OA 8-31-98

IN THE SUPREME COURT OF FLORIDA

CAL HENDERSON,

Petitioner/Defendant,

v.

ISAC B. BOWDEN, et. al.,

Respondents/Plaintiffs.
_____/

CASE NO.: 91,965
DISTRICT COURT OF APPEAL,
SECOND DISTRICT
NO.: 96-02301

REPLY BRIEF OF PETITIONER
CAL HENDERSON, SHERIFF OF HILLSBOROUGH COUNTY

DARRELL D. DIRKS, ESQUIRE
Florida Bar No.: 309664
MANUEL J. ALVAREZ, ESQUIRE
Florida Bar No.: 298522
RYWANT, ALVAREZ, JONES,
RUSSO & GUYTON, P.A.
Perry Paint and Glass Building
109 N. Brush Street, Ste. 500
Tampa, Florida 33602
(813) 229-7007
Attorneys for Defendant/Petitioner
Cal Henderson, as Sheriff
of Hillsborough County

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes and Authorities

PRELIMINARY STATEMENT

In this brief, the Petitioner/Defendant CAL HENDERSON as Sheriff of Hillsborough County will be referred to as SHERIFF. Plaintiffs/Respondents, ISAC B. BOWDEN and LUNA DELL ARCHIE HAYWOOD will be referred to as BOWDENS.

References to the Record on Appeal will be referred to as (R.) followed by a page number. References to the SHERIFFS' initial brief on the merits will be referred as (IB) followed by the page number. References to the BOWDENS answer brief will be referred as (AB) followed by the page number.

STATEMENT OF CASE AND FACTS

Although HENDERSON does not disagree with BOWDENS statement of facts, these additional facts may be instructive to understand the arguments in this reply:

Deputy Garcia testified that Brandon Lyons agreed with Garcia's suggestion that Lyons drive his car across the road to call his relatives from the public telephone there. (R-329) Deputy Garcia left the roadside arrest scene before Brandon Lyons left the arrest scene. (R-323)

Brandon Lyons does not remember exactly what was said to him by the deputies about driving across the road. He doesn't remember which deputy made the statement. Mr. Lyons testified:

> "... I don't remember who said it or how it happened, I don't remember if he came up to the car or if he yelled it or what, told me

> to go--something about the Circle K, we'll follow you, something to that extent. And, of course I'm going to go. You know, I was scared. I was wanting to get out of there in the first place. I made a U-turn and went up to the Circle K and we waited. By this time things were getting fuzzy, but I definitely remember this." (R-233)

Upon additional questioning about his understanding of the reasons for driving across the road to the Circle K, Lyons testified:

> "No, we were trying to figure that out. I was like, you, what the heck is going on. You know, why. You know, Damon said that they said they were going to follow us up there. And the next thing I remember, the cops were gone. I mean, they just left. They shut off their flashers and we didn't see any more of them." (R-234)

Upon further questioning regarding the reasons for leaving the parking lot, Mr. Lyons testified:

> "... I remember asking them, you know, what should I do. And either Damon or Robert just said, screw it, go. And that's all I remember. The next thing I remember is laying on the ground." (R.239-240)

In addition, the BOWDENS make reference to the interpolation opinion of Dr. Feegel, as to the blood alcohol concentration of Brandon Lyons at the time of the temporary roadside custody. (AB -3) However, no interpolation was reported as to Jimmy Bowden, resulting in no legitimate comparison of these individuals at the same point in time.

SUMMARY OF ARGUMENT

No Florida statute or case supports the BOWDENS' argument that the arrest of Jimmy Bowden automatically creates a "special relationship" with the three remaining occupants. Rather, a "special relationship" exists only if the three remaining occupants were considered "in custody," under *Kaisner* v. *Kolb*, at the time of the fatal crash.

The BOWDENS do not conduct the required separate analysis of sovereign immunity and of common law duty. The BOWDENS confuse and commingle these separate issues in their arguments. The BOWDENS use authoritative references which discuss common law duty in their argument addressing the immune, discretionary decision to make arrests and enforce laws. As a result, the BOWDENS have effectively eliminated sovereign immunity, which is the real issue in this case.

The remaining allegations relate to the alleged negligent pursuit. It is acknowledged that the manner of pursuit is considered "operational." But, since the allegations of the discretionary conduct at the arrest scene cannot be used in this lawsuit, the remaining allegations come nowhere near the necessary factual allegations of wanton and reckless conduct necessarily to support a viable police pursuit complaint.

