

ORIGINAL

IN THE SUPREME COURT OF OHIO

JANINE LYCAN, et al.,

Plaintiffs-Appellees

v.

CITY OF CLEVELAND, OHIO,

Defendant-Appellant

Case No. 2014-0358

On appeal from the Eighth District Court
of Appeals of Ohio, Cuyahoga County
Court of Appeals No. 99698

**BRIEF OF AMICUS CURIAE MICHAEL K. ALLEN, COUNSEL FOR
CERTIFIED CLASSES OF PLAINTIFFS IN SPEED CAMERA
LITIGATION, IN SUPPORT OF APPELLEE JANINE LYCAN**

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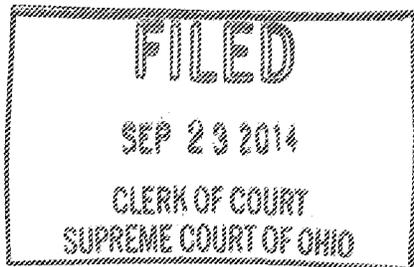
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INTEREST OF AMICUS CURIAE

Attorney Michael K. Allen, counsel for the certified classes of plaintiffs in two cases challenging the use of speed cameras, respectfully submits this *Amicus Curiae* Brief. The certified classes represented by Allen are in: *Pruett v. Village of Elmwood Place*, Hamilton County Common Pleas No. A1209235; *Barrow v. Village of New Miami*, Butler Cty. C.P. Case No. CV 2013 07 2047. In both *Pruett* and *Barrow*, the trial court certified a class consisting of all persons who have received notices of liability under automated speed enforcement programs operated by the Villages of Elmwood Place and New Miami. The constitutional claims asserted by the class representatives seek restitution of all penalties, fees, and other charges paid to each village based on unjust enrichment. The constitutional claims asserted by the class representatives also seek injunctive and corresponding declaratory relief halting enforcement of the automated speed enforcement programs.

The Common Pleas Court Judges in *Pruett* and *Barrow* found that automated speed enforcement schemes violate the Ohio Constitution in two respects:

1. the ordinances are unconstitutional because they violate the Ohio Constitution's due course of law (due process) guarantees; and
2. the ordinances are unconstitutional because they violate Article IV, Section 1, of the Ohio Constitution by usurping the authority of a municipal court.

In both cases, the Common Pleas Court judges issued permanent injunctions prohibiting the further operation of the that automated speed enforcement schemes.

The overwhelming majority of the members of the certified classes, like the Plaintiffs-Appellees in this case, did not bring a facial challenge to the constitutionality of the automated speed enforcement programs in the ersatz administrative hearings established by the villages. Instead, the members of the certified class paid civil fines assessed under the ordinances.

The application of *res judicata* in this case, if applied to the similarly situated certified classes in *Pruett* and *Barrow*, would prohibit the recovery of the fines paid under the unconstitutional municipal ordinances. The members of the certified class would be significantly impacted because they would be found to have “waived” constitutional claims even though they were not provided a full and fair opportunity to litigate the issues at the administrative level.

The Certified Classes in *Pruett* and *Barrow* have a significant interest in the outcome of this case because they paid over \$1,700,000 to the Village of Elmwood Place and over \$1,000,000 to the Village of New Miami. These civil fines were not paid “voluntarily,” as suggested by the Defendants-Appellants but were paid because the class members believed that they had no viable alternative. Compare Def. Br. at 1. For most motorists, the costs of challenging the violations far exceeded the costs of simply “paying the two dollars.”¹ One of the class representatives in *Barrow* in a deposition testified that the class members who paid the civil fines were not, as the Defendant’s characterize the situation, “simply admit[ing] the violations documented by the . . . automated camera system.” Def. Br. at 1. Rather, this class representative explained clearly that she admitted liability and paid the citation because she did not feel she could mount an adequate defense:

Q. In the box [on the Notice of Liability] you understand the language together indicates that if you do make the payment that is considered to be an admission of liability?

¹ See *North by Northwest* (1959) (Clara Thornhill: “Roger... Pay the two dollars.”). See also <http://wordsgoingwild.blogspot.com/2012/05/pay-two-dollars.html> (explaining that “pay the two dollars” became a catch-phrase following a popular Vaudeville sketch meaning something like “don’t fight City Hall”).

A. I think that they could have written in the box if you pay this your horrible person and you hate babies I still would've had to pay it. I had no choice. [sic]

(Deposition of Michelle Johnson at 38.

The application of *res judicata* in this case would lead to an anomalous result. The villages, along with their out of state corporate partners that operated the automated speed enforcement systems, would be unjustly enriched in the truest sense of the term; they would have received a significant benefit from enacting an unconstitutional scheme.

ARGUMENT

A. The Application Of Res Judicata To Facial Challenges To An Ordinance Is Improper Because The Plaintiffs Could Not Raise Facial Challenges To Statutes And Ordinances Before The Administrative Agency

Amicus curiae urge that any decision by this Court distinguish between facial and as-applied challenges to municipal ordinances. The difference between a facial challenge and an as-applied challenge lies in the scope of the constitutional inquiry. In a facial challenge, a plaintiff “must demonstrate that there is no set of circumstances under which the statute would be valid.” *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948, 880 N.E.2d 420 (2007), citing *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). As a general matter, a facial challenge is a challenge to an entire legislative enactment or provision. A court considering a facial challenge is to assess the constitutionality of the challenged law “without regard to its impact on the plaintiff asserting the facial challenge.” *Educ. Media Co. at Va. Tech, Inc. v. Swecker*, 602 F.3d 583, 588 (4th Cir. 2010). In contrast, an as-applied challenge is “based on a developed factual record and the application of a statute to a specific person[.]” *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 172 (4th Cir. 2009) (*en banc*). One court explained, “A paradigmatic as-applied attack . . . challenges only one of the rules in a statute, a subset of the statute's applications, or the application of the statute to a specific factual circumstance, under the assumption that a court can ‘separate valid from invalid subrules or applications.’” *Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011), quoting Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1334 (2000).

The distinction between an as-applied and a facial challenge can be seen in the remedy sought. The facial invalidation of a municipal ordinance – which is what the plaintiff classes represented by *amicus curiae* sought in the cases in Hamilton and Butler Counties – is a broader

remedy than an as-applied invalidation. In a facial challenge a plaintiff is asking the court to hold that a municipal ordinance can never be validly enforced. In contrast, in an as-applied challenge, a plaintiff would only be asking the court to hold that a municipal ordinance cannot be enforced in some particular set of circumstances applicable to the plaintiffs in that particular case. *See Citizens United v. FEC*, 558 U.S. 310, 330, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (noting that the facial/as-applied distinction “goes to the breadth of the remedy employed,” because a facial challenge is an argument for the facial invalidation of a law, whereas an as-applied challenge is an argument for the narrower remedy of as-applied invalidation).

