

**FILED**

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JOAN M. GILMER  
CIRCUIT CLERK, ST. LOUIS COUNTY

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY  
STATE OF MISSOURI

CHERI BALLARD, JAY BAUR,  
STEPHEN ARNOLD and  
BRENDA ARNOLD, on behalf of themselves  
and all others similarly situated,

Plaintiffs,

vs.

CITY OF CREVE COEUR,  
and  
AMERICAN TRAFFIC SOLUTIONS, INC.,

Defendants.

Case No. 11SL-CC03166

Division 9

**JUDGMENT**

This date, before this Court appeared Defendant Creve Coeur ("CC"), by and through counsel Carl Lumley, Dudley McCarter and Timothy Reichardt, Defendant American Traffic Solutions, Inc. ("ATS"), by and through counsel Jane Dueker and Nick Frey, (collectively, "Defendants") and Plaintiffs Cheri Ballard, Jay Baur, Stephen Arnold and Brenda Arnold, on behalf of themselves and all others similarly situated (collectively "Plaintiffs"), by and through counsel John Campbell and Ryan Keane. CC called for hearing Defendants' Joint Motion to Dismiss Plaintiffs' First Amended Class Action Petition and CC's Separate Motion to Dismiss Plaintiffs' First Amended Class Action Petition. ATS called for hearing its Separate Motion to Dismiss Plaintiffs' First Amended Petition.

For the reasons set forth below, this Court grants in full all Defendants' Motions and dismisses Plaintiffs' Amended Class Action Petition ("Petition") with prejudice.

## **I. The Ordinance**

Section 315.140 of the Creve Coeur Municipal Code ("the Ordinance"), establishes requirements to promote public safety at intersections and authorizes the use of an automated camera system to enforce against violations of public safety at intersections. An automated enforcement system consists of a camera and vehicle sensor that work in conjunction with a traffic control signal. §315.140(A). The system produces high resolution color digital recorded images showing: 1) the traffic control signal emitting a steady red light; 2) the offending vehicle; and 3) the license plate of the offending vehicle. *Id.* "A person commits the infraction of violation of public safety at an intersection when a motor vehicle of which that person is an owner is present in an intersection while the traffic control signal for the intersection is emitting a steady red signal for the direction of travel or orientation of that vehicle in or through the intersection," unless one or more of the various exceptions or defenses apply. §135.140(B), City Code. The Ordinance addresses problems posed to the public safety when vehicles are in the wrong place at the wrong time, without regard to whether the vehicles are in motion. The Ordinance creates enforcement and adjudication procedures that require compliance with Missouri court rules governing ordinance violations. §315.140(G), City Code; *see also* §135.090, City Code; Creve Coeur City Charter, Art. VII, §7.4.

## **II. Plaintiffs' Claims and Purported Classes**

Plaintiffs purported to file the Amended Class Action Petition on behalf of themselves and two separately asserted classes. Plaintiff Ballard claims to represent Subclass 1. Petition, ¶ 89. Subclass 1 is defined as "Missouri citizens who received a Citation pursuant to the Ordinance and paid the fine." Petition, ¶ 87a. Plaintiff Ballard seeks to recover the fine she paid. Petition, ¶ 106j. Plaintiffs Baur and the Arnolds (hereinafter Baur and the Arnolds are collectively referred to as "Baur") claim to represent Subclass 2. Petition, ¶ 90. Subclass 2 is

defined as "Missouri citizens who received a Citation pursuant to the Ordinance, but have not paid the fine and have at least one outstanding Citation." Petition, ¶ 87b.

Plaintiff Ballard purports to assert six counts: Count I – Declaratory Judgment; Count II – Unjust Enrichment against Defendant CC; Count III – Violation of Article I, §19 of the Missouri Constitution (prohibition against self-incrimination); Count IV – Violation of Article I, §10 (due process); Count V – Civil Conspiracy against all Defendants; Count VI – Unjust Enrichment against Defendant ATS. Plaintiff Baur joins in Counts I, III, IV, and V. Plaintiff Ballard seeks monetary damages for Unjust Enrichment (Counts II and VI) and all Plaintiffs seek monetary damages for alleged constitutional violations (Counts III and IV) and under a theory of civil conspiracy (Count V). All Plaintiffs seek declaratory and injunctive relief for Counts I, III, and IV.

**III. Subclass 2 Plaintiffs Are Dismissed as They Have An Adequate Remedy at Law And Cannot State A Claim for Damages**

*a. Subclass 2 Plaintiffs Cannot Bring Declaratory Judgment Claims When They Have An Adequate Remedy at Law, Their Municipal Court Proceeding*

Plaintiff Baur requests the equitable relief of declaratory judgment on the basis that the Ordinance is invalid under state law and violates the Missouri Constitution. Petition, Counts I, III, and IV. He also requests that the City be enjoined from enforcing the Ordinance on constitutional grounds. Petition, ¶¶ 141, 166.

Under the Creve Coeur City Charter, the Municipal Court has jurisdiction over all cases involving an alleged violation of a City ordinance. Charter, Art. VII, §7.1; *see also* §479.010, RSMo. (Municipal courts have jurisdiction over municipal ordinance violations.). Any person alleged to have committed an ordinance violation may plead not guilty upon which plea the person is entitled to a trial as authorized by law. §135.075(A), City Code. Defendants tried in

Municipal Court also have a right to a trial de novo before an Associate Circuit or Circuit Judge. §135.220, City Code; see also §479.200, RSMo.

