IN THE SUPREME COURT OF FLORIDA

CAL HENDERSON, as Sheriff of Hillsborough County,

Defendant/Petitioner,

v.

Case No.: 91,965

ISAC R. BOWDEN, and LUNA DELL ARCHIE HAYWOOD, et. al.,

Plaintiffs/Respondents.
_____/

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

JURISDICTIONAL BRIEF ON BEHALF OF PLAINTIFFS/RESPONDENTS, ISAC R. BOWDEN AND LUNA DELL ARCHIE HAYWOOD

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TABLE OF CONTENTS

I. TABLE OF CITATIONS

II. STATEMENT OF THE CASE AND OF THE FACTS

While Petitioner's Statement of the Facts is incomplete, such facts (and omissions) are not of particular significance to the jurisdictional issues involved.

Attached as Respondents' Appendix is the decision under review, which shall be referenced (A_).

III. SUMMARY OF ARGUMENT

The decision under review does not undertake "to explain, define or otherwise eliminate existing doubts arising from the language or terms" of a constitutional provision - it simply applies existing case law to the factual scenario. Thus, the decision does not "expressly construe" the Florida Constitution.

The decision under review is not in any way a departure from prior Florida Supreme Court decisions and thus does not "affect" a class of constitutional officers.

The decision under review does not conflict with decisions of District Courts of Appeal or the Florida Supreme Court. Rather, as described by the opinion itself, it represents the "level ground" between two prior key Supreme Court decisions and simply falls more "within the teachings" of one than the other.

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

The decision under review does not expressly construe the Florida Constitution.

In Armstrong v. City of Tampa, 106 So.2d 407, 409 (Fla. 1958), the Florida Supreme Court held that an opinion or judgment does not construe a provision of the Constitution unless it undertakes "to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision". The underlying opinion applies the existing case law on sovereign immunity to the factual scenario - it does not set out to "explain" or "define" the terms of Article II, Section 3 of the Florida Constitution, which states:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

In the underlying opinion, the Second District Court of Appeal stated that in reaching its conclusions, the Court sought

> ...to find the level ground between the sovereign immunity principle of Everton v. Willard, 468 So.2d 936 (Fla. 1985), and the principle stated in Kaisner v. Kolb, 543 So.2d 732 (Fla. 1989) and City of Pinellas Park v. Brown, which recognize that sovereign immunity is not available to a governmental entity when its officers are engaged in "operational" activities that create a substantial zone of risk.

(A6-7)

Petitioner's argument that such language expressly construes Article II, Section 3 of the Florida Constitution is misplaced. Such language does not purport to explain or define the terms of Article II, Section 3 of the Florida Constitution. It merely attempts to apply the existing case law to the facts. Significantly, the underlying opinion cites the three Supreme Court cases which dealt with sovereign immunity issues. However, none of these cases were reviewed on the basis that the District Court opinion expressly construed Article II, Section 3 of the Florida Constitution.

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

Petitioner essentially argues that **any** decision in **any** case involving constitutional officers (or, as in this case, any of their many employees) "affects" such constitutional officers. Petitioner cites no authority for such a proposition.

The subject decision is not in any way a departure from prior decisions of this Court (for all the reasons stated in Respondents' Argument as to Issue Three) and thus does not adversely "affect" constitutional officers at all.

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?

As clearly (and best) stated by the subject decision itself, there simply is no conflict "with the Kaisner v. Kolb and the Everton v. Willard lines of cases" as asserted by Petitioner. Since Petitioner concedes that the remaining cases cited by Petitioner simply "reiterate" the sovereign immunity principles of Everton and Kaisner, Respondents will limit their remarks to those two key cases.

The decision under review is the "level ground" between those two prior Supreme Court opinions which, as conceded by Petitioner, have together been the controlling authority on this subject for a decade or so. As stated in the subject decision:

> In arriving at our conclusions, we have sought under the circumstances of this case to find the level ground between the sovereign immunity principle of Everton v. Willard, 468 So.2d 936 (Fla. 1985), and the principle stated in Kaisner v. Kolb, 543 So.2d 732 (Fla. 1989) and City of Pinellas Park v. Brown, which recognize that sovereign immunity is not available to a governmental entity when its officers are engaged in "operational" activities that create a substantial zone of risk.
>
> . . .
>
> We reach the conclusions we do because we find that the alleged acts of the deputies involved in this instance fall more within the teachings of Kaisner, and similar cases, and are distinguishable from those of the deputy sheriff in Everton.