1. This Court Has Unequivocally Held That Administrative Hearings Set Up By Municipalities May Not Hear Facial Constitutional Challenges.

The application of the proposition of law to facial challenges to statutes suffers from a fundamental flaw: “It is settled that an administrative agency is without jurisdiction to determine the constitutional validity of a statute.” *State ex rel. Columbus S Power Co. v. Sheward*, 63 Ohio St.3d 78, 81, 585 N.E.2d 380 (1992). This Court has held that the failure to request an administrative hearing does not preclude a *facial* challenge in a separate constitutional challenge in the Court of Common Pleas because a facial constitutional challenge *cannot be brought in the administrative* hearing. In other words, the City of Cleveland’s Proposition of Law should be rejected with respect to facial challenges because motorists who receive a notice of liability could not have raised the validity or constitutionality of the Ordinance in any administrative hearing; as a result, the failure to pursue these constitutional claims in an administrative hearing cannot preclude a party from raising that claim in a subsequent action in the Common Pleas Court. *Fairview General Hosp. v. Fletcher*, 63 Ohio St. 3d 146, 149, 586 N.E.2d 80 (1992); *Buckeye Quality Care Centers, Inc.*, 48 Ohio App.3d 150, 154, 548 N.E.2d 973 (10th Dist. 1988).

This Court has long held that administrative exhaustion is not required before bringing a facial challenge to an ordinance or statute for precisely this reason.

We have long held that failure to exhaust administrative remedies is not a necessary prerequisite to an action challenging the constitutionality of a statute, ordinance, or administrative rule. The policy interest underlying the rule distinguishing between cases presenting constitutional issues and others is simply the conservation of public resources. Because administrative bodies have no authority to interpret the Constitution, requiring litigants to assert constitutional arguments . . . administrative remedies would be wholly futile, exhaustion is not required.

Jones v. Chagrin Falls, 77 Ohio St.3d 456, 460-61, 674 N.E.2d 1388, 1997-Ohio-253 (1997). See also *Johnson's Island, Inc. v. Board of Township Trustees*, 69 Ohio St. 2d 241, 248-249, 431 N.E.2d 672 (1982) (“The requirement of exhaustion of administrative remedies is not applicable where the constitutionality of a statute is raised as a defense in a proceeding brought to enforce the statute.”); *Thomson v. Ohio Dep't of Rehab. & Corr.*, Franklin App. No. No. 09AP-782, 2010 Ohio 416, ¶19 (“The common law rule in Ohio requiring that administrative remedies be exhausted before declaratory relief is sought arguably does not apply . . . where the constitutionality of a statute or rule is involved.”).

The discussion of whether a motorist waived the ability to raise a facial constitutional challenge to a municipal ordinance is, accordingly, a red herring. See *Cleveland Br.* at 12-14. This Court has previously explained that constitutional claims not raised during administrative proceedings are not waived because “the issue of constitutionality can never be administratively determined.” *Mobil Oil Corp. v. Rocky River*, 38 Ohio St.2d 23, 26, 309 N.E.2d 900 (1974). See also *Grant v. Dept. of Liquor Control*, 86 Ohio App. 3d 76, 83, 619 N.E.2d 1165 (1993)(“constitutional issues, not raised during administrative proceedings, are not waived, because constitutional issues cannot be determined administratively”). In order to accept the City

of Cleveland's Proposition of Law, this Court would have to reject and over-rule this long-held tenet of Ohio law.

2. As A Practical Matter, The Administrative Entities Set Up By Municipalities In Automated Traffic Enforcement Cases Refuse To Hear Facial Constitutional Challenges.

The inability of Plaintiffs to raise constitutional issues at the administrative hearings set up by municipalities such as Cleveland is not hypothetical. In a case challenging the use of automated traffic enforcement devices in Dayton, Dayton's hearing officer acknowledged in his deposition that he would not have entertained such claims:

Q. Has anyone ever come in and said, Hey, I think this whole ordinance is unconstitutional?

A. Yes.

Q. Do you, as an administrative hearing officer, have the ability to rule on that?

A. *I don't believe I have if it's a facial constitutional challenge.* If it's just challenging a facially -- hey, I think this violates my rights of due process or whatever -- if they've making a facial challenge, I believe the case law has said that that needs to be done in a declaratory judgment, is what I'll tell them.

(Deposition of Hearing Officer Marc Ross at 47(emphasis supplied).)² Later, the Hearing Officer explicitly stated that facial challenges to the Ordinance – like the challenge in this case – must be brought in a declaratory judgment action in the Common Pleas Court:

A. . . . But if they come in and just make a facial constitutional challenge, *I don't have the authority, I don't believe, under the law to rule on a facial constitutional challenge. That has to be done, I believe, to the common pleas court with what's called a declaratory judgment action,* which is what I'll tell them. I'll say, you know, if you will want to pursue that, that's your prerogative. But as an administrative tribunal, I can't rule on just a facial, throw-it-out-there challenge to the constitutionality.

(*Id.* at 48-49 (emphasis supplied).) Ross correctly applied Ohio law. *See supra.*

² Ross suggested that he would consider an as-applied challenge. (Ross Depo. at 48.)

B. The Administrative Hearings Set Up By Municipalities Do Not Provide Parties With A Full and Fair Opportunity To Litigate Facial Constitutional Challenges.

Administrative proceedings may be given preclusive effect only if the parties had a full and fair opportunity to litigate the matters involved. *Gerstenberger v. City of Macedonia*, 97 Ohio App. 3d 167, 172-173, 646 N.E.2d 489 (1994), citing *Yashon v. Hunt*, 825 F.2d 1016, 1021 (6th Cir. 1987). See also *Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals*, 31 Ohio St. 3d 260, 263, 510 N.E.2d 373 (1987) (holding that *res judicata* applies to administrative hearings where parties have had “ample opportunity to litigate”).³

1. Lack of Due Process And A Quasi-Judicial Hearing

Res judicata is inapplicable in those situations where the municipalities do not provide adequate due process. In a number of cases, Ohio courts have refused to apply *res judicata* principles on the grounds that the administrative hearing did not provide adequate due process protections. For example, in *Gerstenberger, supra*, a court refused to apply *res judicata* where the administrative hearing relied upon hearsay evidence. The *Gerstenberger* court noted that the use of hearsay evidence did not “constitute a full and fair opportunity for that party to present its case and to litigate the issues,” in part because there was not “any opportunity for the trier of fact to determine credibility or clarify any ambiguities in statements . . .” 97 Ohio App. 3d at 173-74.⁴ Similarly, in *Independence v. Maynard*, 25 Ohio App. 3d 20, 495 N.E.2d 444 (1985), a court refused to apply *res judicata* to an administrative hearing where the hearing officer “made no

³ The type of hearing that could provide for the application of *res judicata* is illustrated by *Green v. City of Akron*, Summit Co. No. NOS. 18284/18294, 1997 Ohio App. LEXIS 4425, 7-9 (Oct. 1, 1997). In *Green*, the court applied *res judicata* to an administrative hearing. The court found it “significant” that the parties were not only represented by counsel at the hearing but, unlike in the hearings offered by most municipalities, the parties had the opportunity to present evidence and examine witnesses, and the government agency did not “unfairly restrict [the party’s] opportunity to litigate their case.”

