Ohmer wrote that he would not dismiss the Director because the Director:

> may be affected by a declaration of invalidity of the Ordinance since it is the party responsible for the promulgation and application of charge codes related to the Ordinance. The court believes that even if no specific relief is sought from the Director, he is properly a party to this equitable proceeding.

Then in his March 10, 2014 Amendment of its Judgment, L.F. 536, in response to Tupper and Thurmond's Motion to Amend the Judgment because all parties had not been dealt with in the February 11 ruling, Judge Ohmer wrote that he

> declines to expressly enjoin the other Respondents from taking the actions enumerated in its February 11, 2014 Order and Judgment because such other parties lack the power or authority to take the actions prohibited by the Order and Judgment if the City of St. Louis is in the first instance enjoined from taking such actions.

Tupper and Thurmond have no dog in this hunt, and take no formal position on the Director's point. (Tupper and Thurmond cannot resist stating their confidence that "sure as shootin'" if they had not named the Director in the original Petition the other Defendants would have promptly moved to dismiss for failure to join an indispensable party).

It does seem to Tupper and Thurmond, however, that the trial court issued no ruling against the Director and any error Judge Ohmer might have made by leaving him in the case without entering relief against him will have no binding effect on the Director, and so he has "no personal stake arising from a threatened or actual injury" and so lacks standing in the appeal. *Schweich v. Nixon*, 408 S.W.3d 769, 774 (Mo. 2013)

CONCLUSION

Respondents pray the court to affirm the Trial Court by declaring void and enjoining the City's red light camera ticket program, particularly Ordinance 66868, codified at 17.07.010&c, to award costs and attorney's fees to Tupper and Thurmond, and for such other relief as the court finds to be just, meet and reasonable.

RESPONDENTS' CROSS APPEAL

JURISDICTIONAL STATEMENT

This court has transferred this appeal pursuant to Rule 83.01. The Court has jurisdiction pursuant to Article V § 10 of the Missouri Constitution.

STATEMENT OF FACTS

Tupper and Thurmond incorporate by reference their Statement of Facts at the beginning of this brief.

POINT RELIED ON

The trial court abused its discretion in denying in total Tupper and Thurmond's Motion for Attorney's Fees, because Tupper and Thurmond meet and exceed the standard for awarding fees pursuant to the special circumstances exception to the American Rule, in that Tupper and Thurmond were required to file collateral litigation and the City engaged in intentional misconduct.

O'Riley v. US Bank, 412 S.W.3d 400, 418 (Mo.App. 2013)

Goellner v. Goellner Printing, 226 S.W.3d 176, 179 (Mo.App. 2007)

Motor Control Specialities, Inc. v. Labor & Indus. Relations Comm'n, 323 S.W.3d 843, 854, 855 (Mo.App. 2010)

Lett v. City of St. Louis, 24 S.W.3d 157, 162 (Mo.App. 2000)

ARGUMENT

POINT RELIED ON

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Standard of Review

The court reviews the granting of attorney fees for an abuse of discretion, *Motor Control Specialities, Inc. v. Labor & Indus. Relations Comm'n*, 323 S.W.3d 843, 849 (Mo. Ct. App. 2010).

Discussion

This portion of this Brief assumes this court has affirmed the trial court's grant of equitable relief in their favor. If it turns out otherwise, this Court, of course, need not take up this Cross Appeal.

Also, because Tupper and Thurmond prevailed against the City only, Tupper and Thurmond seek attorney's fees from the City only.

After the court issued its judgment Tupper and Thurmond moved for attorney's fees, L.F. 494. The court denied that Motion, L.F. 536.

By the time Petitioners filed this case each had received two red light camera tickets and the Court of Appeals had already issued:

1. *Smith v. City of St. Louis*, 409 S.W.3d 404, 418 (Mo. App. E.D. 2013),

2. *Unverferth .v City of Florissant*, 419 S.W.3d 76 (Mo. App. E.D. September 10, 2013),

3. *Ballard v. City of Creve Coeur*, 419 S.W.3d 109 (Mo App. E.D. October 1, 2013), and

4. *Edwards v. City of Ellisville*, 426 S.W.3d 644, 664 (Mo. App. E.D. November 5, 2013).

