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IN THE SUPREME COURT OF FLORIDA

CITY OF DAYTONA BEACH, et al.,

Petitioners,

vs.

LAURA HUHN,

Respondent.

SUPREME COURT CASE NO. 65,454

D. C. A. CASE NO. 82-1150

REPLY BRIEF OF PETITIONERS CITY OF DAYTONA BEACH AND INSURANCE COMPANY OF NORTH AMERICA

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REPLY BRIEF OF PETITIONERS CITY OF DAYTONA BEACH AND INSURANCE COMPANY OF NORTH AMERICA

ARGUMENT

In its opinion in our case, the Fifth District Court of Appeal held that the Complaint herein stated a cause of action because the City was not entitled to the benefit of the doctrine of sovereign immunity where a City police officer failed to arrest or otherwise detain a drunk driver. Said court reasoned that the decision made by a city police officer as to whether a drunk driver should be arrested was "operational" within the intent and meaning of Commercial Carrier.[1]

In arriving at its decision, said District Court did not consider the fact that under the common law of this State a police does not have an absolute duty to arrest or detain a drunk driver, the breach of which creates a cause of action in favor of any person injured thereby. On the contrary, Evett v. City of Inverness[2] and Everton v. Willard,[3] the only Florida decisions in point, specifically hold that there is no such duty.

Nevertheless, said District Court did not consider the question of duty at all.

It is our position that in considering the liability of any governmental entity, including a municipality, for failure to enforce the law, it is first necessary to determine whether the duty of the police officer is absolute or discretionary. Based on the statutes

1. Commercial Carrier Corp. v. Indian River County, Fla., 371 So. 2d 1010
2. Evett v. City of Inverness, Fla., 224 So. 2d 365
3. Everton v. Willard, 426 So. 2d 996 (Fla.App.2 Dist. 1983)

and case law we will now review, we believe the only conclusion that can be reached is that such duty is discretionary and that failure of a police officer to enforce the law does not create a cause of action for damages.

The Statutes:

In our Brief F. S. 901.15 is cited in support of the proposition that a police officer does not have an absolute duty to arrest any person who commits a felony or misdemeanor in his presence.

In her Brief, Respondent Laura Huhn states that said statute contains language not quoted in our Brief which imposes an absolute duty upon a police officer to make an arrest where a violation of the law occurs in his presence.

The applicable portions of F.S. 901.15 provide:

> "A peace 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'." (Underlining ours.)

We submit that when the Florida Legislature provided that a peace officer may arrest a person without a warrant under the circumstances stated in paragraph (1) it meant exactly what it said. This statute by no stretch of the imagination imposes upon a police officer an absolute duty to arrest any person who commits a felony or misdemeanor in his presence.

Respondent on the other hand contends that the words "arrest for the commission of a misdemeanor or violation of a municipal ordinance shall be made immediately or in 'fresh pursuit'," imposes

upon a police officer an absolute duty to arrest any person who commits a crime in his presence. This assertion is ridiculous on its face.

The obvious intent of the language upon which Respondent relies is that if a police officer decides to make an arrest for the commission of a misdemeanor or violation of a municipal ordinance, then such arrest must be made immediately or in fresh pursuit. Any other interpretation of this language in the statute would impose an intolerable burden upon a police officer which would require him to arrest either immediately or in fresh pursuit any person whom he observes committing a violation of the law.

The ramifications of such a rule, which we contend is unfair and unreasonable, would create insoluble problems insofar as performance by a police officer of his duties under the laws of this State.

Another statute upon which Respondent relies in support of her contention that a police officer has an absolute duty to arrest or otherwise detain all drunk drivers is F.S. 396.072 which provides:

> "TREATMENT AND SERVICES FOR INTOXICATED PERSONS.--
>
> (1) Any person who is intoxicated in a public place and who appears in need of help, if he consents to the proper help, may be assisted to his home or to an appropriate treatment resource, whether public or private, by a peace officer. 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." (Underlining ours.)

