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BRIEF OF PETITIONERS CITY OF DAYTONA BEACH  
AND INSURANCE COMPANY OF NORTH AMERICA  
AS TO JURISDICTION

In this Brief petitioner City of Daytona Beach will be referred to as the "City". Respondent Laura Huhn will be referred to as "Huhn".

The following symbols will be used:

"A" - Appendix to Brief of Petitioners City of Daytona Beach and Insurance Company of North America.

STATEMENT OF THE CASE

In her Amended Complaint, Huhn seeks to recover damages for injuries which she allegedly sustained on June 8, 1979 when she was struck by a car while walking on the beach at Daytona Beach.

To said Complaint, the City filed a Motion to Dismiss on the ground that said Complaint failed to state a cause of action upon which relief could be granted in that:

1. Said Complaint failed to allege sufficient ultimate facts to establish a duty on the part of the defendant City to Huhn different from that owed to any member of the public and, therefore, said defendant was not liable to Huhn as a matter of law.

2. From the allegations of said Complaint it appears that any negligent act or omission by the City in establishing when and under what circumstances motor vehicles may travel on the Atlantic Ocean beach at Daytona Beach is a governmental decision for which the defendant City could not be held responsible as a matter of law.

On July 21, 1982 an Order was entered granting the City's Motion to Dismiss.

Thereafter, Huhn filed a Motion for Rehearing and on August 6, 1982 an Order was entered denying Huhn's Motion for Rehearing and amending the trial judge's previous Order of July 21, 1982 to provide that said Complaint was dismissed with prejudice.

An appeal was taken from said Order dismissing the Amended Complaint with prejudice to the District Court of Appeal of Florida, Fifth District, which in an opinion filed May 17, 1984 reversed the Order of the trial court.

In its opinion reversing said Order, the Fifth District Court of Appeal said:

"In so concluding, this opinion appears to be in direct conflict with Everton v. Willard, 426 So. 2d 996, (Fla. 2d DCA 1983)."

By this appeal, petitioners City of Daytona Beach and Insurance Company of North America seek to invoke the discretionary conflict jurisdiction of this Court as authorized by Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

#### STATEMENT OF FACTS

Because the instant case was decided on a Motion to Dismiss, for purposes of this Brief we must assume that all well pleaded allegations of the Complaint are true.

The following is a statement of the facts upon which the Fifth District Court of Appeal relied in arriving at its decision:

"The Complaint states that on the evening of June 8, 1979 appellee 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 observed 'that . . . Collins was operating (his) motor vehicle

while intoxicated and otherwise physically unfit, due to alcohol consumption, to be operating a motor vehicle'. The Complaint goes on to allege that 'despite such observations and knowledge on the part of the police officers, . . . Collins was not detained, arrested . . . or otherwise prevented from continuing to operate his motor vehicle while in an intoxicated state and shortly thereafter, at a time contemporaneous to the release of Collins by the . . . officers, Collins while in his intoxicated state' operated his vehicle in a reckless manner on the ocean beach and struck plaintiff who was legally walking thereon."

It is further alleged in said Complaint that the release of the driver of the motor vehicle which struck Huhn by City police officers was a breach of duty owed to Huhn and that said breach proximately resulted in injury and damage to said plaintiff.

#### ARGUMENT

THE DECISION BELOW IN HOLDING THAT A MUNICIPALITY DOES NOT ENJOY SOVEREIGN IMMUNITY WHERE ITS POLICE OFFICERS FAIL TO DETAIN OR ARREST THE DRIVER OF AN AUTOMOBILE WHO IS KNOWN TO BE INTOXICATED IS IN DIRECT CONFLICT WITH THE DECISION OF ANOTHER DISTRICT COURT OF APPEAL.

In its opinion<sup>1</sup> in the instant case, the Fifth District Court of Appeal states that said opinion is in direct conflict with the opinion<sup>2</sup> of the Second District Court of Appeal in Everton v. Willard.<sup>3</sup>

In Everton plaintiffs appealed from the dismissal of the counts of their Complaints that sought damages in tort from C. W. Parker, a Pinellas County Sheriff's deputy; the Pinellas County Sheriff's Department and Pinellas County.

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1. A-1
  2. A-2
  3. Everton v. Willard, 426 So. 2d 996 (Fla.App.2 Dist. 1983)

The facts which the Second District Court of Appeal accepted as true for purposes of the defendant's Motion to Dismiss were that Azor Everton was seriously injured and Anton Trinko's daughter Renee was killed in a two car collision at an intersection in Pinellas County when the motor vehicle which they occupied was struck by a second vehicle operated by the defendant Marion Willard.

Approximately ten to twenty minutes before the accident, Pinellas County Sheriff's Deputy C. W. Parker stopped Willard and issued him a traffic citation or summons for making an improper U turn at another intersection.

While issuing the citation to Willard, Deputy Parker knew, by his own observations, and by Willard's own admissions, that Willard had been drinking to some extent. However, Deputy Parker did not charge Willard with a driving offense relating to intoxication but instead, having issued the citation and having observed him while doing so, Parker allowed Willard to drive away.

In affirming the Order of the trial court dismissing said Complaints, the Second District Court of Appeal held:

"that act of deputy sheriff in issuing a citation to motorist and, instead of charging him with a driving offense related to intoxication, allowing motorist to proceed without detaining or arresting him for intoxication was an act involving an exercise of discretion which was inherent both in nature of enforcement and in implementation of basic planning level activity, such as to immunize a deputy sheriff, as well as sheriff's department and county, from liability for death and injuries sustained in collision caused by motorist."

The facts alleged in the Complaint in our case are very similar to those alleged in the Complaints in Everton.

In our case Huhn alleges that she was struck by an automobile which was negligently and carelessly driven by defendant Timmy Lynn Collins while under the influence of alcohol. It is further alleged that prior to the accident in which Huhn was injured, Collins was stopped by police officers of the City of Daytona Beach who observed that Collins was operating his motor vehicle while intoxicated and otherwise physically unfit, due to alcohol consumption, to be operating a motor vehicle. Notwithstanding such observations and knowledge on the part of the police officers, it is alleged Collins was not detained, arrested or otherwise prevented from continuing to operate his motor vehicle while in an intoxicated state and thereafter struck plaintiff who was legally walking on the ocean beach.

In reversing the Order of the trial judge dismissing the Complaint in our case, the Fifth District Court of Appeal, contrary to the decision of the Second District Court of Appeal in Everton, held that a municipality does not enjoy sovereign immunity where its police officers fail to detain or arrest the driver of an automobile who is known to be intoxicated.

There being a direct conflict between the decision of the Fifth District Court of Appeal in the instant case and the decision of the Second District Court of Appeal in Everton, we respectfully submit this Court has discretionary conflict jurisdiction pursuant to Rule of Appellate Procedure 9.030(a)(2)(A)(iv).



THIS 21st day of June, 1984.

Respectfully submitted,



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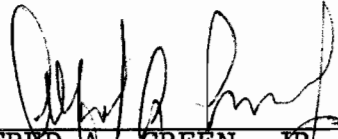


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by U. S. mail, to Walter A. Ketcham, Jr., Esquire, Post Office Box 273, Orlando, Florida 32802; Leslie King O'Neal, Esquire, Post Office Drawer 1991, Orlando, Florida 32802 and Haas, Boehm, Brown & Rigdon, P. A., Post Office Box 6511, Daytona Beach, Florida 32022, this 21st day of June, 1984.



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