IN THE SUPREME COURT OF IOWA

Supreme Court Case No. 16-1031
Linn County Case No. CVCV083575
Court of Appeals Decision: February 22, 2017

MYRON DENNIS BEHM, BURTON J. BROOKS,
BOBBY LEE LANGSTON, DAVID LEON BRODSKY,
JEFFREY R. OLSON and GEOFF TATE SMITH,

Plaintiffs-Appellants,

v.

CITY OF CEDAR RAPIDS, IOWA
AND GATSO USA, INC.,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR LINN COUNTY
HONORABLE JUDGE CHRISTOPHER L. BRUNS

JOINT RESISTANCE TO APPLICATION FOR FURTHER REVIEW OF DEFENDANT-APPELLEES CITY OF CEDAR RAPIDS, IOWA AND GATSO USA, INC.

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1. Whether the Court of Appeals properly determined Cedar Rapids Municipal Code § 61.138's administrative hearing procedure is not preempted by Iowa Code §§ 364.22(4), (6), or 602.6101?

2. Whether the Court of Appeals properly rejected Plaintiffs' substantive due process claims?

3. Whether the Court of Appeals properly determined Gatso's involvement does not constitute the unlawful delegation of police power?

4. Whether the Court of Appeals properly rejected Plaintiffs' claim for unjust enrichment?

5. Whether the Court of Appeals properly rejected Plaintiffs' claim for a violation of procedural due process?

6. Whether the Court of Appeals properly determined there is no private cause of action under the Iowa Constitution?

Statement Resisting Further Review

Plaintiffs' Application for Further Review of the Iowa Court of Appeals decision does not meet the criteria for further review. An application for further review is not a matter of right but is discretionary. Iowa R. App. P. 6.1103(1)(b). Applications for further review "are not granted in normal circumstances." *Id.* Iowa Rule of Appellate Procedure 6.1103(1)(b)(1)–(4) sets forth criteria which the Court considers in deciding whether to grant an application for further review:

> (1) The court of appeals has entered a decision in conflict with a decision of this court or the court of appeals on an important matter;
>
> (2) The court of appeals has decided a substantial question of constitutional law or an important question of law that has not been, but should be, settled by the supreme court;
>
> (3) The court of appeals has decided a case where there is an important question of changing legal principles;
>
> (4) The case presents an issue of broad public importance that the supreme court should ultimately determine.

Iowa R. App. P. 6.1103(1)(b)(1)–(4).

As to the first factor, contrary to Plaintiffs' assertion, the Court of Appeals did not enter a decision in conflict with a decision of the Iowa Supreme Court or Iowa Court of Appeals. (Plaintiffs' Application for Further Review ("Pl. Br."), p. 3; Iowa R. App. P. 6.1103(1)(b)(1). While Plaintiffs argue the United States District Court for the Northern District of Iowa and Eighth Circuit's decisions in *Hughes v. City of Cedar Rapids*, 112 F. Supp. 3d 817 (N.D. Iowa 2015) aff'd in part, rev'd in part, 840 F.3d

987, 998 (8th Cir. 2016) create a conflict which would make further review appropriate, this is not the case. First, as discussed *infra*, the decisions of these courts are consistent with the Court of Appeals' decision. Second, these are not decisions of the Iowa Supreme Court or Iowa Court of Appeals. These decisions are not binding on Iowa courts, although they may provide persuasive authority. Further, Plaintiffs' assertion that the Court of Appeals decision is inconsistent with the Iowa Supreme Court's decision in *City of Davenport v. Seymour*, 755 N.W.2d 533 (Iowa 2008) is incorrect. (Pl. Br. pp. 4–5.) Plaintiffs did not preserve error on the inconsistency they raise with *Seymour,* but even if they had, the decisions are consistent.

While Plaintiffs have raised, and the courts have determined, constitutional questions in this case, *substantial* questions of constitutional law have not been addressed in this case. Iowa R. App. P. 6.1103(1)(b)(2). The Court of Appeals did not overturn precedent or venture into previously untouched areas of the law in rejecting Plaintiffs' constitutional claims. Nor did the Court of Appeals opine on important questions of changing legal principles. Iowa R. App. P. 6.1103(1)(b)(3). The Court of Appeals decision is consistent with all other Iowa case law on this matter, as well as relevant federal case law from the Northern and Southern Districts of Iowa and the Eighth Circuit.