Judge Ohmer paid particular note to *Smith*, stating at L.F. 473, (p. 13 of Judgment) that the *Smith* case's mandate had issued on October 30, 2013 and at 427 the court had:

> held in part that the Ordinance was "void for failure to comply with Supreme Court rules…
>
> Despite the Court of Appeals clearly stating that the Ordinance was "invalid" pages 407, 417, 418 and 427 and "void", pages 407 and 427, the City has asserted the position that it could continue to enforce the Ordinance, [and] the Court of Appeals merely found that the applicable "Notice" was invalid… The Court notes that the Court of Appeals importantly did *not* say or imply that the Ordinance was valid. The Court of Appeals said the Ordinance was *void*. It did not say, as Defendants argue, that the Ordinance was valid except for the Notice."

As noted in response to the City's Point 4, it is true that the *Smith* Court found the Ordinance to be void as applied. But the *Smith* court still did find the Ordinance to be

void. But even if this court finds that *Smith* should not have been enough to stop the City, the City can hardly argue that it acted in good faith in continuing its program in light of the three other on-point cases, *Unverferth*, *Damon* and *Brunner*. Each of those cases was sufficient to inform the City that the Court of Appeals had determined that red light camera ticket Ordinances with a rebuttal presumption were void and unenforceable.

The City, however, continued right on with its program, essentially ignoring those findings. Patti Hageman, then-City Counselor, was quoted on in the StlBeacon.com newspaper on November 7, 2013 as saying:

> The law remains that red light safety cameras are constitutional, legal and valid safety tools. The recent Ellisville court decision does not impact the St. Louis City red light camera safety program, A4.

Those circumstances left Tupper and Thurmond with no choice but to file this suit on November 25, 2014 to stop the City from prosecuting their tickets. This litigation is therefore collateral litigation to the litigation directly involving the tickets.

In *O'Riley v. US Bank*, 412 S.W.3d 400, 418 (Mo App W.D. 2013) the court stated:

> Missouri follows the "American Rule" that provides, absent statutory authorization or contractual agreement, each party bears the expense of his or her own attorney's fees, with few exceptions. "Special circumstances" is one of the few exceptions to the American Rule. *Klinkerfuss v. Cronin*, 289 S.W.3d 607, 618 (Mo.App. E.D.2009) (*Klinkerfuss III*). Intentional misconduct constitutes 'special circumstances' justifying an award of

attorney's fees." Id. at 619. (Internal quotations and some citations omitted).

See also *Goellner v. Goellner Printing*, 226 S.W.3d 176, 179 (Mo.App.2007) holding that the "special circumstances" are narrowly construed.

In *Motor Control Specialities, Inc. v. Labor & Indus. Relations Comm'n*, 323 S.W.3d 843, 854, 855 (Mo. Ct. App. 2010) the court again referenced collateral litigation:

> Some examples of special circumstances include "where very unusual circumstances exists so it may be said equity demands a balance of the benefits" and "where the attorney fees are incurred because of involvement in collateral litigation." *Lett v. City of St. Louis,* 24 S.W.3d 157, 162 (Mo.App. E.D.2000).
>
> Where the natural and proximate result of a wrong or breach of duty is to involve the wronged party in collateral litigation, reasonable attorney fees necessarily and in good faith incurred in protecting himself from the injurious consequence thereof are proper items of damages. *Essex Contracting, Inc. v. Jefferson Cnty.*, 277 S.W.3d 647, 657 (Mo. Banc 2009) (quoting *Johnson v. Mercantile Trust Co. Nat'l Ass'n.*, 510 S.W.2d 33, 40 (Mo.1974)).

See also *Johnson v. Mercantile Trust Co. Nat. Ass'n*, 510 S.W.2d 33, 40 (Mo. 1974), in which this court stated:

> The question of attorney's fees and costs in this case thus come within the rule that where the natural and proximate result of a wrong or breach of

> duty is to involve the wronged party in collateral litigation, reasonable attorneys' fees necessarily and in good faith incurred in protecting himself from the injurious consequence thereof are proper items of damages. Without the allowance of fees and costs plaintiffs are not restored to the position they enjoyed prior to this abortive transaction.