REPLY TO RESPONDENTS' FIRST ARGUMENT:

THE EXISTENCE OF A SPECIAL RELATIONSHIP CREATED A DUTY WHICH REQUIRED THE DEPUTIES TO EXERCISE REASONABLE CARE IN THE PROTECTION OF THE DECEDENTS

In this section of the BOWDENS' brief, they affirm well-recognized legal principles related the facts at the case at bar. They agree with SHERIFF that Florida's waiver of sovereign immunity does not create any new duties of care, and that the common law does not recognize an individual duty of the police to make arrests or enforce the law. (RB 9-10) Therefore, in the context of police roadside stops and arrests, in order to make a viable claim, an individual must establish a duty at common law, recognized by Florida law, which does not involve privileged or immune conduct.

The BOWDENS argue that the arrest of Jimmy Bowden created a "special relationship" as to the remaining three occupants, and therefore, the deputies' conduct must be considered "operational" as to the three remaining occupants. (RB 10). The BOWDENS implicitly argue that this "special relationship" continued, even after the three occupants were permitted to drive away from the arrest scene, while disregarding the deputies' suggestion to use the nearby public phone, and while speeding down this rural eastern Hillsborough county road.

As support for their arguments in this section of the brief, the BOWDENS make reference to *Kaisner* v. *Kolb*, 543 So.2d 936 (Fla.1989) and *McCain* v. *Florida Power Corp.*, 593 So.2d 732

(Fla.1992), *The Restatement of the Law (Second) Torts*, and *Handbook of the Law of Torts*. (AB 10-11) These references cited by the BOWDENS are references to analysis of common law *duty*. The BOWDENS inappropriately attempt to use these *duty* analyses in their argument that the *discretionary* decision to arrest Jimmy Bowden was the conduct which created a *common law duty* as to the three remaining occupants; and that this duty continued up to and including the time of the fatal crash. The BOWDENS' argument fails to recognize the distinction of the concepts of *duty* and *sovereign immunity*. As a result, the BOWDENS' argument becomes a rather confusing mixture of *common law duty* arguments when addressing *sovereign immunity* issues; particularly, the well-recognized discretionary authority of the executive to make an arrest, or not to make an arrest, in the context of roadside temporary detentions.

The following paragraphs in this section will address the BOWDENS' authoritative references to explain the distinction between these two separated concepts.

KAISNER V. KOLB

In *Kaisner*, the court decided the issue of whether the police could be liable to individuals who were injured while standing along the roadside, while in the actual custody of the police. In making that decision the court engaged in a lengthy

analysis of *common law duty*, beginning on page 733 and ending in the first paragraph of page 736 of that opinion. The BOWDENS' brief quotes from pages 734 and 735 of that common law duty analysis. (AB 10) The *Kaisner* opinion concluded that, since the motorists were in the actual physical custody and control of the police at the roadside, then the police could be liable for injuries to those motorists for so long that they were in that custody or detention. In arriving at that conclusion, the *Kaisner* opinion defined custody and outlined points to consider when deciding if an individual is "in custody" in the context of roadside stops when considering the issue of common law duty. 543 So.2d 732, 734.

SHERIFF agrees that this language cited from this portion of the *Kaisner* opinion is the appropriate practical, legal analysis to determine if, at *common law duty* a duty would be recognized if the deputies were private individuals under like circumstances. Fla. Stat. 768.28(1),(5). After reciting these common law duty references in *Kaisner*, the BOWDENS argue:

> In the instant case the discretionary to make an arrest (of Jimmy Bowden) had been exercised. The exercise of that discretion created a "special relationship" in the deputies' operational activities with the other three occupants of the vehicle..." (AB 10)

The BOWDENS, thereby, attempt to use the *common law duty* analysis in *Kaisner*, pages 733-736, as an authoritative basis

when arguing that this *discretionary* conduct can create a *common law duty*.

This argument is contrary to clearly established law that discretionary/immune conduct cannot be the basis of tort liability. In fact, the BOWDENS recognized this clearly established law in their brief.(AB 9) Furthermore, this argument is contrary to the *Kaisner* opinion itself. For, after concluding its *common law duty* analysis in the first column at page 736, the *Kaisner* court states:

> "We thus find that a duty of care existed that would support a lawsuit in the absence of any viable claim of governmental immunity, a question to which we now turn."