Finally, Plaintiffs' claims are not issues of broad public importance which require the Supreme Court's input. Iowa R. App. P. 6.1103(1)(b)(4). At its core, this case is about $75 speeding tickets received by six individuals and the resolution of

those tickets.

The same arguments advanced by Plaintiffs in this case have been uniformly rejected by the Sixth Judicial District, Iowa Court of Appeals, Northern District of Iowa, Southern District of Iowa, and Eighth Circuit Court of Appeals. In addition, this Court has already considered and rejected challenges to automated traffic enforcement systems which are in material respects similar to the system at issue here.[1] There are no grounds which warrant further review of the Iowa Court of Appeals' decision.

Brief in Resistance to Plaintiffs' Application for Further Review

Plaintiffs filed claims against the City of Cedar Rapids (the "City") and Gatso USA, Inc. ("Gatso") claiming the City's Automated Traffic Enforcement system ("ATE System") is unconstitutional, is preempted by Iowa law, and constitutes unlawful delegation of police power. Plaintiffs also stated as a separate count a private cause of action under the Iowa Constitution, and sought damages for unjust enrichment and injunctive relief. Defendants filed a joint motion for summary judgment under Iowa Rule of Civil Procedure 1.981(2) and the District Court found Defendants were entitled to judgment as a matter of law on all of Plaintiffs' claims. (Appendix ("App.") pp. 506–19). Plaintiffs appealed and the Court of Appeals

[1] *City of Sioux City v. Jacobsma*, 862 N.W.2d 335 (Iowa 2015) (rejecting constitutional challenge to Sioux City's ATE ordinance); *City of Davenport v. Seymour*, 755 N.W.2d 533 (Iowa 2008) (Davenport's ATE ordinance not preempted by Iowa Code).

affirmed the District Court. *Behm v. City of Cedar Rapids*, No. 16-1031, 2017 WL 706347 (Iowa Ct. App. Feb. 22, 2017).

I. The Court of Appeals Correctly Determined the Ordinance is Not Preempted by Iowa Law.

Plaintiffs first argue the Court of Appeals erred by determining Cedar Rapids Municipal Code § 61.138 (the "Ordinance") is not preempted by Iowa Code §§ 364.22(4), (6), or 602.6101. (Pl. Br. p. 5.) The Court of Appeals properly determined the Ordinance is not preempted. While the Court of Appeals agreed with Plaintiffs that the Notice of Violation is a municipal infraction, contrary to the District Court (*compare Behm*, 2017 WL 706347, at *3 *with* App. p. 515), that finding ultimately does not affect the preemption analysis. Both courts determined unequivocally that the optional administrative hearing is consistent, and not irreconcilable, with Iowa Code §§ 364.22(4), (6), and 602.6101.

The Court of Appeals determined the Notices of Violation constitute municipal infractions, implicating §§ 364.22(4) and (6). The Court of Appeals relied on the principles of preemption articulated in both *Seymour* and *Hughes* and rejected Plaintiffs' preemption arguments. *Behm*, 2017 WL 706347, at *5–6. The District Court rejected Plaintiffs' preemption claims on two alternative grounds, only one of which had anything to do with its finding that the Notices of Violation are not municipal infractions. The District Court wrote: "To start with, ATE citations are not municipal infractions." (App. p. 515.) In addition, and in the alternative, the District Court

determined that the plain language of Cedar Rapids Municipal Code § 61.138(e)(2) provides direct access to the courts, which is consistent with § 364.22(4). (*See id.*) That second finding does not turn on the first. Regardless of whether Notices of Violation are municipal infractions from the outset, both lower courts have found that the administrative hearing is an optional measure of additional due process which does not deprive anyone of immediate access to a court. *In Interest of L.G.*, 532 N.W.2d 478, 480 (Iowa Ct. App. 1995) ("We affirm the trial court if one ground, properly urged, exists to support the decision.")

