

IN THE SUPREME COURT OF FLORIDA

Case No.:

91,965

**CAL HENDERSON, as Sheriff of
Hillsborough County,**

Defendant/Petitioner,

v.

**ISAC B. BOWDEN, and LUNA DELL
ARCHIE HAYWOOD, et. al.,**

Plaintiff/Respondent.

FILED

W. J. WHITE

DEC 9 1997

CLERK, SUPREME COURT

By _____
Clerk Deputy Clerk

**ON THE PETITION TO INVOKE DISCRETIONARY
JURISDICTION FROM THE SECOND DISTRICT
COURT OF APPEAL**

**INITIAL JURISDICTIONAL BRIEF ON BEHALF
DEFENDANT/PETITIONER CAL HENDERSON,
AS SHERIFF OF HILLSBOROUGH COUNTY**

✓
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II. STATEMENT OF THE CASE AND OF THE FACTS

This case involves two wrongful death complaints, alleging negligence of Hillsborough County Sheriff Cal Henderson for the acts of his deputies. The alleged negligence relates to two separate, but closely but related, set of facts and circumstances, beginning with the arrest of a suspected drunk driver of a vehicle occupied by four individuals.

Late in the evening, August 7, 1992, Hillsborough County Sheriff's Office deputies arrested Jimmy Bowden for DUI. (A3)¹ Passengers included Jimmy's brothers, Robert and Damon, and also Brandon Lyons. The passengers where temporarily detained at the arrest scene. Thereafter, the vehicle was turned over to Brandon Lyons, whose father owned the vehicle. Brandon Lyons was instructed to drive his vehicle across the road to a parking lot and wait there for a deputy. For appellate purposes, it was assumed that the deputies knew or should have known that all passengers were intoxicated. (A4)

After a few minutes at the parking lot, Brandon Lyons disregarding the deputies' instructions, sped away from the parking lot. One of the deputies observed Brandon Lyons leaving the parking lot and followed Brandon Lyons. (A4) About one and a half miles away from the parking lot, Brandon Lyons missed a curve in the road and struck a tree. The passengers, Robert and Damon Bowden, where killed. Brandon Lyons could not remember any of these events after driving away from the parking lot.(A5)

The trial court entered two orders of summary judgement. One order relates to the circumstances at the arrest scene, the other as to the pursuit.(A5) The appellate court reversed

¹References of the appendix of this appeal are designed by "A" and the page number.

the orders of summary judgment, and denied motions for rehearing and rehearing en banc. (A11)

This petition seeks review of that appellate decision reversing the trial courts orders of summary judgment.

III. SUMMARY OF ARGUMENT

This court has authority to accept jurisdiction in this case based upon three provisions of Florida Rules Appellant Procedure 9.030(a)(2). First, under Fl.R.App.P. 9.030(a)(2)(ii), this decision expressly construes the Florida Constitution as to the doctrine of separation of powers and as to sovereign immunity.

Second, this court has discretionary jurisdiction in this case because under Fl.R.App.P. 9.030(a)(2)(iii), this decision affects a class of constitutional officers. All Florida sheriffs have deputies who will be confronted with circumstances similar to the circumstances in this case. Therefore, all Florida sheriffs will be affected by this decision which is the first Florida case deciding that, upon the arrest of a suspected drunk driver, a "special relationship" is automatically created between the arresting officer and the passengers.

Third, this court has discretionary jurisdiction under Fl.R.App.P. 9.030(a)(2)(iv), because this decision expressly and directly conflicts with decisions of other district courts of appeal and also conflicts with the decisions of the supreme court. This decision states that sovereign immunity is waived upon the arrest of a suspected drunk driver, that any passengers automatically have a "special relationship with the arresting officer; and that the passengers are, thereafter, considered "in custody" of the officer, even if they disregarded the officer's instructions and flee the arrest scene. These concepts of sovereign immunity conflict with previous appellate court and supreme court decisions. In addition, the decision conflicts with the previous appellate court decisions and supreme court decisions on the question of law relating to the sufficiency of allegations for actionable alleged negligent pursuit.