543 So.2d at 736. Thereafter, the *Kaisner* opinion engaged in a rather lengthy analysis of *sovereign immunity*, as a required separate analysis from the analysis of *common law duty*. That sovereign immunity analysis in *Kaisner* reaffirmed the governmental immunities are derived from the separation of powers, that the judiciary should not infringe upon the discretionary powers of the executive branch of government, and that decisions such as decisions to make a traffic stop or enforce laws are discretionary decisions which the judiciary cannot and should not interfere. *Kaisner v. Kolb*, 543 So.2d 732,736-739.

The BOWDENS' references to the portion of the *Kaisner*

opinion which discusses *common law duty* are certainly appropriate when considering the issue of duty. But, the BOWDENS references to *Kaisner* opinion which discusses *common law duty* cannot be used to argue that the *discretionary* power to initiate a traffic stop and to make an arrest can create a common law duty. In fact, in the context of the case at bar, this improper use of the *Kaisner* opinion results in an argument by the BOWDENS which was addressed and rejected by the *Kaisner* opinion. *Kaisner* clearly holds that the discretionary power to make and arrest cannot be used as a basis for tort liability. *Kaisner*, 543 So.2d 732, 736-739.

Under the "custody" analysis in *Kaisner*, the three remaining occupants were no longer "in custody" of the deputies when they sped from the parking lot and down Trapnell Road. The deputies allowed the three occupants to drive away from the roadside. The deputies were no longer controlling their movement. The three remaining occupants had regained their ability of self-protection, which was temporarily controlled by the deputies when they were at the roadside stop. They did not risk arrest simply by driving from the roadside. In fact, everyone, including the deputies had already left the roadside.

When applying these *Kaisner* tests for "roadside custody" *common law duty* analysis, it is clear that the deputies no longer owed a *common law duty* to the three remaining occupants after they were released from the temporary roadside custody.

McCAIN v. FLORIDA POWER CORP.

The BOWDENS next cite *McCain* v. *Florida Power Corp.*, 593 So.2d 500,503 (Fla.1992). (AB 11) The *McCain* case adopted the duty analysis in *Kaisner*. Again, this case accurately describes the analysis employed in Florida law to determine the existence of a *common law duty,* particularly in the context of forseeability. But, McCain has no application to the issue of sovereign immunity. Therefore, like *Kaisner*, *McCain* should not be used as support for the argument that the discretionary decision to arrest Jimmy Bowden created a duty as to the other three occupants.

CITY OF PINELLAS PARK v. BROWN

The BOWDENS next cite *City of Pinellas Park* v. *Brown*, 604 So.2d 1222 (Fla.1992). They argue that the *Brown* case is additional support for their position that the arrest of Jimmy Bowden created a duty of care. (AB 11) However, this reliance is misplaced. The *Brown* case involved the operational function of a police pursuit. The court in Brown determined that the manner of the police pursuit had unnecessarily created the dangerous situation which resulted in the death of an innocent motorist. In Brown, the court determined that a police pursuit of such egregious nature is sufficient to give rise to duty:

> "As we stated in *Kaisner*, when government agents create a zone of risk through operational functions, then the government unit will not be shielded by sovereign

immunity. *Kaisner*, 543 So.2d at 735."

Brown, 604 So.2d at 1227.

Surely, the Brown case is very important when analyzing the alleged pursuit in this case. The *Brown* case discusses the concepts of duty and waiver of sovereign immunity in the context of operational police pursuits. But, *Brown* is not authority for the argument that the discretionary decision to arrest Jimmy Bowden created a duty as to the other three occupants. Such misplaced reliance is not consistent with the required step by step analysis, separating the concepts of duty and sovereign immunity.

RESTATEMENT OF THE LAW, TORTS (SECOND)
and
HANDBOOK OF THE LAW OF TORTS

In their brief the BOWDENS next quotes from section 324, Restatement of the Law, Torts (Second) (1965) and from section 54, Prosser's Handbook of the Law of Torts, page 339, (3rd Ed. 1964). SHERIFF agrees that these are instructive references when addressing the issue of *common law duty*. However, they do not address the critical issue, *sovereign immunity*, as explained above.

