

Court Defers Sovereign Immunity Question in Red-Light Camera Case

The federal appeals court in Atlanta has decided against jumping into Florida's red-light-camera logjam, at least for now.

A total of 72 Florida cities, towns and counties lost a preliminary round in Miami federal court, where a proposed class action to attack the traffic program is pending. They lost again Aug. 31 in the U.S. Court of Appeals for the Eleventh Circuit, which ruled it would be premature to consider their sovereign immunity defense.

Florida government has much more to lose than any driver with a \$158 ticket for running a red light. Last year, camera data yielded over 960,000 citations for more than \$54 million in fines, according to the Florida Department of Highway Safety and Motor Vehicles. The state takes a 58 percent cut.

The defendants' failed run at a pretrial, or interlocutory, appeal may wind up costing municipalities untold millions of dollars in future settlements and trials. This assumes, of course, that the full Eleventh Circuit doesn't decide to rehear and reverse the Aug. 31 panel decision.

"If a city loses on a motion to dismiss [based on sovereign immunity] the plaintiff can have his day in court and get to trial before the city can challenge the ruling," attorney Stephen Rosenthal of Podhurst Orseck in Miami explained. "That's very empowering to the little guy who's suing the city or a business that's taking on a local government, whether the issue is environmental, zoning, taxation, you name it."

"It's a pretty broadly applicable ruling," said Rosenthal, co-lead counsel for the plaintiffs steering committee with Theodore Leopold of Cohen Milstein in Palm Beach Gardens.

PARALLEL TRACKS

The federal multidistrict case before U.S. District Judge Federico Moreno in Miami is running parallel to several state court assaults on the red-light camera system. The latter



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seems to be heading for the Florida Supreme Court.

The justices declined once to get involved in the controversy. A recent decision that created conflict may oblige them to reconsider.

In the case of *Hollywood v. Eric Arem*, the Fourth District Court of Appeal ruled the city wrongly outsourced to a private contractor the power to decide whether a driver should be cited for a traffic violation seen on camera.

The contractor in the Arem case was Arizona-based

American Traffic Solutions, the dominant red-light camera vendor in Florida and the United States. ATS is also a common denominator in the proposed federal class action.

The Fourth District panel ruled 2-1 for Arem and certified a question of public importance to the Florida Supreme Court in April 2014. But six months later, the same panel reached the same result, except this time the judges didn't ask the high court to take the case.

Once it appeared the dispute would go no further, Rosenthal and the other plaintiffs lawyers filed the federal global lawsuit. Sure enough, the justices passed on accepting jurisdiction in Arem in April 2015.

Two months ago, the Third District Court of Appeal spurned a challenge to Aventura's red-light camera system. Motorist Luis Jimenez tried to leverage the Arem decision to get his citation dismissed. The precedent persuaded Miami-Dade County Court Judge Steven Leifman.

The Arem ruling carried less weight with the Third District, however. A unanimous panel backed the red-light camera system, finding police officers — not ATS functionar-

ies — decide whether drivers should be ticketed.

"The record reflects that no notice or citation is issued unless and until an individual officer of the city weighs the evidence in the images and determines in his or her professional judgment that probable cause exists," Judge Thomas Logue wrote for the Jimenez panel.

TALLAHASSEE BOUND

Logue commended three issues of "great public importance" to the Florida Supreme Court's attention. Judge Linda Ann Wells disagreed on this point but certified conflict with Arem. The high court generally tries to resolve direct conflicts among the district courts of appeal.

"I think it's difficult to read the two decisions without thinking there's a conflict," Rosenthal said. "I would be very surprised if the Florida Supreme Court didn't think that this was a significant enough public issue to settle the law in this area."

Plaintiffs in the federal MDL, who argue governments use the cameras to unlawfully extract money from them, are demanding reimbursement.

The defendant cities, towns and counties contend sover-

eign immunity shields them from unjust enrichment claims like this one. Moreno ruled it does not. The Eleventh Circuit agreed and relied on this finding to conclude it lacks jurisdiction to consider an appeal at this juncture.

The court said it's bound by a 1998 ruling in *CSX Transportation v. Kissimmee Utility Authority*. In *CSX*, the Eleventh Circuit interpreted Florida sovereign immunity law "to provide only a defense to liability, not immunity from suit," Judge Julie Carnes wrote for a unanimous panel.

"If we prevail, can they take an appeal at the end on that question? Sure," Rosenthal asked and answered.

Moreno has yet to rule on the all-important issue of class certification. It seems likely he will wait to proceed until the Florida justices speak.

"The landscape has changed since the case was last before Judge Moreno," Rosenthal noted. "Since the Third District certification, it's only natural to ask whether or not everything in the federal case should wait on hold to see what the Florida Supreme Court does."

CHRISTOPHER L. PARKER, ET AL., APPELLANTS, V. CITY OF APOPKA, ET AL., APPELLEES

Case no.: 15-13721

Date: Aug. 31, 2016

Case type: Sovereign immunity

Court: U.S. Court of Appeals for the Eleventh Circuit

Author of opinion: Judge Julie E. Carnes

Lawyers for petitioners: Theodore J. Leopold, Cohen Milstein Sellers & Toll, Palm Beach Gardens, and Stephen F. Rosenthal and Ramon A. Rasco, Podhurst Orseck, Miami

Lawyers for respondents: Edward G. Guedes, Samuel I. Zeskind, Matthew H. Mandel and Adam A. Schwartzbaum, Weiss Serota Helfman Cole & Bierman, Coral Gables

Panel: Carnes, Judge Charles R. Wilson and U.S. District Judge William T. Moore, Southern District of Georgia

Originating court: Southern District of Florida