Moreover, Plaintiffs' argument that the Court of Appeals erred and should be "reviewed and reversed" on this issue is nonsensical in that reversal would not advance Plaintiffs' preemption claims. (Pl. Br. p. 5.) Plaintiffs argued that the Notices of Violation were municipal infractions, it was the City and Gatso who argued the Notices of Violation were not. *Behm*, 2017 WL 706347, at *4. The Court of Appeals' determination is consistent with Plaintiffs' position. In seeking further review, Plaintiffs are attempting to use an immaterial inconsistency on an issue that the Court of Appeals decided in their favor.

Plaintiffs also now claim that the burden of proof applied in the administrative hearing renders the hearing preempted by § 364.22(6) under *Seymour*. (Pl. Br. p. 7.) Plaintiffs raise this argument for the first time in their Application for Further Review, so neither the District Court nor the Court of Appeals ever had an opportunity to address it. The District Court addressed Plaintiffs' burden of proof arguments as part

of its procedural due process analysis (App. p. 508), not as part of its preemption analysis. (*Id.* at pp. 516–17.) More specifically, the District Court considered Plaintiffs' burden of proof arguments in assessing any risk of erroneous deprivation of a party's rights. The Court of Appeals did not address the difference in burdens of proof at all. *See Behm*, 2017 WL 706347, at *4–6. Plaintiffs failed to preserve error on this issue and therefore it is not appropriate for further review. *See Bank of Am., N.A. v. Schulte*, 843 N.W.2d 876, 883–84 (appellate review requires issues be both raised and decided by the district court and error is not preserved if an issue is not addressed and a motion for enlargement is not brought); *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002)(issue must be both raised and decided below to be heard on appeal).

Even if error was preserved, *Seymour* determined the ordinance at issue was not preempted by Iowa Code § 364.22(5)(b) because that ordinance did not alter the burden of proof applicable to a municipal infraction. *Seymour*, 755 N.W.2d at 542. Neither does the Ordinance in this case establish any particular burden of proof. *See* C.R. Mun. Code § 61.138(e). Under preemption analysis, the proper comparison is the Ordinance with the Code.[2] *See id.* ("preemption only applies where a local ordinance

[2] The Court of Appeals provided a metaphor when rejecting a preemption argument in another ATE case where plaintiff argued preemption based outside the language of the Ordinance and Code:

> Consider the following hypothetical: a state law enforcement official arrests an individual for violation of a state narcotics trafficking law, but the arrest is in violation of the Fourth Amendment. Under [plaintiff's] analysis, the state narcotics trafficking law (the legislative act) would be

prohibits what a state statute allows or allows what a state statute prohibits"). To the extent Plaintiffs believe an improper burden of proof was applied in their administrative hearing, Plaintiffs could have appealed that decision to the District Court or availed themselves of the process for municipal infractions at the first instance. Either way, the Ordinance does not establish a burden of proof at odds with the Code and therefore no preemption exists. The Court of Appeals' decision is both correct and wholly consistent with *Seymour*.

Plaintiffs next argue that the Court of Appeals erred in finding the Ordinance does not conflict with Iowa Code § 364.22 and § 602.6101 because the Notice of Violation only directs recipients to the Ordinance and does not explicitly give instructions as to how recipients may contest a notice of violation with the District Court. This argument is without merit. Again, the proper comparison for preemption analysis is the Ordinance with the Code. *Seymour*, 755 N.W.2d at 542. Neither the Iowa Code nor the Ordinance dictate any particular information that must be provided to the recipient of a municipal infraction and Plaintiffs have not cited to any legal support for this proposition. The material contained in a particular Notice of

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> preempted because the arrest (the executive act) was unlawful. This is wrong. While the arrest may be unlawful, the underlying statute is not preempted.

Cedar Rapids v. Leaf, No. 16-0435, 2017 WL 706305, at *8 (Iowa Ct. App. Feb. 22, 2017).

Violation does not govern for preemption purposes.[3] Moreover, as the lower courts have observed, the Notice of Violation Plaintiffs received urges recipients to review the Ordinance before deciding how to proceed.