Tupper and Thurmond suffered a "natural and proximate" wrong when the City did not stop its program after the Court of Appeals turned against these tickets. Tupper and Thurmond had to incur attorney's fees in good faith in order to protect themselves from that wrong and to be restored to where they were before receiving their tickets. Their fees are therefore a proper item of damages.

There is also a record of intentional misconduct by the City in that it sought to moot the controversy with its "end run" dismissal of the outstanding tickets not on appeal (even after Tupper had prevailed in obtaining a judgment of acquittal in Tupper 1 on the same grounds briefed to this Court). Particularly, as the record here shows, the City dismissed the Tupper 2 ticket and the Thurmond tickets at the conclusion of the Temporary Restraining Order hearing after the circuit court announced from the bench that it would grant the TRO. (In the Court's words from its Judgment, it was "poised", to enter the TRO, L.F. 458, (p. 4 of Judgment), as outlined above in the beginning of Tupper and Thurmond's Response to the City's Brief, and incorporated here by reference.)

The City, after dismissing Tupper 2 and the Thurmond tickets, argued that the controversy was mooted and so Respondents could not seek relief. There ensued a long briefing cycle on the issue of mootness exceptions. The trial court ruled in favor of

Tupper and Thurmond and found the matter to be not moot under the public interest exception, capable of repetition yet evading review. (See discussion of Mootness above in the first portion of Tupper and Thurmond's Argument directed at the original appeal).

When the City dismissed the tickets it sent a message to the trial court and the world that it was unwilling to defend its red light camera ticket program in the courts. When one considers such conduct one must ask whether on the one hand the City was engaging in a routine "tough litigation tactic", or whether on the other hand the City had gone "over the line" into territory justifying attorney's fees. One reason the dismissals were "over the line" is because of the large sums of money involved. At 225 tickets per day, *see* the City's exhibit 1 from the TRO bond hearing, City TRO Motion Exhibit 1, A5, the revenue being received from the citizenry was (and perhaps still is) $22,500 per day, $675,000 per month, and $8,100,000 per year, with around 40% of the City's citizens receiving such tickets every year. At those numbers the City should have welcomed the challenge, for if the City really believed its program were lawful, it would have desired a hearing. The City's conduct tells the tale.

In *Goellner v. Goellner Printing*, 226 S.W.3d 176, 179 (Mo. Ct. App. 2007) the court awarded fees stating:

> We believe that special circumstances have been shown—after relying on GP to pay her health insurance premiums for more than twenty years, these payments were terminated, out of spite, and Erlene—92 years old at the time of trial—was forced to bring a declaratory judgment action. Erlene is entitled to the attorney's fees and costs she incurred in bringing this action.

Similarly, in *Motor Control Specialities, Inc. v. Labor & Indus. Relations Comm'n*, 323 S.W.3d 843, 854, 855 (Mo. Ct. App. 2010) the court granted fees stating:

> Motor Control breached a duty to Claimant in seeking an injunction, which constituted collateral litigation, and required Claimant to incur attorney fees to defend against it.

This case is on point to *Goellner* and *Motor Control*. This court should find that the trial court abused its discretion in denying attorney's fees to Tupper and Thurmond.

As oral argument approaches counsel for Tupper and Thurmond will submit an application for attorney's fees in this court. Tupper and Thurmond suggest that the appropriate remedy for fees in the trial court is to remand for the trial court to determine an appropriate fee for that level of the litigation.

CONCLUSION

Respondents pray the court to reverse the trial court denial of attorney's fees in favor of Tupper and Thurmond and against the City of St. Louis, to award Tupper and Thurmond attorney's fees on appeal, and to remand for determination of a reasonable attorney fee in the trial court, to award costs to Tupper and Thurmond, and for such other relief as the court finds to be just, meet and reasonable.

RULE 84.06(c) CERTIFICATION

This Brief complies with the limitations contained in Rule 84.06(b) because the Brief's word count is less than 27,900, that is, the word count is 17,513.

The Brief has been scanned and is virus free.

/s/ W. Bevis Schock .
W. Bevis Schock, MBE # 32551

CERTIFICATE OF SERVICE

Undersigned counsel for Intervenors hereby certifies that on September 30, 2014 he delivered copies of this Amended Brief by the electronic filing system to:

All counsel of record

//s// W. Bevis Schock .
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