IN THE SUPREME COURT OF FLORIDA

CITY OF DAYTONA BEACH,
et al.,

Petitioners,

vs.

LAURA HUHN,

Respondent.

_____/

Supreme Court Case No: 65,454

5th D.C.A. Case No: 82-1150

BRIEF OF RESPONDENT
LAURA HUHN
ON THE MERITS

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TABLE OF CITATIONS

PRELIMINARY STATEMENT

In this brief, Respondent LAURA HUHN will be referred to as "HUHN". Petitioner CITY OF DAYTONA BEACH will be referred to as "CITY".

The following symbols will be used:

"A" - - Appendix to brief of Respondent LAURA HUHN.

STATEMENT OF THE CASE

A Complaint was filed in this action on February 26, 1981, by HUHN in the Circuit Court for damages in excess of $5,000.00 as a result of injuries sustained by her as a direct result of being struck by an automobile driven by Timmy Lynn Collins (Defendant below). The Complaint also asserted a cause of action against Dixie Insurance Company and Elaine Black a/k/a Remonie Black. (R-1 through 12). An Amended Complaint was thereafter filed on June 7, 1982, wherein the City of Daytona Beach and The Insurance Company of North American were added as Defendants to the cause of action. (R-13 through 27). CITY filed a Motion to Dismiss on July 6, 1982, and The Insurance Company of North America, (Defendant below) filed a Motion to Dismiss on July 8, 1982. (R-28 through 37, 40 through 49).

On July 21, 1982, the trial court entered an Order granting the motion of CITY to dismiss. That Order was filed on July 27, 1982. (R-51). HUHN filed a Motion for Rehearing on August 5, 1982. (R-55). The trial court entered an Order on August 6, 1982, denying HUHN's Motion for Rehearing. The Order was filed on August 9, 1982. (R-56).

HUHN thereafter duly filed a Notice of Appeal on August 17, 1982. An Amended Notice of Appeal was filed on August 23, 1982. (R-57,59). The District Court of Appeal of Florida, Fifth District, filed an Opinion on May 17, 1984, reversing the Order of the trial court.

An appeal was duly taken by CITY. This Court accepted jurisdiction in an Order dated October 24, 1984.

STATEMENT OF FACTS

In that this appeal is from an Order granting CITY's Motion to Dismiss HUHN's Amended Complaint, the allegations contained therein must be accepted as true for purposes of review. The allegations contained therein as to the cause of action against CITY are that at approximately 11:00 p.m., on the night of June 8, 1979, Defendant, Timmy Lynn Collins, was negligently and carelessly driving his automobile while under the influence of alcohol. He was stopped by police officers of the City of Daytona Beach, who had observed his operation of the motor vehicle while intoxicated in that he was physically unfit, due to alcohol consumption, to be operating a motor vehicle. Regardless of the fact that such behavior on the part of Defendant, Timmy Lynn Collins, was in clear and flagrant violation of the laws of the State of Florida, and that Defendant, Timmy Lynn Collins, had previous violations of a similar character on his driving record, he was not detained, arrested, charged or otherwise prevented from continuing to operate his motor vehicle while in an intoxicated state. (R-4). Shortly thereafter, at approximately 11:05 p.m., at or near the 600 block of North Ocean Beach, approximately 150 feet of the Seabreeze approach, Defendant, Timmy Lynn Collins, negligently and carelessly caused said motor vehicle to strike a pedestrian, the Plaintiff, LAURA HUHN, who thereafter sustained extensive injuries.

The police officers were employees of Defendant, CITY OF

DAYTONA BEACH, and were acting within the course and scope of their employment upon encountering Defendant, Timmy Lynn Collins, on the evening of June 8, 1979. The Defendant, CITY OF DAYTONA BEACH, is insured by Defendant, The Insurance Company of North America. (R-16,17).

ARGUMENT

QUESTION: 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?

For the record, the above question was answered in the positive by the Fifth District Court of Appeal.

In their Initial Brief, the Petitioners argued that there is no duty on the part of a municipal police officer to arrest or otherwise detain an operator of a motor vehicle known to be under the influence of alcohol. Putting aside for the moment the fact that the Petitioners did not take such a position in the appeal below, it is nevertheless clear that an overwhelming duty exists as is dictated by both statute and public policy.