The obvious purpose of this statute is to provide for treatment and services for intoxicated persons. By no stretch of the imagina-

tion can it be said that this statute imposes upon all police officers an absolute duty--without any discretion--to take into custody all persons known to be intoxicated.

It can readily be seen from even a casual reading of the first sentence of this statute that a person who has had "one too many" can be taken into custody by a peace officer only if the person in question (1) is intoxicated in a public place; (2) appears in need of help; (3) consents to the proffered help.

This statute is to prevent an over-zealous police officer from taking into custody a citizen who may have had a little too much to drink but still is not incapacitated within the meaning of this statute.

The last two sentences of this statute make it very clear that the statute is not applicable to the facts of our case.

It is specifically stated in the statute that a peace officer is not required to take a person who is intoxicated in a public place to a hospital or other appropriate treatment resource unless the person is "incapacitated" within the meaning of the statute.

As to what constitutes "incapacity" the statute goes on to provide:

> "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."

If we refer to the allegations of the Complaint in our case, there is not the first word which would bring the driver of the vehicle which is alleged to have injured Respondent within the definition of "incapacity" as defined in this statute.

It is also contended by Respondent that paragraphs (7) and (8) of F.S. 396.072 impose upon a police officer an absolute duty to arrest or otherwise detain a drunk driver. If we consider these two sections of said statute, it becomes obvious that neither one of them have anything whatsoever to do with making an arrest.

Paragraph (7) provides that a police officer, in detaining an intoxicated person or in taking him to a treatment resource, should be deemed to be taking him into protective custody. This statute does not impose any duty upon a police officer whatsoever until such time as the intoxicated person has been detained.

As to paragraph (8) of said statute, this paragraph merely provides that if a peace officer takes an intoxicated person into protective custody, said officer shall be considered as acting in the conduct of official duty and is not criminally or civilly liable for false arrest or false imprisonment. Once again, it is difficult to see why Respondent has chosen to rely on these two paragraphs. Obviously paragraphs (7) and (8) do not have anything whatsoever to do with the duty of a peace officer to arrest or detain a person who is intoxicated.

The foregoing statutes support our contention that under the laws of the State of Florida there is no absolute duty imposed upon a police officer to arrest or detain a drunk driver, the breach of which creates a cause of action in a person injured thereby. Our position in this regard is supported by the case law in Florida and other jurisdictions which we will now discuss.

The Cases:

Respondent and Academy of Florida Trial Lawyers rely heavily upon the opinion of the Supreme Judicial Court of Massachusetts in Irwin v. Town of Ware.[4] For reasons hereinafter stated, we do not believe that the Ware decision should be relied upon by this Court as a basis for creating a new cause of action in favor of persons sustaining injury by reason of a police officer's failure to take a drunk driver into custody.

The following is a summary of the factual situation involved in Ware:

In the early morning hours of May 14, 1978 an officer of the Ware police department was on patrol when he saw a car "peel out" from the side of a lounge and heard "squealing tires."

The police officer who saw this car got behind it and put on his blue flashers and "pulled it over" for driving too fast under the circumstances. After stopping the car in question, the police officer approached the driver and discovered that the driver was intoxicated.

Despite the fact that it appeared that the driver of the car was intoxicated, the police officer did not take the driver into custody. Ten minutes later the car which the police officer had stopped collided with the car in which plaintiffs were riding as a result of which said plaintiffs sustained injury.

Obviously, the facts of the Ware case are similar to ours.

Based on these facts, the Supreme Judicial Court of Massachusetts held:

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4. Irwin v. Town of Ware, 467 N.E. 2d 1292 (Mass. 1984)

"Police officers of defendant town owed a duty to plaintiffs as members of motoring public to take into protective custody an intoxicated motorist whose vehicle subsequently struck and injured plaintiffs and their failure to fulfill that duty supported a cause of action in negligence."