Declaratory judgments and injunctive relief are equitable remedies. *Purcell v. Cape Girardeau County Commission*, 322 S.W.3d 522, 524 (Mo. 2010). A court lacks jurisdiction to issue equitable remedies if an adequate remedy at law exists. *Schildknecht v. Director of Revenue*, 901 S.W.2d 348, 349 (Mo. App. 1995). A trial de novo is an adequate remedy at law. *Id.* In *Schildknecht*, the Court held that the availability of a trial de novo precluded the Circuit Court's jurisdiction over the request for injunctive relief. *Id.*; see also *Schaefer v. Koster*, 342 S.W.3d 299 (Mo. 2011) (affirming dismissal of declaratory judgment action challenging constitutionality of statute under which plaintiff was charged with criminal offense when the criminal case was still pending, finding plaintiff had adequate remedy at law to raise claims of invalidity of statute in criminal proceeding).

Plaintiff Baur should be required to raise his claims regarding the validity of the ordinance in his Municipal Court proceeding. He is free to raise all of his claims regarding the invalidity of the Ordinance, including the constitutionality of the Ordinance, in Municipal Court. See *Harris v. Bates*, 270 S.W.2d 763 (Mo. 1954). The fact that such challenges have no merit, as demonstrated by the recent opinion of the Court of Appeals in *City of Creve Coeur v. Nottebrok*, 356 S.W.3d 252 (Mo Ct. App. 2011), discussed further herein below (where defendant at least properly raised such issues in municipal court, albeit only after attempts to obtain relief by extraordinary writ were denied by the circuit court, court of appeals, and Supreme Court) does not make Plaintiff Baur's right to raise them in Municipal Court inadequate. Plaintiff Baur should not be allowed to attack the process of another forum when he has an adequate process afforded to him. As such, Baur's claims asserted in Counts I, III, IV and V should be dismissed.

*b. Subclass 2 Plaintiffs Cannot State A Claim for Damages*

Baur has not paid any fine and his violation is currently pending in Municipal Court. Petition, ¶¶ 87b, 90. Therefore, Baur does not bring a claim for unjust enrichment requesting a refund of the fine paid. In addition to a request for equitable relief, Baur also requests damages under Counts III and IV, alleging unconstitutionality of the Ordinance. Baur also includes Count V, seeking recovery under the theory of civil conspiracy.

The law in Missouri is well established that no cause of action for money damages exists for violations of the Missouri Constitution. *Moody v. Hicks*, 956 S.W.2d 398, 402 (Mo. App. 1997). Therefore, Baur cannot recover damages under either Count III or IV. Further, civil conspiracy is not in and of itself a tort, but rather provides a means to establish joint and several liability for another underlying tort. *Gettings v. Farr*, 41 S.W.3d 539, 541 (Mo. Ct. App. 2001). Because Baur has not alleged a tort claim, he cannot recover under a civil conspiracy theory.

**IV. Subclass 1 Plaintiffs Are Barred from Bringing Their Constitutional Claims**

*a. Subclass 1 Plaintiffs Lack Standing to Challenge Procedures They Did Not Utilize*

It is well established that a party lacks standing to challenge the constitutionality of a statute or ordinance where that party did not avail himself of the procedure provided thereunder and, therefore, was not adversely affected by its operation. *Belton v. Board of Police Com'rs of Kansas City*, 708 S.W.2d 131 (Mo. 1986) ("A party may not challenge the sufficiency of review procedures which have not been invoked.") (citing *Miller v. Police Retirement System of St. Louis*, 296 S.W.2d 78, 80 (Mo.1956)). "A person does not have standing to challenge the constitutionality of a statute simply because the statute may be subject to the charge of invalidity[;]" in order to acquire standing, "a litigant must be 'adversely affected' by the statute he challenges." *State v. Stottlemire*, 35 S.W.3d 854, 861 (Mo. App. 2001) (internal citations omitted). Similarly, "one may not urge unconstitutionality of a statute who is not harmfully

affected by the particular feature of the statute alleged to be unconstitutional." *State v. Brown*, 502 S.W.2d 295, 305 (Mo. 1973) (holding convict could not challenge constitutionality of involuntary commitment statute when he did not raise insanity defense at trial).

The United States District Court for the Western District of Missouri reached the same conclusion in a similar challenge to the constitutionality of the City of Springfield's automated traffic enforcement system. *Mills v. City of Springfield*, 2010 WL 3526208 (W.D. Mo. 2010). Judge Laughrey held that person who had paid their fines without using local procedures pursuant to the Springfield intersection safety ordinance could not later challenge the ordinance (even though Springfield had been found to use an unauthorized administrative procedure rather than using a municipal court procedure like Creve Coeur does). The court stated "Plaintiff has not taken advantage of the procedural processes offered to him, therefore he has not been harmed one way or another by such processes and, accordingly, cannot challenge them on due process grounds." *Id.* at \*5.