IV. ARGUMENT AS TO ISSUE ONE
DOES THE DECISION UNDER REVIEW EXPRESSLY CONSTRUE
THE FLORIDA CONSTITUTION?

The only issue in this case is the interpretation of the Florida Constitution relating to sovereign immunity. The Plaintiffs and the Defendants agree that the issue in this case is whether the doctrine of sovereign immunity insulates the Defendant from the liability. The decision under review states that the conclusions in the opinion were determined by finding a level ground between sovereign immunity principles.(A6)

This court has consistently held that governmental immunity derives entirely from the doctrine of separation of powers, not from a duty of care or from any statutory bases. Kaisner v. Kolb, 543 So.2d 732 (Fla.1989). Therefore, the decision under review clearly falls within this court's discretionary authority as expressly construing the Florida Constitution.

V. ARGUMENT AS TO ISSUE TWO
DOES THE DECISION UNDER REVIEW AFFECT A CLASS
OF CONSTITUTIONAL OFFICERS?

This court's discretionary jurisdiction, applies to this case, likewise, because of the obvious implications upon all affected sheriffs. It is obvious that all sheriffs have had, and will have, deputies who will stop suspected drunk drivers in vehicles with passengers. These sheriffs must be aware of their legal responsibilities relative to these passengers in order to determine policy and procedure. Therefore, legal implications are of obvious import and affect upon all sheriffs; and, for that matter, upon all law enforcement officers on Florida's streets and highways.

This affect is particularly critical in light of previous judicial decisions which seem contrary to the decision under review, as will be discussed in the next issue. If other Florida law enforcement officers have the same impression or interpretation, then it is all the more important for this court to exercise its discretionary jurisdiction and reconcile these apparent inconsistent judicial opinions.

VI. ARGUMENT AS TO ISSUE THREE
DOES THE DECISION UNDER REVIEW EXPRESSLY AND DIRECTLY CONFLICT
WITH DECISIONS OF DISTRICT COURTS OF APPEAL AND THE SUPREME
COURT ON THE SAME QUESTIONS OF LAW?

The question of law in the case under review is the interpretation of the constitutional doctrine sovereign immunity, requiring the interpretation terms “discretionary conduct”, “operational conduct”, “special relationship” and “custody”, as those terms are construed in the context of the constitutional sovereign immunity. These construed terms must then be applied to the facts of the case under review.

The decision under review followed that process and concluded that sovereign immunity does not apply to the facts and circumstances of this case. The decision under review determined that sovereign immunity was waived upon the arrest of the suspected drunk driver Jimmy Bowden; that, upon that arrest, “special relationship” was automatically created with regard to the passengers, and that special relationship continued throughout the course of the events that followed the arrest, ending with the fatal collision. The decision under review also determined that the deputies owed a duty of care to the passengers because the passengers were considered “in custody” of the deputies, even after they were permitted to drive away from the arrest scene into a nearby parking lot. The passengers’ status of being in the “custody” continued, even when they disregarded the deputies’ instructions and fled from the arrest scene and from the deputies.

The decision under review correctly based its conclusion by construing the principles of constitutional sovereign immunity under Kaisner v. Kolb, 543 So.2d. 732(Fla.1989) and Everton v. Willard, 468 So.2d 936(Fla.1985). However, the conclusions in the decision under the review directly conflicts with the Kaisner v. Kolb and the Everton v. Willard lines of cases.

If a motorist is stopped and ordered to stand alongside the roadway and later injured, then liability may attach because the motorist is under the control or custody of the arresting officer.

Kaisner v. Kolb, 543 So.2d 732, 734, Department of Highway Motor Vehicle v. Kropff, 491So.2d 1252(Fla.3rd DCA1986). Likewise, if an individual is arrested and taken into custody, liability can result from negligence occurring during the incarceration or custody. White v. Palm Beach County, 404 So.2d 123 (Fla.4th DCA 1981).