⁴ One of the issues in *Gerstenberger* was that a key witness was not available to testify. The administrative hearing relied upon a deposition.

findings of fact or conclusions of law.”⁵ See also *Poneris v. A&L Painting, LLC*, Butler App. No. CA2007-05-133, 2009-Ohio-4128 (reliance on affidavit by hearing officer was insufficient to satisfy *res judicata* requirements); *Brice v. City of Cleveland*, 124 Ohio App. 3d 271, 281, 706 N.E.2d 10 (1997) (*res judicata* not applicable where a municipality did not have an adequate procedure to which the plaintiff could have presented his case).⁶

The City of Cleveland suggests summarily that the ordinance in this case satisfies due process requirements. Cleveland Br. at 14. But this is not always the case. Automated speed enforcement ordinance in the Hamilton County and Butler County cases brought by the Certified Classes were found by the Common Pleas Courts to violate the Ohio Constitution’s due process guarantees. *Pruitt*, March 7, 2013 Entry (Attached as Exhibit 1.); *Barrow*, March 11, 2014 Entry (Attached as Exhibit 2). In both cases, the municipality had contracted with an out of state

⁵ The *Independence* court emphasized “While *res judicata* does apply to administrative hearings, it should be applied with flexibility . . .” 25 Ohio App. 3d at 28.

⁶ Administrative proceedings are entitled to preclusive effect when they are conducted in a judicial manner, which means that the hearing must afford the parties an ample opportunity to litigate the issues involved in the proceeding. See *Grava v. Parkman Township*, 73 Ohio St. 3d 379, 381, 1995-Ohio-331, 653 N.E.2d 226 (1995) citing *In Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals*, 31 Ohio St. 3d 260, 263, 510 N.E.2d 373 (1987). This Court has explained, “Proceedings of administrative agencies are considered quasi-judicial if there is notice, a hearing, and an opportunity for introduction of evidence.” *Superior Brand Meats, Inc. v. Lindley*, 62 Ohio St. 2d 133, 136, 403 N.E.2d 996 (1980), quoting *State ex rel. Republic Steel Corp. v. Ohio Civil Rights Comm.*, 44 Ohio St. 2d 178, 184, 339 N.E.2d 658 (1975). See also *Featherstone v. Columbus Pub. Schs*, 39 F. Supp. 2d 1020, 1022 (S.D. Ohio 1999).

In many situations, while automated speed camera enforcement ordinances provide “notice” and some form of a “hearing,” the proceedings under the ordinances could not be considered to be quasi-judicial because of the undue restrictions placed on the ability of a motorist to introduce evidence. In particular, many ordinances do not permit a party to request discovery or compel the attendance of witnesses or the production of records through a subpoena. See *Zangerle v. Evatt*, 139 Ohio St. 563, 571, 41 N.E.2d 369 (1942) (noting that quasi-judicial hearings are similar “to a court, to wit, witnesses are examined . . .”); *State ex rel. Schachter v. Ohio Pub. Empls. Ret. Bd.*, 121 Ohio St. 3d 526, 2009-Ohio-1704, 905 N.E.2d 1210, ¶30 (2009) (holding that an administrative proceeding was quasi-judicial because “the appeal resembled a trial, with the parties represented by counsel and presenting sworn evidence, cross-examining witnesses, and making objections.”).

corporation to install and administer an automated speed enforcement program. The Elmwood Place and New Miami ordinances provided that the information supplied by the out-of-state corporation was *prima facie* evidence of a violation. Significantly, the ordinances did not permit motorists to subpoena witnesses or documents to challenge the hearsay evidence presented by the village.

In *Pruett*, Judge Ruehlman found that “the [Elmwood Place] ordinance fails to provide due process guarantees to any person receiving a notice of liability.” *Pruett* Decision at 5. Judge Ruehlman found that the administrative hearing process is “nothing more than a sham!”

Id. He wrote:

The so-called witness for Elmwood Place testifies from a report produced by the company that owns the speed monitoring unit. This witness has no personal knowledge of the speeding violation and therefore their testimony is based solely on hearsay. The accused motorist has no ability to cross-examine the witness because the witness was not present when the violation occurred. There is no opportunity to obtain any discovery about the device or to subpoena any witnesses that may have knowledge of the device. . . . Moreover, the device was not calibrated by certified police officer, but rather it was calibrated by Optotraffic, the corporation that owns the device. Remember, Optotraffic has a financial stake in this game. I use the word “game” because Elmwood Place is engaged in nothing more than a high-tech game of **3 CARD MONTY**. It is a scam the motorists can’t win. The entire case against the motorist is stacked because the speed monitoring device is calibrated and controlled by Optotraffic.

Id. at 5-6 (emphasis in original.)

In *Barrow*, Judge Sage found that that the New Miami ordinance denied motorists due process. He wrote:

The village has intentionally chosen to ignore [the] basic tenants of procedural law and adopted a civil ordinance which is strongly skewed in its favor and which denies the people cited any chance for a fair hearing.... When government chooses to bypass time-tested traditions which incorporate Ohio's rules of practice and procedure then it invites scrutiny to ensure the process is fair to citizens from whom they wish to take their property.

Barrow Decision at 13.

The primary case relied upon by the City of Cleveland does not suggest that many of the municipal ordinances in Ohio provide adequate due process. *Balaban v. City of Cleveland*, U.S.D.C., N. D. Ohio No.1:07-cv-1366, 2010 U.S. Dist. LEXIS 10227 (N.D. Ohio Feb. 5, 2010). The *Balaban* court noted that a court “certainly could not justify allowing [a municipality] to impose liability based on blatantly unreliable evidence.” 2010 U.S. Dist. LEXIS 10227 at *20 n. 3. Because many of the automated traffic enforcement ordinances throughout the state rely upon hearsay without providing a party with the opportunity for discovery or subpoena power, the ordinances do not provide procedures that guarantee that the evidence relied upon by the hearing officer is reliable and probative.⁷ The ordinances have been found to violate due process guarantees because they do not permit vehicle owners to request that witnesses, including the officer who approved the notice of violation or a representative of the out-of-state company who can testify about the operation of the equipment, be subpoenaed to testify at the administrative hearings. This is not a mere academic concern. Recent news reports from other cities have suggested that there are significant problems with some of the automated traffic enforcement systems. In Baltimore, for example, an audit revealed that speed cameras in that city had an error rate of more than 10 percent, which resulted in motorists wrongly paying approximately \$2.8 million in civil fines. Luke Broadwater and Scott Calvert, *Secret Audit Found City Speed Cameras Had High Error Rates*, *The Baltimore Sun*, January 22, 2014 (available at http://articles.baltimoresun.com/2014-01-22/news/bs-md-ci-speed-camera-audit-20140122_1_city-speed-cameras-documented-erroneous-speed-readings-xerox-state).