We urge this Court not to adopt the decision and rationale of the Massachusetts court in Ware because the law in Massachusetts applicable to the facts stated above is different from the law in this State.

In Massachusetts, the doctrine of sovereign immunity was abrogated by statute. The effect of this under Massachusetts law was that the defense of immunity in certain tort actions against municipalities was simply removed. As to the effect of this removal, the Massachusetts court said:

"It did not create any new theory of liability for a municipality . . . In order to recover against the town for negligence . . . the plaintiffs must show, (1) the existence of an act or omission in violation of a, (2) duty owed to the plaintiffs by the defendant, (3) injury, and (4) a causal relationship between the breach of duty and the harm suffered."

We agree with the language in Ware to the extent that it holds that before a municipality can be held liable for negligence it must be established that there is a duty owed to the plaintiffs by the defendant.

We disagree with the conclusion in Ware that such a duty did in fact exist under the relevant facts.

In the Ware opinion it is stated:[5]

"The town does not argue that its police officers owed no duty of reasonable care 'to enforce the statutes

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5. Irwin v. Town of Ware, 467 N.E. 2d 1292 (Mass. 1984) Page 1299

> with respect to intoxicated operators of motor vehicles.' We, therefore, assume for the purposes of this case that the town concedes its police officers had a duty to enforce such statutes and do not need to address the issue separately. Rather the town claims the duty its police officers owed was to the 'general public'." (Underlining ours.)

The Ware decision does not apply in our case because we definitely do not concede that a police officer has a duty under Florida law to arrest or otherwise detain an intoxicated driver. On the contrary, it is our position that no such duty exists.

Review of the Florida cases beginning with Wong v. City of Miami,[6] the "rock" upon which all subsequent Florida decisions as to the liability of law enforcement officers must necessarily stand, supports our position that no cause of action exists under Florida law for failure of a police officer to enforce the law.

The applicable portions of the decisions of this Court and the Third District Court of Appeal in Wong have been previously cited in our Brief on the Merits; however, for the benefit of this Court we again quote the following language in the decision by said District Court of Appeal:

> "At common law, governmental unit has no responsibility for damage inflicted upon its citizens or property as a result of riot or unlawful assembly.
>
> Common law in Florida has not been abrogated by a statute.
>
> City and County were not liable for damage to plaintiffs' businesses and property resulting during period of civil disobediance, riot and disregard for peace and dignity in area surrounding plaintiffs' businesses even if plaintiffs' businesses were not afforded adequate police protection."

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6. Wong v. City of Miami, Fla., 229 So. 2d 659

We also commend to this Court the following language contained in the opinion of the Second District Court of Appeal in Everton:

> "We, therefore, determine that the proper planning and implementation of a viable system of law enforcement for any governmental unit must necessarily include the discretion of the officer on the scene to arrest or not arrest as his judgment at the time dictates. When that discretion is exercised, neither the officer nor the employing governmental entity should be held liable in tort for the consequences of the exercise of that discretion."

Also see Tomlinson v. Pierce[7], wherein a complaint alleging facts very similar to ours was held insufficient by the California District Court of Appeal for the following reasons:

> "An indispensable factor to liability founded upon negligence is the existence of duty of care owed by alleged wrongdoer to person injured or class of which he is a member.
>
> Power of police officers to arrest or not arrest is power in which discretion is vested in officer."

In Ware the Massachusetts court did not have to address itself to the question as to whether there was an absolute duty on the part of a City police officer to arrest a drunk driver because it was conceded by the Town that such duty existed. In our case, however, the advisability of adopting such a rule remains to be decided by this Court.

We remind the Court that except for the decision of the Fifth District Court of Appeal in our case, there is not a single Florida decision in which it has been held that a police officer can be held liable for failure to arrest or otherwise detain a drunk driver. No good reason has been given why this rule should be changed. Certainly,

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7. Tomlinson v. Pierce, 2 Cal. Rep. 700

the enactment of F.S. 768.28 and the adoption by this Court of the "planning-operational" dichotomy in Commercial Carrier should not be used as a pretext for creating a cause of action where none existed before under Florida law.