To their proposition, the Petitioners argued that Florida Statutes Sections 901.15 and 790.052 do not create such a duty. Essentially, Petitioners argue that because said statutes use the word "may" instead of "shall", there would only be "a discretionary right, as opposed to an absolute duty, to make an arrest." The Petitioner's argument to that proposition is absolutely without merit. It appears that the Petitioners are confusing the issues of duty as opposed to discretionary governmental function. There can be no question that the statutes cited supra create a duty on the part of a police officer to arrest or otherwise prevent a known intoxicated person from operating a motor vehicle. A thorough and logical reading

of the applicable statutes cited by the Petitioners in their Initial Brief makes it clear that a duty by a police officer to arrest or otherwise prevent an intoxicated person from driving a motor vehicle does in fact exist. Florida Statutes Section 901.15 states that:

> A police officer may arrest a person without a warrant when:
>
> > (1) the person has committed a felony or misdemeanor or violated a municipal ordinance in the presence of the officer. Arrest for the commission of a misdemeanor or violation of a municipal ordinance shall be made immediately or in fresh pursuit. (Emphasis supplied).

In their Initial Brief, the Petitioners saw fit to omit once again the second sentence of Section 901.15(1) which uses the word "shall" and thereby does in fact impose an absolute duty to arrest the person who has violated the provisions of that section. Even if the word "may" were used throughout that section, it could not be justifiably argued that no duty exists for a police officer to arrest a person guilty of a felony or a misdemeanor or violation of a municipal ordinance, rather, the word "may" suggests that a standard of reasonableness be read into the statute, thereby creating a reasonable duty on the part of a police officer to arrest or otherwise detain those persons who have committed a felony or misdemeanor or violated a municipal ordinance. See, e.g., Osborne vs. State, 87 Fla. 418, 100 So. 365 (1924); Dixon vs. State, 101 Fla. 840, 132 So. 684 (1931); Jeffcoat vs. State, 103 Fla. 466, 138 So. 385 (1931); Miami vs. Nelson, 186 So.2d 535 (Fla. 3d DCA 1966), cert. denied 194 So.2d 621 (Fla.).

In addition to the above referenced statutory provisions, it is additionally clear that Florida Statute Section 396.072 likewise creates a similar duty on the part of a police officer to arrest or otherwise detain an intoxicated person. Florida Statute Section 396.072(1) states:

> (1) . . . any person who is intoxicated in a public place and appears to be incapacitated shall be taken by the peace officer to a hospital or other appropriate treatment resource. A person shall be deemed incapacitated when he appears to be in immediate need of emergency medical attention, or when he appears to be unable to make a rational decision about his need for care. (Emphasis supplied).

It is further specified in Section 396.072 that:

> (7) The peace officer, in detaining an intoxicated person or in taking him to a treatment resource, shall be deemed to be taking him into protective custody. A taking into protective custody under this section shall not be considered an arrest for any purpose, and no entry or other records shall be made to indicate that he has been arrested or has been charged with a crime.
>
> (8) A peace officer and any public safety office or agency who or which acts under this section shall be considered as acting in the conduct of their official duty and shall not be held criminally or civilly liable for false arrest or false imprisonment. (Emphasis supplied).

As is clearly specified by Section 396.072 supra, any person who is intoxicated in a public place, regardless of whether they are operating a motor vehicle, shall be taken into protecive custody. Again, assuming that a duty must be absolute to constitute a duty at all, it is clear that an absolute duty is created by that section.

Section 396.072(8) essentially states that a peace officer of public safety office or agency so acting are considered to be acting in their official duty. Statutory safeguards against criminal or civil liability are further created to insure the proper undertaking of said duty. It is therefore undeniable that such a duty exists on the part of a police officer to arrest or otherwise detain a known intoxicated driver of a motor vehicle.

Contrary to what was asserted by the Petitioners in their Initial Brief, there was no "leap frogging" by the Fifth District Court of Appeal in their Opinion by deciding the issue of sovereign immunity prior to establishing a duty. The Fifth District Court of Appeal initially addressed such as was specified in the case of First National Bank vs. Filer, 107 Fla. 526, 145 So. 204 (1933). Said decision was cited for the proposition that:

> (W)here the law imposes upon a police officer the performance of ministerial duties in which a private individual has a special or direct interest, the officer will become liable to such individual for any injury which he may proximately sustain in consequence or the failure or neglect of the officer either to perform the duty at all, or to perform it properly. In such case the officer is liable as well as for nonfeasance as for misfeasance or malfeasance. Id at 535, 145 So. at 207.