⁷ The balancing of interests by the *Balaban* court is suspect. The *Balaban* court described the potential fines faced by motorists as “relatively minimal.” However, the appellate court in this case correctly noted that “the imposition of a \$100 civil penalty resulting from a [traffic] camera violation has significant value to the individual.” *Lycan v. City of Cleveland*, 2014-Ohio-203, 6 N.E.3d 91, ¶2.

2. **The *Carroll* Decision is Inapposite Because It Was An As-Applied Challenge**

The City of Cleveland's *res judicata* argument relies primarily on an unpublished Sixth Circuit decision in *Carroll v. City of Cleveland*, 522 Fed. Appx. 299 (6th Cir. 2013). Cleveland Br. at 18-20.

Carroll involved the establishment of a red light camera system in Cleveland. Unlike many automated traffic enforcement schemes throughout Ohio which rely upon administrative appeals process run by the police, Cleveland allowed appeals to be heard by the Parking Violations Bureau through an administrative process established by the Clerk of the Cleveland Municipal Court. The *Carroll* court noted that had the plaintiffs chosen to contest the citations, they "would have received ample opportunity to develop the facts surrounding their citations and to present their arguments about the statute's constitutionality, first in an administrative proceeding, then in the Ohio court system." *Id.* at 304. In contrast, in most municipalities which have adopted traffic enforcement schemes, motorists do not have the opportunity to develop a full record in the administrative proceeding because of the limitations imposed by the ordinances on the admissibility of evidence or the lack of any ability to subpoena records or witnesses.

This precise difference between the ordinance in cases where courts have found a lack of due process and the Cleveland ordinance in *Carroll* was noted by the Federal District Court in *Foor v. City of Cleveland*, U.S.D.C., N.D Ohio No. 1:12 CV 1754, 2013 U.S. Dist. LEXIS 115552 (Aug. 14, 2013). The *Foor* Court referred to the Hamilton County Common Pleas Court's decision finding the nearly identical Elmwood Place ordinance unconstitutional and observed that that case was distinguishable from the Cleveland ordinance because in Elmwood Place "the court found the hearing to be lacking in due process." *Id.* at *16.

The *Carroll* court relied heavily on the fact that the motorists failed to pursue an appeal to the Common Pleas Court pursuant to R.C. §2506.01. From a practical standpoint, this is a

major flaw in the *Carroll* court's reasoning because the filing fee in the Common Pleas Court is significantly greater than the amount of the civil fines at issue. While a few appeals may have been filed, this does not seem a rational choice on the part of motorists. One court, in rejecting a similar argument, noted, "An appeal that, quite apart from the time of the appellant and any attorney's fee, costs more to file than the maximum gain that the appeal can yield the appellant is an illusory remedy." *Van Harken v. City of Chicago*, 103 F.3d 1346, 1353 (7th Cir. 1997) (Chicago parking tickets).

Finally, but perhaps most importantly, the *Carroll* case involved an as-applied constitutional challenge to a camera ordinance. 522 Fed. Appx. at 306. ("The claims here fall cleanly in the "as-applied" category."). The court specifically that its reasoning, based primarily on the availability of an appeal pursuant to R.C. §2506, would not apply to facial challenges. *Id.* ("while Appellants correctly note that a facial constitutional challenge is not available in a §2506 proceeding, they do not, and cannot, maintain such a challenge here"). This is an important distinction, as the *Carroll* court recognized that while a facial constitutional challenge could not have been raised either before the hearing officer or in a later appeal pursuant to R.C. §2506 proceeding, the as-applied challenge before the court could have been raised in an administrative appeal to the common pleas court.⁸ *Id.* at 305-306. In other words, the *Carroll* court recognized that while a plaintiff who fails to pursue an administrative appeal has no standing to later pursue an as-applied challenge, a plaintiff who fails to pursue an administrative appeal *would* have standing to later pursue a facial challenge in a separate action brought in the common pleas court.

⁸ The *Jodka* court apparently failed to appreciate this important distinction. *Jodka v. City of Cleveland*, 2014-Ohio-208, 6 N.E. 3d 1208 (8th Dist. 2014). This failure led to the incorrect decision in *Jodka*.

3. Res Judicata Should Not Be Applied To Class Action Cases That Seek The Return of Money Under An Equitable Restitution Claim

This Court has held that administrative remedies do not need to be exhausted in class action matters that seek the equitable restitution of money paid under an unconstitutional statute or ordinance. *Herrick v. Kosydar*, 44 Ohio St. 2d 128, 339 N.E.2d 626 (Ohio 1975). In *Herrick*, a class of plaintiffs sought a declaration of their liabilities arising from a statute that they claimed was invalid. The court held that pursuing administrative remedies (or an appeal under R.C. § 2506.01) made no sense in this type of situation:

[T]he present action is a class action, brought on behalf of an estimated 40,000 claimants. Administrative remedies would require each of those claimants to file a separate refund application, a requirement which can hardly be considered an equally serviceable alternative to a single declaratory judgment action. A class action provides various other procedural benefits and safeguards, as set out in Civ. R. 23, and offers clear advantages for large groups of litigants with similar interests. None of these advantages would be available in an administrative hearing, or in an appeal therefrom to the courts.

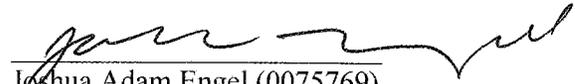
44 Ohio St. 3d at 130-31.⁹ See also *Ojalvo v. Board of Trustees*, 12 Ohio St. 3d 230, 235, 466 N.E.2d 875 (1984) (“class action would seemingly provide the ideal means of adjudicating in a single proceeding what might otherwise become three thousand to six thousand separate administrative actions”); *Grant v. Becton Dickinson & Co.*, Franklin App. No. No. 02AP-894, 2003-Ohio-2826, ¶21 (noting that class action procedure “was designed to give access to the courts for persons without the means to pursue litigation individually, or in instances where, as in small but numerous consumer grievances, the value of each individual lawsuit would not justify litigation”).