The Court of Appeals was correct in determining the Ordinance is not preempted by Iowa Code § 364.22 or § 602.6101. "A local ordinance is *not* inconsistent with a state law unless it is *irreconcilable* with the state law." *BeeRite Tire Disposal/Recycling, Inc. v. City of Rhodes*, 646 N.W.2d 857, 859 (Iowa Ct. App. 2002) (emphasis in original). The Ordinance's provision for an administrative hearing is in addition to direct access to the Iowa Courts; it does not allow anything which state law prohibits. *Seymour*, 755 N.W.2d at 542. Stated otherwise, nothing in state law, or any other legal authority, prohibits additional administrative processes such as the one in Cedar Rapids Municipal Code § 61.138. The Court of Appeals determination was correct.

II. The Court of Appeals Correctly Rejected Plaintiffs' Claims for Alleged Violations of Substantive Due Process.

Plaintiffs assert the Court of Appeals erred in rejecting Plaintiffs' substantive due process claims because it relied entirely on *Hughes*. (Pl. Br. p. 9.) As an initial matter, Plaintiffs' assertion is incorrect: the Court of Appeals also relied on the Iowa

[3] While not properly before the Court, more recent versions of the Notice of Violation refer expressly to the municipal infraction process. Regardless, it is the Ordinance itself which Plaintiffs challenge, not the Notices of Violation which are subject to change without any change in the Ordinance. This is precisely why the Court of Appeals upheld the Ordinance despite the concern it expressed about the particular Notice of Violation issued to Plaintiffs.

Supreme Court, noting that it "has not yet expressly recognized a fundamental right to intrastate travel under the Iowa Constitution . . . *[b]ut even if it were so recognized, our conclusion would remain the same*." *Behm*, 2017 WL 706347, at *6 n.8 (emphasis added). But more importantly, the Court of Appeals' reliance on *Hughes* was proper.

The Court of Appeals cited to the Eighth Circuit's opinion in *Hughes* at pages 995-96 in support of its determination that Plaintiffs' substantive due process claims failed. *Behm*, 2017 WL 706347, at *6. Plaintiffs argue this was in error because the *Hughes'* plaintiffs' claims under the Iowa Constitution were dismissed without prejudice as not ripe, and therefore, they assert, *Hughes* does not support the outright rejection of Plaintiffs' claims. (Pl. Br. pp. 9–10.) However, the portion of the *Hughes* opinion to which the Iowa Court of Appeals cites (pages 995–96) is where the Eighth Circuit rejects plaintiffs' claims under the *federal* constitution. *Hughes*, 840 F.3d at 995–96. It is not until later in the *Hughes* decision that the Eighth Circuit determined those plaintiffs' claims under the Iowa Constitution were not ripe. *Id.* at 997. The Court of Appeals' citation to *Hughes* in rejecting Plaintiffs' claims under the Iowa Constitution reflects that the Court of Appeals found the Eighth Circuit's federal constitutional analysis to be persuasive authority for purposes of its own state law analysis of substantive due process. It is well settled that a state court may refer to federal authority when analyzing comparable constitutional issues.

Similarly, it is of no significance that *Hughes* was decided on the less developed factual record for a motion to dismiss as compared to the more fully developed

record for summary judgment under review by the Court of Appeals. The Court of Appeals' reliance on *Hughes* was still proper. The relevant point is that just as the Eighth Circuit did in *Hughes*, the Court of Appeals determined there is no fundamental right to intrastate travel. It then went on to hold that even if there was such a fundamental right, the Ordinance does not infringe on that right. *Behm*, 2017 WL 706347, at *6. Plaintiffs' argument is essentially that the Court of Appeals had too much information at its disposal. (Pl. Br. p. 11).