Here, Plaintiffs challenge the constitutionality of the Ordinance. In particular, they allege the Ordinance requires them to testify against themselves in violation of Article I, §19 of the Missouri Constitution and violates their procedural due process rights under Article I, §10 of the Missouri Constitution. However, like the defendants in *Brown* and *Mills*, Plaintiff Ballard never availed herself of the procedure established by the Ordinance. Plaintiff Ballard simply admitted her guilt and paid the fine. Plaintiff Ballard never could have been forced to testify against herself or been deprived of any due process rights by the Ordinance because she never availed herself of the procedure established by the Ordinance. Thus, Plaintiff Ballard lacks standing to challenge the constitutionality of the Ordinance. Likewise, as addressed above, Plaintiff Baur

and Subclass 2 Plaintiffs must take advantage of such procedures and raise any such challenges in his municipal court case and not this collateral proceeding.

*b. Subclass 1 Plaintiffs Have Waived Their Constitutional Claims*

Subclass 1 Plaintiffs alleged the Ordinance under which they received a Citation and paid a fine is unconstitutional in that it violates their right against self-incrimination and due process rights in Counts I, III, and IV. Plaintiff Ballard received a Citation and paid a \$100.00 fine. Petition at ¶¶ 87a and 89. Ballard, a purported class representative, did not challenge the Citation in Municipal Court or seek a trial de novo in circuit court.

Claims based on constitutional violations are waived if not raised at the earliest opportunity. *State ex rel. York v. Daugherty*, 969 S.W.2d 223, 224 (Mo. banc 1998)); *see also* 16 Am. Jur.2d Constitutional Law §159. "The critical question in determining whether waiver occurs is whether the party affected had a reasonable opportunity to raise the unconstitutional act or statute by timely asserting the claim before a court of law." *Id.* Thus, the failure to raise a constitutional challenge to an ordinance in a proceeding before municipal court constitutes a waiver of that claim. *City of Kansas City v. McGary*, 218 S.W.3d 449, 452 (Mo. App. 2006).

In the present action, Plaintiff Ballard is barred from asserting any constitutional claims under the doctrine of waiver because these claims could have been raised before Missouri state courts. Plaintiff Ballard had the opportunity to challenge the Citation under the Ordinance in Municipal Court. Had she been unsuccessful in her Municipal Court hearing, she had the right to a trial de novo in Circuit Court. Thus, Plaintiff Ballard was granted a reasonable opportunity to challenge the constitutionality of the Ordinance and failed to timely assert this claim before a court of law. Plaintiff Ballard's constitutional claims were therefore waived.

*c. Estoppel Also Bars Subclass 1 Plaintiffs' Constitutional Claims*

Similar to waiver, estoppel prevents collateral attacks on judgments that have already been voluntarily paid in full. *See York*, 969 S.W.2d at 225. Although an invalid judgment neither binds nor bars anyone, "notwithstanding, a party to such a judgment may voluntarily perform it by paying the amount adjudged against him and, when paid, no inquiry will be made to the validity of the judgment... and [the payor can] thereby estop himself from questioning the decree." *Id.* (citing *Tremayne v. City of St. Louis*, 6 S.W.2d 935, 936 (Mo. 1928)).

In *York*, family court commissioners had issued numerous judgments under a presumptively constitutional statute granting commissioners authority to sign binding dissolution orders. 969 S.W.2d at 224. The statute was later found to be unconstitutional because the orders were not signed by an Article V judge, leaving the court to address the validity of orders previously issued by commissioners. *Id.* The court reasoned that a party to an invalid judgment may voluntarily perform it and thereby estop himself from later questioning its validity if he fails to challenge the judgment before an available judicial forum. *Id.* at 225. Thus, by failing to appeal an otherwise invalid judgment, a plaintiff waives his right to challenge the decision itself and the constitutionality of the procedures under which the decision was rendered. *Id.*

Likewise, a party cannot collaterally attack a judgment under Rule 37.64(d). *See, e.g., State ex inf. Voights ex rel. Mayor, Council, and Citizens of Liberty v. City of Pleasant Valley*, 453 S.W.2d 700, 704 (Mo. App. 1970); *State v. Pendleton*, 910 S.W.2d 268, 270 (Mo. App. 1995); *see also Yakus v. US*, 321 U.S. 414, 444 (1944).

As discussed regarding waiver, Plaintiff Ballard was entitled to a Municipal Court hearing under the City Code, and had she pursued such a hearing could have also had a trial de novo at Circuit Court, and even an appeal thereafter to the Court of Appeals. Because Plaintiff Ballard paid the fine imposed without challenging the validity of the Citation before the



Municipal Court or the Circuit Court, she accepted the judgment imposed. She is therefore estopped from challenging the validity of the fine through collateral constitutional claims.

**V. The Ordinance Does Not Violate Article I, Sections 10 or 19 of the Missouri Constitution**

No Plaintiff in this action can properly state a claim for violation of the Missouri Constitution. Plaintiff Ballard and Subclass 1 Plaintiffs have no standing to bring such claims and would also be deemed to have waived such claims and be estopped from bring such claims. Plaintiff Baur and Subclass 2 Plaintiffs cannot bring declaratory judgment action alleging unconstitutionality because they have an adequate remedy at law, their Municipal Court proceeding. Further, no Plaintiff can state a claim for damages under the Missouri Constitution. *Moody v. Hicks*, 956 S.W.2d 398, 402 (Mo. Ct. App. 1997). Therefore, there is no reason for this Court to reach the allegation on the unconstitutionality of the Ordinance.