⁹ The *Herrick* court also held that, as explained *supra*, administrative proceedings did not need to be pursued because the “administrative agency [was] without jurisdiction to determine the constitutional validity of a statute.” 44 Ohio. St 3d at 130-31, citing *S. S. Kruse Co. v. Bowers*, 170 Ohio St. 405, 166 N.E.2d 139 (1960). In such a situation, the court explained that administrative proceedings would be “futile.” *Id.*

CONCLUSION

The Court should not validate the City of Cleveland's Proposition of Law to the extent that it would apply to facial challenges to municipal ordinances.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2014, sent a copy of the foregoing to counsel of record for all parties by U.S. Mail


Joshua Adam Engel (0075769)

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

[Handwritten Signature]
JUDGE ROBERT P. RUEHLMAN
COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

GARY PRUIETT, et al.
Plaintiffs

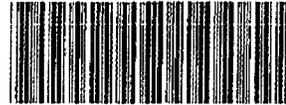
Case Number: A1209235

Judge Robert P. Ruehlman

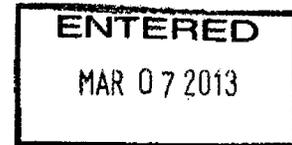
v.

VILLAGE OF ELMWOOD, et al.
Defendants

DECISION



D101235334



On July 10th, 2012 The Village Counsel of Elmwood Place, a small village located in Hamilton County, Ohio passed ordinance 9-12 (The Ordinance). This ordinance created The Automated Speed Enforcement Program. The ordinance added Section 77 to the Village's codified ordinances for the implementation of the Automated Speed Enforcement Program. The ordinance provides that the "owner of a vehicle shall be liable for a penalty imposed for speeding." The ordinance also provides that the recorded images produced by the Automated Speed Enforcement Program are prima facie evidence of a violation. In addition, the ordinance assumes that the owner of the motor vehicle was operating the vehicle at the time of the offense.

On July 14th, 2012, the Village of Elmwood Place entered into a service agreement with Optotrafic, LLC (service agreement), Optotrafic is a Maryland for profit Corporation that provides automated speed and traffic enforcement systems to local governments. The service agreement provides that Optotrafic would operate the Automated Speed Enforcement Program

for the Village of Elmwood Place. The operation of the Automated Speed Enforcement Program by Optotraffic includes:

- Installation of cameras and equipment to measure speed and produce images of vehicles allegedly violating speed limits.
- Obtaining from BMV records the identity of the owner of vehicles alleged to have violated the speed limits.
- Printing and mailing citations, or Notices of Liability, to the owners of vehicles alleged to have violated speed limits.
- Operation of a phone number for recipients of citations to make inquiries and receive information.
- Retention of a collection system to pursue any imposed fines and fees.

In exchange for providing this service to Elmwood Place, Optotraffic receives 40% of all revenues resulting from payments of citations and related fees.

Elmwood Place recently passed Ordinance No. 12-12, which announced that anyone requesting an “Administrative Hearing” will be assessed a \$25.00 fee, even when that request was made before the law’s passage.

Elmwood Place began operation of the Automated Speed Enforcement Program on September 1, 2012. One speed camera was placed in a school zone on Vine Street and a second speed camera was placed in a residential neighborhood. The hours of operation are twenty-four hours per day, seven days per week throughout the year. Vehicles traveling over the posted limit are subject to enforcement action. This action is based on evidence captured by the Automated

Speed Enforcement Program. The owner of a vehicle subject to enforcement action receives a Notice of Liability. The Notice of Liability is a Civil, not a Criminal, proceeding.

The Civil penalty is \$105.00 and it does not involve points on a driver's license or on a driver's record. The fine is enforced like Civil Judgments. Elmwood Place stated that it may use collection services, report non-payment to credit agencies and deprive owners of their vehicles.

Thousands of these tickets have been issued since September 1, 2012 and thousands of Notices of Liability have been issued. Of the money collected through this program, 40 percent of the revenue goes to Optotraffic and 60 percent stays in the Village of Elmwood Place. With approximately 115 Notices of Liability being issued per day, at \$105.00 per violation, Elmwood's Automated Speed Enforcement Program is capable of generating approximately \$362,250.00 per month. Over a six month period, Elmwood Place is capable of collection over 2 million dollars.

Individuals and businesses in Elmwood Place have suffered damages as a result of the operation of the Automated Speed Enforcement Program. Businesses have lost customers who now refuse to drive through Elmwood. Churches have lost members who are frightened to come to Elmwood and individuals who have received notices were harmed because they were unable to defend themselves against the charges brought against them.

ISSUES:

PUBLICATION AND POSTING

Plaintiffs assert that Elmwood Place violated the publication and posting requirements of the Ohio Revised Code when it passed the Ordinance established its Automated Speed Enforcement Program. The Court does not need to decide this issue because the case will be resolved under the issue of Due Process.

DUE PROCESS

The Plaintiffs assert that the ordinance violates the Ohio Constitution. The Constitution of the State of Ohio guarantees that every person injured in his lands, goods or personal reputation shall have remedy by "due course of law". In other words, a person facing civil penalties must be afforded the opportunity to defend, enforce or protect their rights through presentation of their own evidence, confrontation and cross-examination of adverse witnesses, and oral argument. *Goldberg v. Kelly*, 397 US 254 (1970). Moreover, the terms, "due course of law" under the Ohio Constitution and "due process of law" under the United States Constitution are interpreted identically. *Adler v. Whitbeck*, 44 Ohio State 539 (1886).

DECISION

The Court finds that the ordinance fails to provide due process guarantees to any person receiving a Notice of Liability, from The Village of Elmwood Place.

Revised Code 4511.094 requires that traffic law photo-monitoring devices to enforce traffic laws cannot be used in a village, unless a sign is erected within that village, warning motorists that such a monitoring device is operating. The Chief of the Elmwood Place Police Department testified that it was possible for a motorist to enter the village and go through a speed enforcement area without ever passing a warning sign.

Furthermore, when a speed monitoring device records a violation, a motorist is mailed a Notice of Liability. The violation is based on a report and a photograph from the speed monitoring unit. The report contains the speed of the vehicle indicating that the vehicle was traveling faster than the speed limit. The photograph shows the car and its license plate number. The owner of the vehicle is then sent a Notice of Liability and is told to pay a civil penalty of \$105.00. If the owner of the vehicle wants to contest the liability, he or she must pay \$25.00 to the Village of Elmwood and request a hearing before a hearing officer and there is no assurance that the fee will be returned if the appeal is successful. However, the hearing is nothing more than a sham!

The so called witness for Elmwood Place testifies from a report produced by the company that owns the speed monitoring unit. This witness has no personal knowledge of the speeding violation and therefore, their testimony is based solely on hearsay. The accused motorist has no ability to cross-examine the witness because the witness was not present when

the violation occurred. There is no opportunity to obtain any discovery about the device or to subpoena any witnesses that may have knowledge of the device. In fact, the device is calibrated once a year; even though it may have been subjected to 12 months of varying amounts of rain, snow, sun, storms, ice, wind and lightning. Moreover, the device was not calibrated by a certified Police Officer, but rather it was calibrated by Optotraffic, the corporation that owns the device. Remember, Optotraffic has a financial stake in this game. I used the term "game" because Elmwood Place is engaged in nothing more than a high-tech game of **3 CARD MONTY**. It is a scam that the motorists can't win. The entire case against the motorist is stacked because the speed monitoring device is calibrated and controlled by Optotraffic. Remember, Optotraffic had already received approximately \$500,000.00 at the time of the January 9th, 2013 hearing, before this court.