Turning to the heart of the issue, "substantive due process prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty." *Zaber v. City of Dubuque,* 789 N.W.2d 634, 640 (Iowa 2010) (internal quotations omitted). While the right to interstate travel is recognized in Iowa as a fundamental right, *Saenz v. Roe*, 526 U.S. 489, 500 (1999), Iowa Courts have declined to recognize a right to *intrastate* travel. *City of Panora v. Simmons*, 445 N.W.2d 363, 367 (Iowa 1989). For purposes of constitutional analysis, "'fundamental right' is not a synonym for 'important interest.' Many important interests, such as the right to choose one's residence or the right to drive a vehicle, do not qualify as fundamental rights." *King v. State*, 818 N.W.2d 1, 26 (Iowa 2012).

As a matter of law, Plaintiffs have not suffered a violation of their right to travel, and consequently no fundamental right is implicated by the ATE system in this case. It is a system which enforces speed limits in a safe and efficient manner while affording a full opportunity to appeal a citation in an administrative hearing, the Iowa

courts, or both. It does not shock the conscience and readily passes rational basis review. The Court of Appeals correctly rejected Plaintiffs' substantive due process claims.

III. The Court of Appeals Correctly Determined Gatso's Involvement Does Not Constitute Unlawful Delegation of Police Power.

Plaintiffs argue the Court of Appeals erred in rejecting Plaintiffs' claim that the Ordinance constitutes unlawful delegation of police power because the Court relied on the *Hughes* analysis and the District Court's recitation of facts. (Pl. Br. p. 14.) Contrary to Plaintiffs' contention, the Court of Appeals assessed the facts of record and made its own determination that no unlawful delegation occurs. *Behm*, 2017 WL 706347, at *7–8 ("Given that it is the Cedar Rapids Police Department, not Gatso, that determines which vehicle owners are in violation of the ATE ordinance and are to receive a notice of violation for the office, we conclude, like the district court and Eighth Circuit, the ordinance does not unconstitutionally delegate police power."). The Court of Appeals need not go through the exercise of restating the entire factual record in order to conduct a *de novo* review.

"As a general rule, a municipal corporation cannot surrender, by contract or otherwise, any of its legislative and governmental functions and powers, including a partial surrender unless authorized by statute." *Warren Cnty. Bd. of Health v. Warren Cnty. Bd. of Supervisors*, 654 N.W.2d 910, 913–14 (Iowa 2002). "It can, however, delegate its right to perform certain acts and duties necessary to transact and carry out

its powers. These delegable acts typically involve functions that require little judgment or discretion." *Id.*; *see also Bunger v. Iowa High Sch. Athletic Ass'n*, 197 N.W.2d 555, 559 (Iowa 1972) (delegation of rule-making generally impermissible).

This Court upheld the legality of Sioux City's ATE ordinance which utilized a private contractor to operate that ATE system in part because the Sioux City police, like the Cedar Rapids police, and not the contractor, determined which vehicle owners were to be issued a notice of violation. *See City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 337 (Iowa 2015) ("While the ATE ordinance provides that the automated system shall be operated by a private contractor, the police department receives the digital images and determines which 'vehicle owners are in violation of the city's speed enforcement ordinance and are to receive a notice of violation for the offense.'"); *compare to* Cedar Rapids Municipal Code § 61.138(a) ("The police department will determine which vehicle owners are in violation of the city's traffic control ordinances and are to receive a notice of violation for the offense."). Accordingly, the Court of Appeals properly determined that the particular tasks Gatso performs pursuant to its contract with the City are not an unlawful delegation of police power.

IV. The Court of Appeals Correctly Rejected Plaintiffs' Claims for Unjust Enrichment.

To show unjust enrichment, Plaintiffs must show: "(1) defendant was enriched by the receipt of a benefit; (2) the enrichment was at the expense of the plaintiff; and (3) it is unjust to allow the defendant to retain the benefit under the circumstances."

State ex rel Palmer v. Unisys Corp., 617 N.W.2d 142, 254–55 (Iowa 2001). As both lower courts have held, all of Plaintiffs' claims that the ATE system is unconstitutional or in violation of the law fail as a matter of law. Therefore, Plaintiffs have no basis to suggest that payment of ATE citations or contractual payments are unjust. Moreover, with respect to Gatso, fines paid by Plaintiffs are owed and paid to the City, not Gatso. *See* Cedar Rapids, Municipal Code § 61.138(d)(2) (stating that fines are "payable to the city of Cedar Rapids"). Gatso is paid by the City, not the Plaintiffs, for services Gatso provides.