Nonetheless, should this case be appealed and this Court's ruling in that effect be challenged, in order to avoid remand, the Court will address the substantive issues raised by Plaintiffs' constitutional claims.

a. *The Ordinance Does Not Violate Article I, § 10 of the Missouri Constitution*

A procedural due process challenge was made against the Ordinance in *City of Creve Coeur v. Nottebrok*. Plaintiffs' Count I and III claims raise the same issue here. The Eastern District Court of Appeals specifically upheld the Ordinance against that challenge. *Nottebrok*, 356 S.W.3d 252. Based upon that decision, insofar as it alleges the unconstitutionality of the Ordinance, Plaintiffs' Count I is dismissed with prejudice. Further, Plaintiffs' Count III is dismissed with prejudice.

b. *The Ordinance Does Not Violate Article I, § 19 of The Missouri Constitution*

The defendant in *Nottebrok* did not raise a defense under Article I, Section 19 of the Missouri Constitution. Here, Plaintiffs allege that the provision allowing for submission of an affidavit of non-responsibility violates Plaintiffs' protection against being compelled to testify against oneself in a criminal cause under Article 1, § 19 of the Missouri Constitution.<sup>1</sup>

The privilege against self-incrimination "protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. U.S.*, 406 U.S. 441, 445 (1972). As discussed above, enforcement of the City's intersection safety ordinance is civil in nature; therefore, the privilege against self-incrimination does not attach. Use of the affidavit in response to a violation is insufficient to create a violation of Plaintiffs' rights. In a civil proceeding, invocation of the Fifth Amendment privilege requires a "nexus between the risk of criminal conviction and the information requested." *Martin-Trigona v. Gouletas*, 634 F.2d 354, 360 (7<sup>th</sup> Cir. 1980). The witness must "tender some credible reason why a response would pose a real danger of incrimination, not a remote and speculative possibility." *Id.*; see also *Hoffman v. U.S.*, 341 U.S. 479, 486-87 (1951) (stating that it must be "evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result"). Plaintiffs make no allegation that the information provided on the affidavit could possibly be used in any criminal proceeding separate from the intersection safety infraction case.

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<sup>1</sup> As is the case with due process, the protection against self-incrimination in the Missouri Constitution mirrors that found in the Fifth Amendment of the U.S. Constitution. *State v. Werner*, 9 S.W.3d 590, 595 (Mo. banc. 2000) ("Missouri courts analyze issues regarding the privilege against self-incrimination claimed under the Missouri Constitution in a manner consistent with analysis of those arising under the federal constitution").

The information those subject to the Ordinance may submit in the affidavit is exculpatory. It creates the possibility that the person filling out the affidavit will not be required to pay the fine at all. The burden of proving an affirmative defense is properly placed on the defendant without violating constitutional limits. *City of Brentwood v. Nalley*, 208 S.W.2d 838, 840 (Mo. App. 1948). This holding is consistent with review of similar automated traffic enforcement by other states. *Ware*, 2009 WL 5876275 at \*6; *City of Knoxville v. Brown*, 284 S.W.3d 330 (Tn. App. 2008).

Plaintiffs cannot allege a set of facts under which the Ordinance violated Article I, § 19 of the Missouri Constitution and, for this reason as well, Plaintiffs' Count III is dismissed with prejudice.

**VI. The Remainder of Plaintiffs' Declaratory Judgment Action Fails As A Matter of Law**

As part of the Declaratory Judgment count, and as an underlying basis for their damages counts, Plaintiffs allege the Ordinance was enacted without proper authority and that the Ordinance is inconsistent with state law. Both of these issues were addressed by the Court of Appeals in *Nottebrok*. Following that decision, this Court hereby dismisses the remainder of Plaintiffs' Count I with prejudice.

*a. The Ordinance Was Properly Enacted*

This claim also fails as a matter of law because the City possesses clear constitutional and legislative authority to enact the Ordinance. The Eastern District determined the Ordinance was enacted pursuant to the municipality's police power for regulating local public safety. *Nottebrok*, 356 S.W.3d 252. The Court in *Nottebrok* stated:

"The purpose of the police power is to promote the public health, safety, and welfare. *St. Charles County v. St. Charles Sign & Electric, Inc.*, 237 S.W.3d 272, 275 (Mo. App. E.D. 2007), quoting *Bezayiff v. City of St. Louis*, 963 S.W.2d 225, 229 (Mo. App. E.D. 1997). Although a city's police power is not unlimited, it is very

broad. *St. Charles Sign & Electric*, 237 S.W.3d at 275; *Bezayiff*, 963 S.W.2d at 229. “The test of whether an ordinance is fairly referable to a legitimate exercise of police power is whether the expressed requirements of the ordinance have a substantial and rational relationship to the health, safety, peace, comfort, and general welfare of the inhabitants of the municipality.” *Bezayif*, 963 S.W.2d at 229. We presume that an ordinance enacted pursuant to a municipality’s police power is valid, and the party challenging the ordinance bears the burden of proving its invalidity. *Id.* “The burden is on the party contesting the ordinance to negate every conceivable basis which might support it.” *Id.* If reasonable minds might differ as to whether a particular ordinance is substantially related to the protection of the general health, safety, or welfare of the public, then the issue must be decided in favor of the ordinance. *Id.*”

*Id.*

In making their claim, Plaintiffs ignore the precedent on which the *Nottebrok* decision relied and misunderstand the nature of the City’s authority as a constitutional charter city. The City has adopted a home rule charter under Article VI, Section 19(a) of the Missouri Constitution. That section provides that charter cities have:

“all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law.”