These days it is fashionable to apply pressure upon our judiciary and law enforcement agencies to get drunk drivers off the road. The problem with this is that it is unreasonable and unfair to impose upon a police officer an absolute duty to arrest all drivers known by him to be drunk and give them a discretionary duty to arrest those who for other reasons drive in a reckless manner. Why should a police officer be required in every case to arrest a drunk driver when he is not required to arrest every person whom he may observe speeding, violating traffic control devices or otherwise operating a vehicle in a dangerous manner?

Suppose for example that a person not under the influence of alcohol is observed by a police officer operating a vehicle well in excess of the posted speed limit. The police officer does not attempt to arrest the driver of the speeding vehicle and shortly thereafter said vehicle collides with a pedestrian. This Court is asked to decide in this case whether the pedestrian would have a cause of action against the police officer for failure to stop the vehicle causing his injury and damage.

It would not be consistent and in accord with common sense for this Court to decide that a police officer could be held liable for failure to arrest a drunk driver but can not be held liable for failure to arrest a negligent driver who is not intoxicated. The rule which would fit all cases must necessarily be that the police

officer has discretion as to whether to arrest the negligent driver of a motor vehicle--drunk or sober--and his failure to do so will not create a cause of action in favor of the person injured thereby.

The Parallel Function Doctrine:

The City further contends that it is entitled to the benefit of sovereign immunity under the facts of this case because of the so-called "parallel function doctrine".

This doctrine was adopted by the Florida Legislature when it included in F.S. 768.28 language to the effect that the State or any of its agencies or subdivisions can be liable for personal injury only "if a private person would be liable to the claimant in accordance with the general laws of the State:"

In her Brief, Respondent dismisses the "parallel function doctrine" on the following basis:

> "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 (sic) the legislative intent of F.S. Section 768.28 in that, with few exceptions, all municipal functions have no parallel in the private section, and therefore, there would be no liability for the negligent application of said functions."

In the first place, we are not talking about the duty of a municipality to furnish "police protection". What we are talking about is the duty of a police officer to enforce the law. It seems obvious here that there is no agency in the private sector vested with the responsibility for law enforcement. This responsibility is vested in agencies of the State--such as a municipality.

Therefore, we respectfully submit, if the acts of City police officers do not come within the intent and meaning of the "parallel

function doctrine" then the language which the Legislature included in F.S. 768.28 which specifically provides for this exception is rendered meaningless. It is not the prerogative of this Court to render meaningless words which the Legislature must be deemed to have intended to include in said statute.

Should this Court decide that the enforcement of the law by police officers comes within the "parallel function doctrine, then it becomes unnecessary to decide questions raised herein with regard to duty and sovereign immunity.

Sovereign Immunity:

We have contended in our original Brief that the City is entitled to sovereign immunity under the facts of this case because decisions made by police officers as to whether to arrest a drunk driver are "planning" in nature within the meaning of Commercial Carrier.

In making this contention we recognize the fact that the "planning-operational" dichotomy is probably inappropriate insofar as its application to the every day decisions made by a law enforcement officer is concerned. The Second District Court of Appeal recognized the difficulty in applying this standard in Everton when it said:

> "We have wrestled long and hard with the problems presented by this case and the various theories involved. We have determined that the unique situation presented here is the square peg that will not fit either the 'operational', 'planning', or 'discretionary--non-discretionary' tests as set forth in Commercial Carrier. and its progeny."

This Court may decide to base its decision by applying the "planning-operational" standard. It would be unnecessary to do so, however, should the Court agree with our contention that under the common law of Florida a cause of action is not created by the failure

of a police officer to arrest or otherwise detain a drunk driver.

CONCLUSION

For the reasons stated, the decision of the Fifth District Court of Appeal should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished, by 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 December, 1984.

ALFRED A. GREEN, JR., ESQUIRE