To compound this total disregard for due process, Elmwood Place has another scheme up its sleeve. If a motorist tries to convince a hearing officer that he or she was not the driver of the offending vehicle, the ordinance requires that the owner making such a claim provide the name and address of the driver of the vehicle. If the driver was the owner's spouse, the ordinance requires the owner to testify against his or her spouse, in violation of the spousal immunity statute Revised Code 2917.02 (D).

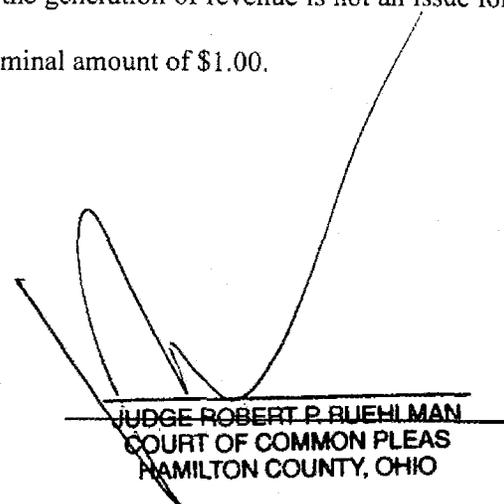
The Court renders Judgment in favor of the Plaintiffs and finds that the ordinance is invalid and unenforceable. A permanent injunction is granted to the Plaintiffs prohibiting further enforcement of the ordinance, by the Defendants.

Court costs, other reasonable expenses and attorney fees are to be assessed against the Defendants.

BOND

Civil Rule 65 (C) provides that an injunction is not operative until the Plaintiffs post a bond to cover any potential damages that may be sustained by the Defendants, if it is finally decided that the injunction should not have been granted.

Since the Defendants have stated that the goal of the ordinance was not to raise revenue, but rather to increase compliance with speed limits, the generation of revenue is not an issue for the Defendants. Therefore, the surety is set in the nominal amount of \$1.00.



A handwritten signature in black ink, appearing to read 'Ruehlman', is written over a horizontal line. The signature is stylized and somewhat cursive.

~~JUDGE ROBERT P. RUEHLMAN
COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO~~

JUDGE ROBERT P. RUEHLMAN
COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

EXHIBIT 2

IN THE COURT OF COMMON PLEAS
GENERAL DIVISION
BUTLER COUNTY, OHIO

DOREEN BARROW, et al.

Case Number: CV2013 07 2047

Plaintiffs,

JUDGE MICHAEL J. SAGE

-v-

VILLAGE OF NEW MIAMI, et al

DECISION AND ENTRY

Defendants.

FILED BUTLER CO.*
COURT OF COMMON PLEAS

MAR 11 2014

MARY L. SWAIN
CLERK OF COURTS

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The plaintiffs filed a class action lawsuit challenging the Automated Speed Enforcement Program (ASEP) in the Village of New Miami, Ohio. The plaintiffs seek class certification, a permanent injunction stopping the Village's speed enforcement program, and a refund for class members who have paid money to the Village as penalties imposed through this program.

There are multiple motions before the court. The matters are the defendants' motion to dismiss Police Chief Kenneth Cheeks, plaintiffs and defendants' cross motions for summary judgment and the defendants' motion for a stay. For the reasons stated in open court and more fully elaborated in this opinion, the court **grants** the Defendant Cheeks motion to dismiss and the plaintiffs' motion for summary judgment; **denies** the defendants' motion for summary judgment and **denies** the defendants' motion for a stay.

Judge Michael J. Sage
Common Pleas Court
Butler County, Ohio

PROCEDURAL BACKGROUND

On August 27, 2013 the Defendant Kenneth Cheeks, Police Chief of the Village of New Miami, filed a motion to dismiss himself as a defendant from this action. On October 22, 2013 the plaintiffs filed a motion for summary judgment and a motion for class certification. On December 26, 2013 the defendants filed a motion to stay a decision on plaintiffs' motion for summary judgment. On January 6, 2014, the defendants filed their cross motion for summary judgment. Both sides requested oral arguments on pending motions, which was held on February 25, 2014. At the conclusion of oral arguments, the court granted class certification, granted plaintiffs' motion for summary judgment and enjoined the Village of New Miami from operating speed cameras under its Automated Speed Enforcement Program (ASEP). The court denied the defendants' motion for stay, and denied the Village's motion for summary judgment.

LEGAL ANALYSIS

The first issue is defendant Cheeks' motion to dismiss. Civ.R. 12(B)(6) allows a motion to dismiss based on the defense of failure to state a claim upon which relief can be granted. A motion to dismiss pursuant to Civ.R. 12(B)(6) carries a heavy burden. This motion will only be granted when it appears "beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77

at 80. The court must also “presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party.”

Mitchell v. Lawson Milk Company (1988), 40 Ohio St.3d 190, at 192.

In resolving a Civ.R. 12(B)(6) motion to dismiss, the trial court may consider only the statements and facts contained in the pleadings and may not consider or rely on evidence outside the complaint. *Estate of Sherman v. Milhon* (1995), 104 Ohio App.3d 614, 617, 662 N.E.2d 1098, 1100. When a motion to dismiss presents matters outside the pleadings, the trial court may either exclude the extraneous matter from its consideration or treat the motion as one for summary judgment and dispose of it pursuant to Civ.R.56. *Powell v. Vorys, Sater, Seymour & Pease* (1998), 131 Ohio App.3d 681, 723 N.E.2d 596. However, a trial court may not, on its own motion, convert a Civ.R.12(B)(6) motion to dismiss to a motion for summary judgment and thus dispose of it without giving notice to the parties on its intent to do so and fully complying with Civ.R.12(B) and Civ.R.56 in its considerations. *Id.*

The court also has before it cross motions for summary judgment. A motion for summary judgment shall only be granted when there are no genuine issues of any material fact, and the moving party is entitled to judgment as a matter of law. Summary judgment shall not be granted unless it appears from the evidence that reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion is made. In reviewing

a motion for summary judgment, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Civ. R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317. The only evidence to be considered when ruling upon a motion for summary judgment are pleadings, depositions, affidavits, written discovery responses filed with the court, transcripts of evidence, and written stipulations of fact. Civ.R. 56(C).

Summary judgment is a procedural device to terminate litigation and to avoid formal trial when there is nothing to try. It must be awarded with caution, resolving doubts and construing evidence against the moving party, and granted only when it appears from the evidentiary material that reasonable minds can reach only an adverse conclusion as to the party opposing the motion. *Norris v. Ohio STD Oil Co.* (1982), 70 Ohio St.2d 1. Doubts must be resolved in favor of the non-moving party. *Osborne v. Lyles* (1992), 63 Ohio St. 3d 326.