As under the Filer case, supra, a legal duty of a police officer computes to a ministerial function of which the person complaining has a special and direct interest. Said standard was subsequently explained further by this Court in the case of Hargrove vs. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957). The elements of a cause of action against a municipality were expressed as:

> Subject to the limitations above announced, we here merely hold that when an individual suffers a direct, personal injury proximately caused by the negligence of a municipal employee while acting within the scope of his employment, the injured individual is entitled to redress for the wrong done.

Regardless of the fact that in the instant case there exists overwhelming statutory and public policy requisites for a police officer to arrest or otherwise detain a known intoxicated person or driver of a motor vehicle, the court in Hargrove specified a cause of action against a municipality as merely requiring "a direct, personal injury proximately caused by the negligence of a municipal employee while acting within the scope of his employment." In approaching Timmy Lynn Collins in the instant case, there can be no denying that the police officer in question was acting within the scope of his employment, as is alleged in the Amended Complaint. The reversal by the Fifth District Court of Appeal of the trial court's dismissal with prejudice of the Respondent's Amended Complaint should therefore be upheld by this Court. The public policy in support of said duty on the part of police officers was cogently stated by Judge Orfinger in the Opinion of the Fifth District Court of Appeal stating that " the legislature has enacted statutes designed to keep intoxicated drivers from operating motor vehicles, and it is the responsibility and duty of the police department to carry out such policies". (Emphasis supplied).

As to whether a city can be held liable for the failure of its police officers 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, it is likewise clear that the Fifth District Court of Appeal in the instant case properly held in the affirmative.

The Petitioners again primarily relied upon the case of Evett vs. City of Inverness, 224 So.2d 365 (Fla. 2d DCA 1969), in support of their contention, as they did below before the Fifth District Court of Appeal. The Respondents argued below, and the District Court of Appeal held, that that case was nonpersuasive. The laws applied in that case was the special duty/general duty test as had been adopted by the court in the case of Modlin vs. City of Miami Beach, 201 So.2d 70 (Fla. 1967). That "special duty doctrine" essentially supplied the rationale for the holding of Evett vs. City of Inverness, supra. In that the "special duty doctrine" was abolished by the promulgation of Florida Statute Section 768.28, as judicially construed in Commercial Carrier Corporation vs. Indian River County, 371 So.2d 1010 (Fla. 1979), the holding in the case of Evett vs. City of Inverness has no vitality in current argument.

The Petitioners' next attempt to rely upon the holding of Minard vs. Department of Highway Safety and Motor Vehicles of the State of Florida, 418 So.2d 288 (Fla. 3d DCA 1982). The Petitioners stated in their Initial Brief that:

"In affirming a summary judgment in favor of the trooper, the District Court of Appeal of Florida, Third District, held:

(1) The trooper had no duty to arrest or stop the driver of the car in question.

(2) The state agency which employed the trooper could only be held liable if said trooper were liable.

While it is true that the Court held in Minard vs. Department of Highway Safety and Motor Vehicles of the State of Florida, supra, that the trooper had no duty to arrest the driver of the automobile, the factual distinctions between that case and the principal cause of action are substantial. First of all, the trooper in Minard was off-duty at the time of the occurrence, and was thereby subject to Florida Statute Section 790.052, as opposed to Section 901.15. The rationale in distinguishing between the duty of an off-duty police officer to arrest those who have committed felonies or misdemeanors or violated municipal ordinances, as opposed to a police officer who is on duty, is evident. Second, the trooper in Minard did not actually see the hit and run in that case take place. In the principal cause of action, it is alleged that the police officer did in fact personally see Timmy Lynn Collins driving while under the influence of alcohol. Third, the factual incident in Minard dealt with a "hit and run" accident, while the factual incident in the instant case involved an intoxicated driver of a motor vehicle. Along with the obvious dictates of Florida Statute Section 396.072, the public policy distinctions are evident in dictating that necessary steps must be taken by police officers consistent with their policies in removing intoxicated drivers from the streets. Finally, the dictum suggested by the holding in Minard is very enlightening. The

court in Minard felt compelled to state that as an off-duty police officer, the trooper did not have a duty to make such an arrest. The emphasis by the court upon the fact that the trooper in Minard was off duty, seems to negatively imply that an on-duty police officer would have had such a duty. Therefore, the holding in Minard is completely inapplicable to the principal cause of action, except for the dictum which suggests by negative implication that an on-duty police officer would have such a duty and the municipality could therefore be held liable.