A constitutional charter city derives its authority from the constitution, not statutes passed by the general assembly. *Cape Motor Lodge, Inc. v. City of Cape Girardeau*, 706 S.W.2d 208, 210 (Mo. 1986). Under Article VI, §19, the question to ask regarding municipal authority is not whether the general assembly has enacted a statute authorizing the municipality to so act but whether the constitution, statutes, or charter specifically deny the municipal’s ability to so act. *Id.* at 210 – 211. *See also Hannah ex rel. Christ v. City of St. Charles*, 676 S.W.2d 508, 512 (Mo. 1984)(“Section 19(a) clearly grants to a constitutional charter city all power which the legislature is authorized to grant.....even in the absence of an express delegation by the people of a home rule municipality in their charter, the municipality possesses all powers which are not limited or denied by the constitution, by statute, or by the charter itself.”)

In addition to its constitutional home rule powers, a constitutional charter city has all power expressly granted by law. Mo. Const. Art. VI, §19(a). All Missouri municipalities possess the powers expressly delegated to it by the legislature and those necessarily or fairly implied or incidental to the declared objects of the municipality. *Anderson v. City of Olivette*, 518 S.W.2d 34, 39 (Mo. 1975). The General Assembly has expressly delegated to all Missouri municipalities the authority to "make additional rules of the road or traffic regulations to meet their needs and traffic conditions." §304.120.2(1), RSMo. See also §546.902, RSMo.(St. Louis County municipalities are authorized to enact ordinances and enforce them through fines and imprisonment.)

As found in *Nottebrok*, this is a broad delegation of authority. Just as this statute was found by the Missouri Supreme Court to authorize cities to impose fines on owners whose cars are parked in the wrong place at the wrong time, see *City of Kansas City v. Hertz*, 499 S.W.2d 449 (Mo. 1973), the *Nottebrok* court also found that it authorizes cities to impose fines on owners whose cars are in an intersection at the wrong time. Courts have held this broad delegation of authority to be sufficient to authorize a city to enact an ordinance that authorizes the impoundment of vehicles in violation of other ordinances and place a lien on that vehicle until certain conditions are met. *General Motors Acceptance Corp. v. City of St. Louis*, 663 S.W.2d 408 (Mo. App. 1983); barricade city streets. *State ex rel. Schmitz v. City of St. Louis*, 551 S.W.2d 848 (Mo. App. 1977). Traffic regulation is clearly referable to and has a substantial and rational relationship to the health, safety, peace, comfort, and general welfare of the citizens of a municipality. *Nottebrok*, 356 S.W.3d 252. Plaintiffs' Count I claiming the City was without authority to enact the Ordinance is dismissed with prejudice.

*b. The Ordinance Is Consistent with State Law*

*Nottebrok* upheld the Ordinance under an identical challenge. *Nottebrok*, 356 S.W.3d 252. As stated in the preceding section, Plaintiffs' request for relief under Count I claiming inconsistency was dismissed because Plaintiffs lack standing to assert the claim, an issue not directly addressed by the Court in *Nottebrok*. This Court will nonetheless again reach the allegations of the Amended Petition.

Ordinances are presumed valid and should be upheld unless "expressly inconsistent or in irreconcilable conflict with the general law of the state." *City of Kansas City v. Carlson*, 292 S.W.3d 368, 373 (Mo. App. 2009) citing *McCollum v. Director of Revenue*, 906 S.S.2d 368, 369 (Mo. 1995). An ordinance conflicts with state statute only if the express or implied provisions are so inconsistent and irreconcilable that the statute invalidates the ordinance. *Carlson*, 292 S.W.2d at 371. "If the ordinance prohibits what the statute permits, or permits what the statute prohibits, the two are in conflict." *Id.* If an ordinance merely prohibit more than the statute, the two are not in conflict. *Id.* Ordinances may supplement state laws. *State ex rel. Teefey v. Bd. of Zoning Adjustment of Kansas City*, 24 S.W.3d 681, 685 (Mo. 2000).

The Ordinance was expressly held not to be inconsistent with §302.302.1, RSMo in *City of Creve Coeur v. Nottebrok*. The Eastern District looked to statutes that require assessment of points against owners of vehicles. *Nottebrok*, 356 S.W.3d 252. The Court found no statute that required the assessment of points against the owner of a vehicle for a violation of a municipality's intersection safety ordinance. *Id.* The statute is very limited as to the situations in which points are required to be assessed against the owners of vehicles violating municipal ordinances. See §302.302, RSMo. A violation of the City's Ordinance is not one of the situations enumerated by the statute that requires assessment of points against the owner of a vehicle. *Nottebrok*, 356 S.W.3d 252

The Ordinance is a supplement to statutes. It does not permit what statutes prohibit nor does it prohibit what is permitted by statute. Plaintiffs' Count I, regarding the Ordinance's alleged conflict with state law, is dismissed with prejudice.