For summary judgment to be granted there can be no genuine issue as to any material fact and the moving party must be entitled to judgment as a matter of law. Material facts are those facts that might affect the outcome of the lawsuit under the law of the case. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340, 617 N.E.2d 1123, 1126, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 212–213. To determine if these facts present a genuine issue, the court must decide whether the evidence presents a sufficient conflict to require submission to a jury, or whether it is so one-sided that

one party must prevail as a matter of law. *Id at 1126*

In the case at bar, the parties rely upon arguments provided in their respective supporting memoranda, oral arguments, the pleadings, copies of the Village's ordinances, affidavits filed and eight depositions filed.

DISCUSSION

This case arises out of the operation of the Automated Speed Enforcement Program in the Village of New Miami. The Village of New Miami is in St. Clair Township located just north of the city of Hamilton. New Miami is less than one square mile in size (.95 square miles) and has a population of 2249 people based on the 2010 United States Census Bureau. U.S. 127, a major north-south highway, runs through the Village and is the primary location where the speed cameras were located..

The Automated Speed Enforcement Program (ASEP) was established by Ordinance 1917 adopted by the Village Council on July 5, 2012. On August 2, 2012 the Village entered into a contract with Maryland Optotraffic, LLC, a private Maryland corporation, to operate the program. Optotraffic operates a near identical program in the Village Of Elmwood in Hamilton County, Ohio. Under the contract Optotraffic placed four speed cameras in New Miami. They also maintain the equipment; send out notices of violations and they collect fines. In exchange for this, Optotraffic received 40% of all revenues received from the

program. During the fifteen months the program was in operation over 10,000 violations were reported with over an estimated one million dollars collected. (A *Journal-News* article dated March 8, 2014 actually places the number of speed citations issued under the ASEP in New Miami at 44,993 during the fifteen months.)

Under Section 77.02 of the ordinance, New Miami enacted a "civil enforcement program" for automated speed enforcement system violations. Instead of a speeding ticket being issued by a police officer, a civil "notice of liability" was sent to the vehicle's registered owner. Under Section 77.03 the owner of the vehicle was liable for a civil penalty imposed if the vehicle was operated at a speed in excess of the speed limit. The ordinance provided a limited number of defenses. In both commercial and privately owned vehicles, for the owner to avoid liability, the owner was required to provide the name and address of the person who was operating the vehicle. In the case of privately owned vehicles, the owner also had to provide a signed affidavit from the driver that the affiant (other than the owner) was driving the vehicle accompanied by payment of the civil penalty. Under Section 77.04(d) it is "prima facie evidence" that the owner was operating the vehicle at the time of the offense. The Village makes no attempt to determine who was the actual driver but places that burden on the owner.

Section 77.05 imposes a civil penalty upon the owner of the vehicle if the

vehicle is recorded by the speed camera violating the speed limit. If an owner fails to respond in a timely manner to a "notice of liability" under this section, the owner waives his right to contest his liability.

Section 77.07 provides the owner with his rights to appeal a "notice of liability". An owner can either provide the name of the driver as previously discussed or can file a "written notice of request for review" within 20 calendar days of after the issuance of the notice of liability. The hearing shall be before a hearing officer appointed by New Miami. Under Section 77.07(a) (3) A the Village has established a "prima facie" case by introducing a certified copy of the notice of liability with the recorded image produced by the automated speed enforcement system. This section provides four affirmative defenses which can be asserted at a hearing. Two defenses are that the vehicle or plates were stolen or that photo was illegible. The other two defenses are only available to an owner if that owner provides the name and address of the person who was operating the vehicle or had custody and control of the vehicle.

Under the New Miami ordinance there is no right to discovery, no right to subpoena witnesses, and no right of confrontation. The Ohio Rules of Evidence, the Ohio Rules of Civil Procedure, and the Ohio Traffic Rules do not apply. If an owner wishes to appeal a decision of the Hearing Officer, that person must file an appeal to the Butler County Court of Common Pleas pursuant to R.C. 2506 and pay the court costs, which are three times more than the fine.

The plaintiffs challenge the speed camera ordinance on two different grounds. The first is that any violation of a municipal ordinance must be adjudicated in a municipal court. The second grounds is that the ordinance violates the Ohio Constitution "due course of law" clause.

R.C. 1901.01(A) (1) provides: "The municipal court has jurisdiction of the violation of any ordinance of any municipal corporation within its territory..." In this case if a traffic citation was issued, Hamilton Municipal Court would have jurisdiction. The plaintiffs argue that under Article IV, Section 1 of the Ohio Constitution and R.C. 1901 a municipal court would have exclusive jurisdiction to consider alleged violations of New Miami's ordinances. The plaintiff argues that New Miami Ordinance 1917 violates the Ohio Constitution by improperly placing judicial powers in the hands of an extrajudicial administrative body in which a hearing officer appointed by the Village has the authority to adjudicate violations of the ordinance and issue civil penalties in the form of fines.

The defendants argue that Ohio Constitution guarantees them the right under Section 3, Article XVIII to "home rule" authority and New Miami had a right to adopt the extra-judicial process used to adjudicate civil citations issued for speed camera violations.

It is important to point out that this is not a case about speed cameras or any type of automatic system used to enforce traffic laws by a municipality. In *Mendenhall v, City of Akron*, 117 Ohio St. 33, 2008-Ohio270 the use of speed

cameras in school zones was challenged. The Ohio Supreme Court ruled that Akron did not exceed its home rule authority with regard to cameras for enforcement of traffic laws. Municipalities such as New Miami clearly have the home rule authority to use speed cameras or similar devices for enforcement of traffic laws. This case deals with the process municipalities use when the alleged persons have violated their traffic laws.

The issue as to whether the municipal courts have exclusive jurisdiction to adjudicate speed camera violations is presently before the Ohio Supreme Court. The Sixth Circuit of Appeals in *Walker v. City of Toledo*, 2013 Ohio 2809 ruled the City of Toledo's attempt to bypass the municipal court system by adopting a very similar civil administrative process violated Article IV, Section 1 of the Ohio Constitution. The *Walker* majority ruled that R.C. 1901.20(A)(1) grants Municipal Courts exclusive authority to adjudicate speed violations. The City of Toledo has appealed this issue to the Supreme Court.

After reviewing *Walker*, this court finds the majority opinion persuasive and grants plaintiffs summary judgment on this issue. To decide otherwise is to permit municipalities to create an extra judicial system without all of the court's inherent protections which municipalities could easily abuse. One purpose of a court is the protection of citizens against an over-reaching government. It is this court's strong belief the writers of the Ohio Constitution intended courts with all their procedural protection to be the exclusive venue to resolve traffic and

criminal matters.