(A6)

(A7)

The decision under review even provides a specific and lucid explanation of its consistency with this Court's prior teachings on this subject:

> In Everton, the court found that there has never been a common law duty of care owed to an individual with respect to the discretionary judgmental power granted a police officer to make an arrest and to enforce the law. In the case before us, however, the discretionary authority to make an arrest (of Jimmy Bowden) had been exercised. The exercise of that discretion in arresting the driver of the vehicle then created a special relationship in the deputies' "operational" activities with the other three occupants of

> the vehicle, who for the purposes of this appeal, may be assumed to have been intoxicated.

(A7)

Petitioner's dislike or disagreement with the concept does not create the asserted conflict.

Indeed, as pointed out, the "special relationship" concept is not a new idea, but is in fact an Everton concept:

> We recognize that, if a special relationship exists between an individual and a governmental entity, there could be a duty of care owed to the individual.

468 So.2d at 938.

Likewise, the "custody" concept embraced in the subject decision is in fact a Kaisner concept/definition:

> So long as Petitioner was placed in some sort of "custody" or detention, he is owed a common law duty of care.
>
> > The term "custody" is defined as the detainer of a man's person by virtue of lawful process or authority.
> >
> > The term is very elastic and may mean actual imprisonment or *physical detention* or mere power, legal or physical, of imprisoning or of taking manual possession.
>
> Black's Law Dictionary 347 (5th ed. 1979) (emphasis added). We thus concluded that "custody" need not consist of the formal act of an arrest, but can include any detention.

543 So.2d at 734.

Interestingly, even Petitioner concedes that Brandon Lyons and the Bowden brothers were detained at the arrest scene and further asserts that Brandon Lyons was instructed to drive to the nearby convenience store. (Petitioner's Brief at Page 1) Thus, Petitioner concedes this Court's own definition of custody.

Finally, the "operational v. discretionary" distinction is well-established and not violated in any way by the subject decision. As stated by the Court in Kaisner:

> While the act in question in this case certainly involved a degree of discretion, we cannot say that it was the type of discretion that needs to be insulated from suit. Intervention of the courts in this case will not entangle them in fundamental questions of public policy or planning. It merely will require the courts to determine if the officers should have acted in a manner more consistent with the safety of the individuals involved.

543 So.2d at 737, 738 (footnote omitted).

As to negligent pursuit, the decision under review simply recognizes that the facts cannot be neatly compartmentalized or subdivided from those relating to the initial stop, primarily because it must be assumed that the deputies knew or should have known that Brandon Lyons was intoxicated, which he was - at twice the level of Jimmy Bowden, the arrested driver. The decision thus recognizes that a jury should be allowed to consider the totality of the circumstances (from the arrest of Jimmy Bowden to the crash) in determining whether the actions of the deputies constituted a breach of the duty of care which came into existence when the "special relationship" was created by the arrest of Jimmy Bowden.

Bottom-line, there has been no showing of conflict, since the prior decisions of this Court both established and defined the applicable principles of:

-special relationship

-custody

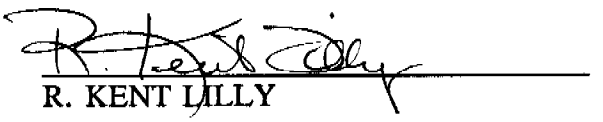
-operational v. discretionary activities

The subject decision simply applies the existing principles of law to the instant factual scenario.

VII. CONCLUSION

Since the subject decision does not expressly construe a constitutional provision, does not affect a class of constitutional officers and does not conflict with prior decisions, Respondents respectfully request that this Honorable Court decline to consider the merits of the opinion under review.

Respectfully submitted,

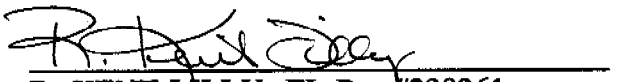


R. KENT LILLY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail to Darrell D. Dirks, Esq., Post Office Box 3283, Tampa, FL 33601-3283, this 23 December, 1997.

KENT LILLY, P.A.



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