The Kaisner v. Kolb case explains or described the term "in custody" in the context of a roadside stop:

"The Petitioner and his family unquestionably where restrained of their liberty when they where ordered to the roadside. They where not free to leave the place where the officers had ordered them to stop. Petitioner effectively had lost his ability to protect himself and his family from the hazard at hand, which consisted of onrushing traffic. The only way the Petitioner could have escaped his threat would have been by disobeying the officer's instructions that he remain in the general area where they had stopped him, thus subjecting himself to immediate arrest and criminal charges. Under these circumstances, petitioner clearly was sufficiently restrained of liberty to be in the "in custody" or control of the police. Thus, the officers owed him and his family a duty of care arising under the common law of Florida."
Kaisner v. Kolb, 543 So.2d at 734.

This explanation of the term "custody" directly and expressly conflicts with the interpretation of "custody" in the decision under review. In the decision under review, the passengers where not restrained of their liberty, and were not situated in a place ordered by the deputies at the time of he fatal collision. They where free to leave, and, in fact did leave the scene. They where not under the control of the deputies. Furthermore, the passengers' "non-

custodial" status is further illustrated by the passengers decision to disregard the deputies' instructions and fled from the area and away from the deputies.

Everton v. Willard, 468 So.2d 936 (Fla.1985), stands for the proposition that the decision to arrest, or not to arrest, is a discretionary judgmental power granted to the law enforcement authority and that liability will not attach to the exercise of that discretion. However, the holding under review, directly and expressly conflicts with Everton v. Willard, which holds that if an individual is temporarily detained, but later released, there is no "special relationship" created and no duty of care is created. These principles of sovereign immunity have been reiterated in numerous cases. Duvall v. City of Cape Coral, 468 So.2d 961(Fla.1985), City of Daytona Beach v. Huhn, 436 So.2d 963(Fla.1985), Rodriguez v. City of Cape Coral, 468 So.2d 963(Fla.1985) and Seguine v. City of Miami, 627 So.2d 14(Fla.App.3rd District 1993).

This conflict is also related to summary judgement as to the alleged negligent pursuit. The decision under the review stated "standing alone, we questioned whether appellants' third amended complaint charging negligent pursuit could be sustained". (A6) The decision under review, however, reversed summary judgment because it concluded that the decisions, acts and conduct of the deputies at the arrest scene where "operational" and not immune from tort liability. This operational conduct, according to the decision under review, was relevant to the issue of the alleged negligent pursuit. Consequently, the acts and conduct of the deputies at the arrest scene have become the acts of negligence to sustain the complaint for negligent pursuit. This court, then, has discretion to review both orders of summary judgment for all the same reasons.

IV. CONCLUSION

The decision under review expressly and directly construes sovereign immunity under the Florida constitution. This construction expressly affects all constitutional and state officers, including all Florida sheriffs, who are charged with the responsibility of executing Florida traffic laws.

The decision under review, applying prior appellant opinions and supreme court opinions, concluded that sovereign immunity was waived, that a duty of care was owed the passengers, and that the passengers were in custody at the time of these fatalities. These conclusions are in express and direct conflict with these prior appellant cases and prior supreme court cases.

The sufficiency of the decision under review can not be overstated. The conclusions have created duties and responsibilities of care never before permitted by the constitution and this court. Policy, manpower and fiscal effects are considerable in light of the decision under review. The logical implications of the decision under review is to presume that every traffic stop will have the potential for making the arresting officer the custodian of all passengers with the arresting officer having legal responsibility for the conduct of those passengers, even after those passengers leave direct control of the deputies.

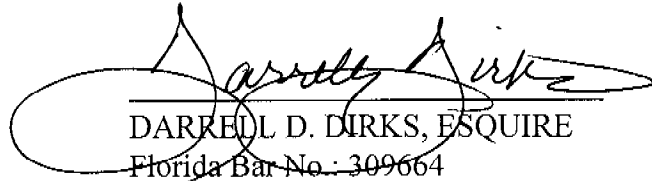
It is respectfully requested that this honorable court exercise its discretion and consider the merits of the opinion under review.

Respectfully submitted,


DARRELL D. DIRKS, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to R. Kent Lilly, Esquire, 800 Florida Avenue, Lakeland, Florida 33801 on this 7th of December, 1997.



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