The second basis for the summary judgment is that the plaintiffs claim the ordinance adopted by New Miami violates the "due course of law" clause in Ohio's Constitution. It is a fundamental concept of American jurisprudence that before a person can be deprived on their property by the government they are entitled to due process of law. Inherent in that concept is that a citizen of this country has a right to a fair hearing before a neutral magistrate. A citizen must be entitled to defend, enforce or protect their rights through presentation of their own evidence, confrontation and cross-examination of adverse witnesses and oral argument. *Goldberg v. Kelly*, 397 U.S. 254 (1970). In determining whether the ordinance provides constitutionally adequate due process, the competing interests of the government and individual must be balanced. *Mathews v. Eldridge*, 424 U.S. 319 (1976). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Id.* Quoting *Armstrong v. Manzo*, 380 U.S. 545 (1965).

The defendants argue that the Automated Speed Enforcement Program provides adequate due process for citizens wishing to challenge a notice of liability. The defendants argue that due process is a flexible concept that calls for procedural safeguards as the particular situation demands. *Chirila v. Ohio State Chiropractic Board*, 145 Ohio App.3d 589 (2001). The court in *Chirila* recognized three factors which must be weighed. The three factors are (1) the private

interest at stake; (2) the risk of erroneous deprivation of that interest and the probable value of additional safeguards; and (3) the government's interest, including the function and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

At the heart of the matter, plaintiffs claim is that the procedure adopted in the New Miami ASEP lacks adequate due process. The court agrees. Under New Miami's Ordinance 1917:

- The Village only needs to enter certified notice of liability with a recorded image of a vehicle to establish a *prima facie* case.
- No "accusing witness" with personal knowledge of the alleged event testifies.
- It is *prima facie* evidence that the owner of the vehicle was operating the vehicle at the time of the offense.
- No person testifies for the Village or is available to testify about the device itself and its reliability, routine maintenance and calibration.
- The ordinance only provides four affirmative defenses.
- Two of the affirmative requires the owner of the vehicle to provide the name of the address of the driver if the owner claims the owner was not driving the car. This would include providing the name of a spouse or family member.
- The hearing officer is hired by the police chief of New Miami.
- There is no requirement that the hearing officer have any legal training.
- There is no requirement that a record be made. In *Rodeffer v. New Miami Police Department*, CV2013 01 0210, Judge Charles Pater granted the appellant's appeal of her civil liability penalty imposed by

New Miami writing "... the Village of New Miami has failed to file a transcript of the administrative hearing because it is unable to do so. Apparently, all or virtually all of the proceedings were not recorded."

- There is no right or method of subpoena to the administrative hearing.
- There is no right to do pre-hearing discovery.
- The Ohio Rules of Evidence, the Ohio Rules of Civil Procedure and the Ohio Traffic Rules do not apply to the hearing.
- If an individual wishes to appeal he must do so by filing an administrative appeal under Chapter 2506 and pay the necessary court costs, which are over three times the amount of the fine.

This court agrees that due process is a fluid and flexible rule of law.

The amount of due process expected in this case is not the same as one would expect in a felony case. At the heart of the concept of due process however is fairness. People who are issued a notice of liability and wish to contest that liability have a right to expect that the hearing they are mandated to appear at will be fair and that the decision will be made by a fair and impartial hearing officer based on reliable evidence.

Ordinance 1917, at first glance, appears to meet minimal requirements of due process. The ordinance provides a hearing in front of a hearing officer in which an owner can appear and challenge the notice of civil liability. The Village of New Miami has entered into a contract with a private contractor to place four speed cameras along a busy north-south highway. That contractor and the

Village split the civil fines imposed. The Supreme Court of Ohio has stated in *Mendenhall*, supra that these cameras are within the power of a municipality under Ohio's home-rule laws.

The Village has made a conscious decision to by-pass the traditional process of a police officer issuing a traffic citation for speeding and that ticket being contested in Hamilton Municipal Court. Invoking their home-rule authority, they have established a civil proceeding which ignores all basic concepts built into Ohio's rules of practice and procedure. This court has tremendous respect for those rules because the court understands that every rule adopted has withstood the scrutiny of the attorneys, law professors, judges and justices of Ohio. Built into every rule is the time honored tradition of fairness. The Village has intentionally chosen to ignore these basic tenets of procedural law and adopt a civil ordinance which is strongly skewed in its favor and which denies the people cited any chance for a fair hearing. The Village's elected council chose to by-pass the time tested process of the municipal court system by adopting this ordinance and did so at its own jeopardy. When government choses to by-pass time tested traditions which incorporate Ohio's rules of practice and procedure then it invites scrutiny to ensure the process is fair to the citizens from whom they wish to take the their property. The Village could easily amend its ordinance so that these cases would be heard in the municipal court system. They have chosen not to.

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When taken as a whole, the court believes Ordinance 1917 fails to provide basic due process rights to the citizens who appear for a hearing. No person with personal knowledge of a speeding violation either reviews the citation or appears at the hearing. Since no witness appears for the Village there is no confrontation with your accuser. The Village under the ordinance puts the burden on the owner to prove he was not the driver. The owner is forced to disclose who was driving the vehicle, including his or her spouse, to avoid liability. There is no right to discovery or right to subpoena witnesses. The hearing officer is appointed by the police chief and not required to have any legal training. There is no requirement for a record to be made. In fact the only time a person has filed a R.C. 2506 appeal, the trial court granted the appeal because the Village failed to provide a record of the proceeding.

Construing the evidence most favorable to the defendants, the court believes the plaintiffs are entitled to summary judgment as a matter of law. The Village of New Miami is permanently enjoined from operating the Automatic Speed Enforcement Program.

The defendants have requested the court stay any decision until after the Supreme Court rules in *Walker*. The court declines to do so. Even if the *Walker* decision is reversed, this court has independently granted summary judgment on the grounds that the ASEP violates Ohio's due process clause.

Finally, Defendant Cheek has filed a Rule 12 (B)(6) motion to dismiss.

Chief Cheek was named as a defendant in his capacity as the police chief for the Village of New Miami. According to his deposition, the deposition of others and affidavits, Chief Cheek was responsible for the operation of the ASEP. There is no evidence before the court that Chief Cheek acted other than within the scope of his employment. There is no evidence that he received any secondary gain or exceeded his authority as the police chief of New Miami. All evidence before the court was that Chief Cheek operated the ASEP in accordance with New Miami Ordinance 1917. Based upon the Court ruling, there is no reason for Chief Cheek to be a defendant in this action and the Motion to Dismiss is granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the court **grants** the Defendant Cheeks motion to dismiss, the plaintiffs' motion for summary judgment, **denies** the defendants' motion for summary judgment and **denies** the defendants' motion for a stay.

SO ORDERED.

ENTER,



Michael J. Sage, Judge

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