V. The Court of Appeals Correctly Rejected Plaintiffs' Claims for Alleged Violations of Procedural Due Process.

"The requirements of procedural due process are simple and well established: (1) notice; and (2) a meaningful opportunity to be heard." *Blumenthal Inv. Trusts v. City of W. Des Moines*, 636 N.W.2d 255, 264 (Iowa 2001). In determining what process is constitutionally due, the Court balances the (1) private interest at stake, (2) risk of erroneous deprivation, and (3) government interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Plaintiffs' first argument is that the risk of erroneous deprivation is high because the process provided by the administrative hearing is less than that provided by the Iowa Courts. But, as Plaintiffs have acknowledged elsewhere in their brief (Pl. Br. p. 7.), Iowa Code § 364.3 expressly allows municipalities to provide more procedural protections, and that is precisely what is provided by the administrative proceedings under Cedar Rapids Municipal Code § 61.138. Both of the lower courts

in this case, along with federal courts in similar challenges, have found this to be true. Notwithstanding Plaintiffs' continued assertions to the contrary, the administrative hearing is optional and exists *in addition to* the right to demand the issuance of a municipal infraction at virtually every point over the course of proceedings for any given Notice of Violation. C.R. Mun. Code § 61.138(e). This feature of the ATE System is clearly stated in the plain language of the ATE Ordinance and as both lower courts have pointed out, access to Iowa Courts is indisputably due process. Where ordinary judicial process is available, "that process is due process." *Lujan, et al. v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 197 (2001). The Court of Appeals was correct in rejecting the notion that by affording additional due process in the form of an administrative hearing, the ATE System somehow renders access to the courts constitutionally insufficient.

Plaintiffs' second argument regarding procedural due process is that the Notice of Violation does not explicitly lay out how the recipient should proceed directly to the courts. The Court of Appeals carefully considered the text of the Notice of Violation (*Behm*, 2017 WL 706347, at *3 n.5), and correctly found no violation of procedural due process. While procedural due process requires notice of the deprivation of rights, it does not require individualized notice of step-by-step procedures for challenging that deprivation. *See City of W. Covina v. Perkins*, 525 U.S. 234, 240–41 (1999) (where notice of remedies were public and available, remedies alone are sufficient to satisfy due process, without further information about those

procedures). As is proper, the Court of Appeals determined the existence of the procedures and their publication in the Ordinance provides adequate procedural due process. *See Seymour*, 755 N.W.2d at 542.

VI. The Court of Appeals Correctly Determined There is No Private Cause of Action Under the Iowa Constitution.

"[T]he constitution itself does not create a cause of action for a violation of its terms; rather, the legislature must pass laws in order for a remedy to exist. Consequently, the intent of our constitution is to rely on a legislative remedy rather than an implied judicial remedy for the existence of a private cause of action." *Conklin v. State*, 863 N.W.2d 301 (Iowa Ct. App. 2015). "[I]t would create a significant separation-of-powers issue were [the court] to judicially imply a remedy in the absence of a statute." *Id.* Plaintiffs argue that the Court of Appeals' decision in *Conklin* should be reversed. As Plaintiffs and the Court of Appeals noted, however, *Conklin* is already subject to an application for further review pending with the Court. This case does not warrant a departure from established law.

Conclusion

For the reasons stated above, the Court should deny Plaintiffs' Application for Further Review.

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/s/ Paul D. Burns — 3/24/17

Paul D. Burns — Date

Proof of Service / Certificate of Filing

I certify that on March 24, 2017, I served and filed the foregoing Joint Resistance to Application for Further Review by electronically filing the foregoing document with EDMS, which will notify all parties of the electronic filing.

/s/ Paul D. Burns
Paul D. Burns

Cost Certificate

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Joint Resistance to Application for Further Review was $0.00 and that the amount has been paid in full by Appellee.

/s/ Paul D. Burns
Paul D. Burns