

IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 65,454

CITY OF DAYTONA BEACH,
et al.,

Petitioners,

vs.

LAURA HUHN,

Respondent.

_____ /

FILED

SID J. WHITE

DEC 6 1984

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

BRIEF OF ACADEMY OF FLORIDA TRIAL LAWYERS,
AS AMICUS CURIAE, IN SUPPORT OF
POSITION OF RESPONDENT

THE ACADEMY OF FLORIDA TRIAL LAWYERS

By: LARRY KLEIN
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(305) 659-5455

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ISSUE

CAN A CITY BE HELD LIABLE FOR FAILURE OF ITS POLICE OFFICER TO PREVENT RECKLESS OPERATION OF A MOTOR VEHICLE BY A DRIVER WHO IS KNOWN BY SAID POLICE OFFICER TO BE UNDER THE INFLUENCE OF ALCOHOL.

ARGUMENT

There is little we can add to the excellent opinion of the Fifth District, or the briefs filed by the parties, without being repetitious. We would commend this Court to read the very recent decision of the Supreme Court of Massachusetts in Irwin v. Town of Ware, 567 N.E. 2d 1292 (Mass. 1984), in which the identical issue was decided, based on a similar tort claims act. The Court stated on page 1298:

...In Whitney v. Worcester, supra 373 Mass. at 219, 366 N.E.2d 1210, we noted that immunity for discretionary functions did not extend to all acts requiring judgment because "the performance of all functions involves the exercise of discretion and judgment to some degree." We described discretionary acts as those "characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning." In contrast, we explained that not counted among such acts are those which involve "the carrying out of previously established policies or plans." Id. at 218, 366 N.E.2d 1210.

No reasonable basis exists for arguing that a police officer is making a policy or planning judgment in deciding whether to remove from the roadways a driver who he knows is intoxicated. Rather, the policy and

planning decision to remove such drivers has already been made by the Legislature....

Compare this with the language of the Fifth District in the present case:

In deciding which of several available methods he could use to get Collins off the streets, this was not the exercise of a discretionary governmental function. Rather the officer was implementing policies established by the legislature of the State of Florida for the protection of the citizens of this state. The determination of strategy and tactics for the deployment of police powers does require the exercise of discretionary governmental functions and in such cases immunity should be the rule. However, a police officer who actually stops a visibly intoxicated driver can not be furthering any legitimate governmental policy when the officer decides to not enforce the law, and turns the driver loose. Collins was intoxicated and visibly unfit, because of his alcohol consumption, to be operating a motor vehicle, and the police officer who stopped him observed and knew of this condition. On the basis of this knowledge, there was no "policy-making, planning or judgmental governmental function" to be performed by the police officer. Although the police officer had some discretion in how he would handle the matter, his duty was plain (and operational) -- he could not turn this drunken driver loose on the streets. An intoxicated and impaired driver on the streets is an "accident looking for a place to happen." The danger involved to everyone on the streets when an intoxicated driver is on the loose is so apparent and obvious that everyone should know it. We are not dealing with a claim of liability because of the failure of the police to apprehend a drunken driver who later causes injury to some one lawfully using the streets. Rather, we deal with a situation where the driver was stopped and his drunken and unfit condition was apparent to the officer. Under these

circumstances, it can hardly be argued that the ultimate accident and injury was not foreseeable. (Emphasis in original) 453 So.2d 70, at 75.

No public policy can possibly be served by giving police officers the discretion to not arrest or remove from the public highways an intoxicated driver. The seriousness of the problem of drunk driving is becoming more apparent to the public with every serious injury or fatality, and the legislature as well as the judiciary and numerous public and private organizations, are working to get drunk drivers off the road. A decision in favor of the city in the present case will simply encourage the failure to strictly enforce drunk driving laws. The failure to arrest a drunk driver is inexcusable, is not discretionary, and a governmental agency whose employee fails to do it should be held responsible.

CONCLUSION

The decision of the Fifth District should be affirmed.

THE ACADEMY OF FLORIDA TRIAL LAWYERS

By: LARRY KLEIN
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(305) 659-5455


LARRY KLEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, this 4th day of December, 1984, to:

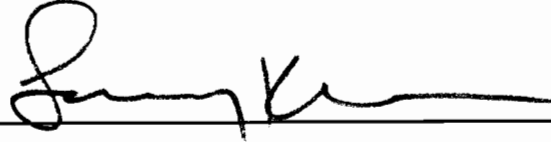
ALFRED A. GREEN, JR.
P. O. Box 5566
Daytona Beach, FL 32018

FRANK B. GUMMEY, III
P. O. Box 551
Daytona Beach, FL 32015

WALTER A. KETCHAM, JR.
P. O. Box 273
Orlando, FL 32802

LESLIE KING O'NEAL
P. O. Drawer 1991
Orlando, FL 32802

HAAS, BOEHM, BROWN & RIGDON, P.A.
P. O. Box 6511
Daytona Beach, FL 32022



LARRY KLEIN