Petitioners also cite several cases from other jurisdictions, to wit: Tomlinson vs. Pierce, 178 Cal.App.2d 112, 2 Cal.Rptr. 700 (1950); Draper vs. City of Los Angeles, 91 Cal.App.2d 315, 205 P.2d 46 (1949); Massengill vs. Yuma County, 104 Ariz. 518, 456 P.2d 376 (1969). Each and every one of those decisions adhere to the antiquated "special duty doctrine" and are therefore completely inapplicable and irrelevant as to the current legal argument in light of the promulgation of Florida Statute Section 768.28 as construed by Commercial Carrier Corporation vs. Indian River County, supra. More recent cases from other jurisdictions are consistent with the abrogation of the "special duty doctrine" as specified in Commercial Carrier. See, e.g., Ryan vs. State, 134 Ariz. 327, 656 P.2d 616 (1982); Irwin vs. Town of Ware, 392 Mass. 745, ___ N.E.2d ___ (1984); Schear vs. Board of County Commissioners of the County of Bernalillo, ___ P.2d ___ (N.M. Aug. 8, 1984); Austin vs. Scottsdale, 684 P.2d 151 (Ariz. 1984).

Petitioners also cite the case of Chandler Supply Company vs. City of Boise, 660 P.2d 1323 (Idaho 1983). On the basis of said case, the Petitioners state in their Initial Brief that:

> . . . it is our intention that police protection provided by a municipality has no parallel in the private sector and, therefore, it was unnecessary for the District Court of Appeal in our case to interpret or apply the planning-operational exception to the sovereign immunity created under Commercial Carrier.

The contention of Petitioners fails in several respects. First of all, to state that police protection has no parallel in the private sector and therefore there can be no liability, is ludicrous. The application of such a standard would be to completely erradicate the legislative intent of Florida Statute Section 768.28 in that, with few exceptions, all municipal functions have no parallel in the private sector, and therefore, there would be no liability for the negligent application of said functions. In addition, Petitioners prefer to specify the issue at hand as "the planning-operational exception to sovereign immunity created under Commercial Carrier." As is readily apparent, the enactment of Section 768.28 essentially abolished sovereign immunity on a broad basis, with the effect of Commercial Carrier being to define the extent of the abolishment of sovereign immunity. The planning-operational standard as adopted in Commercial Carrier is therefore an exception to the lack of sovereign immunity. In addition, the planning-operational standard adopted by the court in Commercial Carrier is clearly met in the instant case in favor of stating a cause of action for a police officer failing to arrest or otherwise detain a known intoxicated driver of a motor

vehicle.

The court in Commercial Carrier basically adopted the test applied by the court in Evangelical United Brethren Church vs. State, 67 Wash.2d 246, 407 P.2d 440 (1965). The standard initiated by the court in that case was:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?;
>
> (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?;
>
> (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?;
>
> (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Under the holding in Evangelical, the above referenced preliminary questions would have to be all answered in the affirmative for the act to be classified as a discretionary nontortious governmental process.

Subsequent to the decision in Commercial Carrier, this court again dealt with the issue of duty, and again rejected Modlin and its progeny in the case of Rupp vs. Bryant, 417 So.2d 658 (Fla. 1982); See also, First National Bank vs. City of Jacksonville, 310 So.2d 19 (Fla. 1st DCA 1975); writ discharged, 339 So.2d 632 (Fla. 1976).