#### **VII. Plaintiff Ballard and Subclass I Cannot State A Claim for Unjust Enrichment**

As discussed above, Plaintiff Baur and Subclass 2 do not bring a claim for unjust enrichment. Neither Plaintiff Baur or Subclass 2 can state a claim for damages under the Missouri Constitution. *Moody v. Hicks*, 956 S.W.2d 398, 402 (Mo. App. 1997). Left to address is whether Plaintiff Ballard and Subclass I can bring a claim for unjust enrichment or recovery under a theory of civil conspiracy. They cannot.

Unjust enrichment occurs when a benefit is conferred upon a person in circumstances in which retention by him of that benefit without paying its reasonable value would be unjust. *Childress Painting & Assocs. V. John Q. Hammons Hotels Two, L.P.*, 106 S.W.3d 558, 562 (Mo. App. 2003). The elements of unjust enrichment are: (a) a benefit conferred by one party on another; (b) appreciation by the receiving party of the fact that what was conferred was a benefit; and (c) acceptance and retention of the benefit that would render that retention inequitable. *Cridlebaugh v. Putnam Cnty. State Bank of Milan*, 192 S.W.3d 540, 543 (Mo. App. 2006). A suit for unjust enrichment is not grounded in tort but is based on an implied contract. *S & P Prop. v. City of Univ. City*, 178 S.W.3d 570, 584 (Mo. Ct. App. 2005).

##### *a. As to Defendant ATS, Plaintiffs Have Not And Cannot Allege That Defendant Conferred A Benefit*

The facts alleged in Plaintiffs' Amended Petition fail to allege a claim of unjust enrichment against ATS. The Amended Petition is devoid of any allegations of any relationship between ATS and Plaintiffs, and certainly no allegations that Plaintiffs and ATS maintain any sort of contractual or quasi-contractual relationship. Plaintiffs do not allege any benefit was

directly conferred by Plaintiffs to ATS. Nor can Plaintiffs allege such a conferring because no relationship exists between Plaintiffs and ATS. The only benefit that could be alleged to be conferred on ATS is from the City as a result of the contract. ATS does not, and is not alleged to, receive any payment directly from the Plaintiffs.

*b. Plaintiffs Have Failed to Allege Unjust Circumstances*

There is nothing inequitable regarding the City's enactment and enforcement of the Ordinance. The Ordinance is validly enacted, consistent with statute, and constitutional. The money received by the City is not "unjustly" received. It is received as a result of Plaintiffs admitting their guilt and paying their fines for violating municipal ordinances.

*c. Voluntary Payment Doctrine Bars Plaintiffs' Recovery*

The voluntary payment doctrine provides that a person who voluntarily pays money with full knowledge of all of the facts in the case, and in the absence of fraud and duress, cannot recover it back. *Huch*, 290 S.W.3d at 724; *Eisel v. Midwest BankCentre*, 230 S.W.3d 335, 339 (Mo. banc 2007). See also *Blake v. City of St. Louis*, Cause No. 014-01970 (Dec. 13, 2002) (Wilson, J.), *aff'd per curiam*, 120 S.W.3d 759 (Mo. App. E.D. 2003). Moreover, where money has been voluntarily paid with full knowledge of the facts it cannot be recovered on the ground that the payment was made under a mistake of law. *Am. Motorists Ins. Co. v. Shrock*, 447 S.W.2d 809, 811 (Mo.App.1969). Therefore, the only exceptions to the doctrine are mistake of fact or duress. *Kep-Co, Inc. v. Regency Savings Bank*, 2007 WL 607745 at \*3 (E.D. Mo. 2007).

It is well settled that the voluntary payment doctrine acts as a bar to claims for restitution where a plaintiff alleges unjust enrichment but has voluntarily paid in the first instance. *Hertz Corp. v. Raks Hospitality, Inc.*, 196 S.W.3d 536, 544 (Mo. App. E.D. 2006); *Tictor Title Ins. Co. v. Mundelius*, 887 S.W.2d 726, 728 (Mo. App. E.D. 1994). The voluntary payment doctrine is a principle based on waiver and consent. *Eisel*, 230 S.W.3d at 339. Thus, "[i]f a person wishes to



resist an unjust demand he must do so at the threshold of the matter; that if he intends to litigate the question he must make his defense in the first instance – not later, after paying the money and biding the course of uncertain future events." *American Motorists Ins. Co.*, 447 S.W.2d at 812. The reason for this requirement is that it would be inequitable to allow those who voluntarily pay the privilege of selecting their own time for litigation once the recipient of payment has accepted payment in resolution of a matter and perhaps has no means of repayment. *Id.*

In order to rise to the level of "duress" necessary to negate the voluntary payment doctrine, a payment must be made under "circumstances of oppression, where an unlawful demand was paid to avoid a greater loss, and either under protest or under circumstances amounting to compulsion." *Ferguson*, 247 S.W. at 796. Under this definition, the *Ferguson* court rejected the argument that a criminal defendant paid a \$2500 fine under duress, finding that the threat of criminal prosecution for assault did not rise to the level of compulsion. *Id.* Thus, the court found no duress even where the defendant faced a 2-10 year prison term upon conviction, because the excessive fine was paid under a voluntary agreement. *Id.* The *Blake* court found no duress in imposing a late fee penalty for failure to pay a parking ticket. Amended Order and Judgment, at 19-20, Cause No. 014-01970 (Dec. 13, 2002) (Wilson, J.), *aff'd per curiam*, 120 S.W.3d 759 (Mo. App. E.D. 2003).

The allegations of the Amended Class Action Petition show that the voluntary payment doctrine applies to Plaintiff Ballard and Subclass 1's claim for restitution of the fines they paid. Subclass 1 is defined to be comprised of "Missouri citizens who received a Citation pursuant to the Ordinance and paid the fine (hereinafter "Subclass 1)." Petition at ¶87(a). Plaintiff Ballard attempts to allege duress by alleging threats of arrest and imprisonment and the inability to

defend herself because of purported limitation of defenses by Ordinance. Amended Class Action Petition, ¶¶ 70-71. But the Ordinance expressly does not allow for incarceration as a consequence for the infraction of violating public safety at an intersection and, while identifying specific defenses, does not limit defendants from presenting any defense they choose. Further, if a ten-year prison term is not adequate "duress" under Missouri law, then the threat of fines associated with a traffic citation could never rise to the level of compulsion necessary to prove the "duress" defense. The *Blake* court, for example, found no duress in imposing a late fee penalty for failure to pay a parking ticket. Amended Order and Judgment, at 19-20, Cause No. 014-01970 (Dec. 13, 2002) (Wilson, J.), *aff'd per curiam*, 120 S.W.3d 759 (Mo. App. E.D. 2003).

*d. As to Defendant CC, Plaintiffs' Claim for Unjust Enrichment is Precluded Because a Quasi-Contractual Theory Cannot Be Maintained Against a Missouri Municipality*

The facts alleged in Plaintiffs' Amended Petition fail to allege a claim of unjust enrichment against CC. Plaintiffs allege that CC is a municipal city located within St. Louis County. A municipality is only bound by those express, duly-executed contracts meeting all requirements of R.S.Mo. §432.070 and, therefore, no contracts implied-in-law are enforceable against CC. *Client Services, Inc. v. City of St. Charles*, 182 S.W.3d 718 (Mo. Ct. App. 2006); *Halamiczek Bros. Inc. v. St. Louis County*, 883 S.W.2d 108 (Mo. Ct. App. 1994). Plaintiffs' claim for unjust enrichment against a Missouri municipality, CC, therefore fails as a matter of law.

### **VIII. Sovereign Immunity Applies to CC**

Counts III, IV and V of Plaintiff's Petition allege causes of action sounding in tort against Defendant CC. In Missouri, a municipality is completely immune from tort liability arising from its performance of acts classified as governmental functions, unless a specific exemption applies

or the municipality specifically waives immunity. Mo. Rev. Stat. §537.600; see also *Junior College Dist. of St. Louis v. City of St. Louis*, 149 S.W.3d 442, 447 (Mo. banc 2004).

An act of a municipality performed for the common good of all is classified as a governmental function. *Parish v. Novus Equities Co.*, 231 S.W.3d 236, 242 (Mo. Ct. App. 2007). To this end, the legislative activities of a municipality, as well as activities to keep the peace, enforce the laws and ordinances and to preserve public health are governmental functions. *Id.* It is well established that enforcement of ordinances is a government function. *State ex rel. City of Nevada v. Bickel*, 267 S.W.3d 780, 781 (Mo. Ct. App. 2008).

Counts III, IV and V of Plaintiffs' Petition allege wrongful conduct by CC in the enactment and enforcement of city ordinance R.O. 2008 §16-398, Ord. No. 4024, Ord. No. 4078 and Ord. No. 5016. As a matter of Missouri law, the enactment and enforcement of ordinances is a government function; thus, the alleged wrongful conduct involves CC's governmental functions. Plaintiffs have pleaded no exception to the application of sovereign immunity. CC therefore has sovereign immunity from Counts III, IV and V and these Count therefore fail as a matter of law.

#### **IX. The Government Contractor Defense Applies to ATS**

A government contractor is entitled to share in governmental immunity when the act or failure to act alleged to create liability for the contractor arises from the performance of its contract with the government. *Rector v. Tobin Construction Company*, 377 S.W.2d 409, 413 (Mo. 1964). Immunity extends where the contractor has performed the work in accordance with the plans and specifications of the government contract. *Id.* The government contractor defense is available to government contractors that perform services for governmental entities. *Trout v. General Security Services Corp.*, 8 S.W.3d 126, 129 (Mo. App. 1999).

Immunity does not extend to the contractor where the injury arises from the negligent performance of the government contract or from a "willful tort." *Id.* To be willful, the harm must be intentional. *Id.* at 414. A voluntary act may result in injury but only when the harm is intentional is there a willful tort. *Id.* This principle of law is well settled. See 9 A.L.R.3d 382 ("where the act, or failure to act, which causes an injury is one which the contractor was employed to do, and the injury results not from the negligent manner of doing the work, but from the performance thereof or failure to perform it at all, the contractor is entitled to share the immunity from liability which the public enjoys, but that the contractor is not entitled to the immunity of the public body from liability where the injury arises from the tortious manner of performing the work.").

The facts alleged in the Amended Petition irrefutably establish the elements of the affirmative defense of government contract immunity: 1) the governmental entity is entitled to immunity; 2) the contractor performed the contract according to its terms and in a non-negligent manner; and 3) no willful tort is alleged.