Apparently, the only arguable precedent supporting the Petitioner's proposition are the cases of Everton vs. Willard, 426 So.2d 996 (Fla. 2d DCA 1983), and City of Cape Coral vs. Duvall, 436 So.2d 136 (Fla. 2d DCA 1983). However, when compared with a close reading of the Commercial Carrier case in its progeny it is readily apparent that the rationale supporting the decisions of the Second District Court of Appeal present an overly restrictive interpretation of Commercial Carrier and are therefore not well founded. As was noted by the court in Commercial Carrier, all governmental functions could be characterized as encompassing some degree of discretion in their exercise. But in order to remain true to the legislative intent of Section 768.28, there could be no blanket rule of immunity, but rather immunity solely as to those functions that have an impact on the free exercise of the governmental operation. See also, Smith vs. Department of Corrections, 432 So.2d 1338 (Fla. 1st DCA 1983), where the appellate court reversed the trial court's dismissal with prejudice of the Plaintiff's Second Amended Complaint which alleged negligent inmate classification. The court cited the case of Bellavance vs. State, 390 So.2d 422 (Fla. 1st DCA 1980), and held that there would be no immunity.

The public policy considerations for upholding the Respondent's Second Amended Complaint in the instant case are also quite evident. Indicative of this recent trend are the cases of Palmer vs. City of Daytona Beach, 443 So.2d 371 (Fla. 5th DCA 1983), and Ralph vs. City of Daytona Beach, 1983 FLW 79 (Fla. Feb. 17, 1983). Those cases

extend municipal liability for damages caused by the negligent acts of the municipality's firefighters in combating a fire, as well as holding a municipality liable for failure to warn the public of a known dangerous condition by the failure of the municipality to properly supervise beach traffic, respectively. The same public policy considerations are also evident in the recent cases holding bar and lounge owners as well as homeowners liable for allowing known intoxicated persons to operate a motor vehicle. See, e.g., Florida Statutes Sections 562.11 and 768.125 as construed in the case of McCarthy vs. Danny's West, Inc., 421 So.2d 756 (Fla. 4th DCA 1982).

The public policy considerations referenced supra are perhaps best explained by Judge Orfinger's Opinion in the instant case. He stated that:

> In deciding which of several available methods he could use to get Collins off the streets, this was not an 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 the 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. . . 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 someone 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.
>
> . . . Because the Complaint alleged that the police officers knew Collins to be intoxicated yet failed to detain or arrest him, there was little room for discretion which would warrant a finding of immunity. The legislature has enacted statutes designed

to keep intoxicated drivers from operating motor vehicles, and it is the responsibility and duty of the police department to carry out such policies. The citizens of this state would be ill served if we were to afford police officers immunity when they encounter drivers who unquestionably are impaired to the point where they cannot operate a vehicle safely, yet fail to detain or arrest such individuals or otherwise get them off the streets. At that point the police oficer is merely implementing policy by enforcing the laws, and cannot be said to be exercising a discretionary governmental function.

The rationale addressed by the court in Everton stating that a "good, adequate and reasonable system of law enforcement" mandates discretion on the part of its police officers pales in the light of the overriding public policy benefits requiring a police officer to take some type of affirmative action in preventing known intoxicated drivers of motor vehicles from continuing to operate said motor vehicles. The Respondents therefore respectfully assert that the apparent conflict between the Everton and Huhn cases should be resolved in favor of upholding the specified cause of action.

CONCLUSION

For the reasons stated herein, Respondents respectfully request this Court to affirm the decision of the Fifth District Court of Appeal in reversing the trial court's dismissal of Respondent's Second Amended Complaint with prejudice, and remanding this cause to the trial court with directions consistent with this Court's ruling.

Respectfully submitted,

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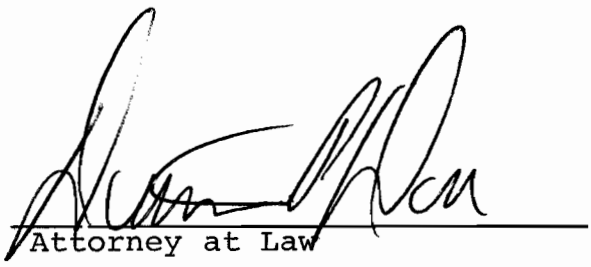
dk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail delivery this 4th day of December, 1984 to Alfred A. Green, Jr., Esquire, P.O. Box 5566, Daytona Beach, FL 32018; Frank B. Gummey, III, Esquire, P.O. Box 551, Daytona, Beach, FL 32015; Walter A. Ketcham, Jr., Esquire, P.O. Box 273, Orlando, FL 32802 and Leslie King O'Neal, Esquire, P.O. Drawer 1991, Orlando, FL 32802.



Attorney at Law