The facts set forth in the Amended Petition do not allege ATS failed to perform the contract according to its terms or in a negligent manner. Further, no willful tort is alleged. Plaintiffs' Amended Petition purports to allege two counts for damages against ATS – Count V – Civil Conspiracy and Count VI – Unjust Enrichment. These claims do not fall within the willful tort exception to the application of government contractor immunity. "A voluntary act may result in injury to another, but it is only when the harm is intentionally inflicted that there is a 'willful' tort." *State ex. inf. Ashcroft v. Kansas City Firefighters Local No. 42*, 672 S.W.3d 99, 112 (Mo. Ct. App. 1984).

Civil conspiracy is not in and of itself a tort, but rather provides a means to establish joint and several liability for another, underlying, tort. *Gettings v. Farr*, 41 S.W.3d 539, 541 (Mo. Ct. App. 2001). A suit for unjust enrichment is not grounded in tort but is based on an implied contract. *S & P Prop. v. City of Univ. City*, 178 S.W.3d 570, 584 (Mo. Ct. App. 2005). Thus, civil conspiracy and unjust enrichment could never provide a basis for the willful tort exception. Here, no willful tort is alleged in Counts V or VI. Therefore, the government immunity defense applies.

### **JUDGMENT AND ORDER**

For the foregoing reasons, the Court enters judgment in favor of Defendants and against Plaintiffs on all claims as follows:

(a) Baur and Subclass 2 Plaintiffs are afforded an adequate remedy at law before the Municipal Court, as provided in §135.075(A) and §135.220 of the City Code and pursuant to R.S.Mo. §479.200. Baur's claims for declaratory and injunctive relief asserted in Counts I, III, IV and V are therefore dismissed as to American Traffic Solutions, Inc. and the City of Creve Coeur.

(b) Baur and Subclass 2 Plaintiffs cannot state a claim for damages under Counts III and IV, because no cause of action for money damages exists under Missouri law for violations of the Missouri Constitution. Therefore Counts III and IV are dismissed with prejudice as to American Traffic Solutions, Inc. and the City of Creve Coeur.

(c) Baur and Subclass 2 Plaintiffs cannot state a claim for civil conspiracy in the absence of a viable underlying tort claim. Therefore Count V is dismissed with prejudice as to American Traffic Solutions, Inc. and the City of Creve Coeur.

(d) Ballard and Subclass 1 Plaintiffs lack standing to challenge the constitutionality of the Ordinance, because each Plaintiff paid the fine imposed and failed to take advantage of the Ordinance procedures they now seek to challenge. Ballard and Subclass 1 Plaintiff have also waived their constitutional claims and are estopped from asserting such claims at this time. Ballard's constitutional claims under Counts I, III and IV are therefore barred and these Counts are dismissed with prejudice as to American Traffic Solutions, Inc. and the City of Creve Coeur.

(e) The Court declares that the Ordinance does not violate Article I, §19 of the Missouri Constitution. Count III is therefore dismissed with prejudice as to American Traffic Solutions, Inc. and the City of Creve Coeur.

(f) The Court declares that the Ordinance does not violate Article I, §10 of the Missouri Constitution. Count IV is therefore dismissed with prejudice as to American Traffic Solutions, Inc. and the City of Creve Coeur.

(g) The Court declares that the Ordinance was properly enacted pursuant to the City's police power for regulating local public safety and is consistent with state law. Count I is therefore dismissed with prejudice as to American Traffic Solutions, Inc. and the City of Creve Coeur.

(h) Ballard and Subclass 1 Plaintiffs have not and cannot allege that they conferred a benefit on Defendant ATS. Plaintiffs' Count VI claim for unjust enrichment is therefore dismissed with prejudice as to American Traffic Solutions, Inc.

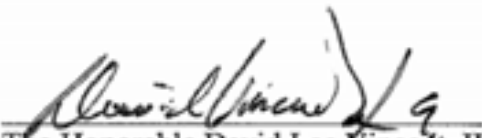
(i) Ballard and Subclass 1 Plaintiffs cannot state a claim for unjust enrichment against CC, because a municipality is only bound by express, duly-executed contracts and no such contract exists in this case. See Mo. Rev. Stat. §432.070. Plaintiffs' Count II claim for unjust enrichment is therefore dismissed with prejudice as to the City of Creve Coeur.

(j) Ballard and Subclass 1 Plaintiffs have not and cannot allege unjust circumstances, as the Ordinance was validly enacted under Missouri statutes and the Missouri Constitution. Further, Ballard and Subclass 1 Plaintiffs voluntarily paid their fines in the absence of fraud or duress and, therefore, the voluntary payment doctrine bars recovery in restitution. Therefore, Counts II and VI must be dismissed with prejudice as to American Traffic Solutions, Inc. and the City of Creve Coeur.

(k) Counts III, IV and V of the Petition allege claims sounding in tort against Defendant CC, a municipality immune from tort liability arising from its performance of its government functions. Defendant CC's enactment and enforcement of the Ordinance are government functions. Defendant CC is therefore immune from suit as set forth in Counts III, IV and V and these Counts are therefore dismissed with prejudice as to City of Creve Coeur.

(l) Counts V and VI allege claims for money damages against Defendant ATS, a contractor performing a contract with CC, a government entity, according to the terms of the contract and in a non-negligent manner. ATS is therefore immune from suit as set forth in Counts V and VI and these Counts are therefore dismissed with prejudice as to American Traffic Solutions, Inc.

SO ORDERED this 12<sup>th</sup> day of March, 2012.

  
The Honorable David Lee Vincent, III  
Circuit Court Judge