After separating out the deputies' discretionary conduct to make an arrest and to enforce the law, these references show that, even under the common law duty analysis, the deputies owed no duty to the remaining three occupants.

Even Brandon Lyons' recollection, albeit vague, is consistent with this analysis of common law duty, under these authoritative references in the BOWDEN brief. He remembers something about going to the Circle K, but nothing for certain. He does remember that the deputies shut off their emergency light, then they were gone. (R - 233-234). These facts clearly support the deputies' testimony that they released these three remaining occupants from their care and custody. Therefore, these facts show that the BOWDENS' case fails under both analyses, common law duty and sovereign immunity.

REPLY TO RESPONDENT'S SECOND ARGUMENT

THE DEPUTIES' NEGLIGENT ACTS ARE NOT IMMUNE FROM SUIT AS THEY CONSTITUTED OPERATIONAL LEVEL ACTS

The BOWDENS' commingling of these concepts has the effect of arguing for the elimination of discretionary conduct as it relates to arrests. The Florida cases, including *Kaisner*, have been careful to separate these analyses because discretionary decisions cannot be the basis to create a duty. The BOWDENS attempt to use the term "operational" in characterizing the deputies' conduct is a valiant attempt to harmonize the case at bar with the Florida law. But, these legal descriptions cannot hide the factual basis for this claim: The discretionary decision to arrest Jimmy Bowden for D.U.I. and the discretionary decision not to arrest Brandon Lyons.

Many other Florida Cases further illustrate the

inconsistency with the BOWDENS' argument. In *Evett* v. *City of Inverness*, 224 So.2d 365(2d DCA 1969), an intoxicated driver was stopped, issued a speeding ticket, then was allowed to drive away, who later killed another motorist. In *Everton* v. *Willard*, 468 So.2d 936 (Fla. 1985), an intoxicated driver was stopped, not arrested, and allow to drive away, who was then involved in a fatal car crash. In *Duvall* v. *City of Cape Coral*,468 So.2d 961(Fla.1985), an intoxicated driver was stopped, but not arrested. Rather, the officer delivered the intoxicated driver to a cab company. The complaint alleged that the police negligently failed to determine the correct whereabouts of this intoxicated driver's residence, resulting in the cab driver delivering the intoxicated driver back to his car and gave him the keys. The intoxicated driver later caused a fatal accident. In *City of Daytona Beach* v. *Huhn*, 436 So.2d 963 (Fla. 1985), an intoxicated driver was stopped, but allowed to drive away. A few minutes later, he struck a pedestrian.

All of these cases relate to the issue in the case at bar. In each of those cases, the police have exercised their discretion in dealing with intoxicated individuals. In each of these cases it is presumed that the officer knew or should have known that the person causing injury was intoxicated. In each case, the officer, when exercising discretion, in one way or another, was involved in the chain of events which resulted in that individual causing injury or death. The cases cannot be

reconciled with the facts in the case at bar and the arguments made in the BOWDENS' brief.

The BOWDENS cite *Sams* v. *Oerlich*, 23 Fla. L. Weekly D1042 (Fla. 1st DCA, April 22, 1998), as additional support for their argument in this case. However, the *Sams* case involves a case where the individual has been arrested, is in handcuffs and is taken to the hospital by the deputy. There is absolutely no question that the prisoner in *Sams* is "in custody,"contrary to the issues in the case at bar. The BOWDENS' failure to address this distinction is, again, directly related to the commingling of the issues of common law duty and sovereign immunity.

REPLY TO RESPONDENTS' THIRD ARGUMENT:

RESPONDENTS ALLEGED AND ESTABLISHED SUFFICIENT FACTS TO SUPPORT ITS CLAIM OF NEGLIGENT PURSUIT

In their brief in this part of the argument, the BOWDENS summarize some of the facts. Clarification here is appropriate. Although Deputy Garcia began to follow the Lyons car along Trapnell Road, he did not "put the pedal to the metal" until he observed the Lyons car disregard the stop sign at Jerry Smith Road. At that time, Garcia estimates that he was still one-quarter mile from Jerry Smith Road. The fatal accident took place only about one-half mile from the intersection of Jerry Smith Road and Trapnell Road. (R.702-704) Common understanding indicates that this high speed pursuit beginning at Jerry Smith Road took only a matter of seconds, certainly less than one

minute.

These facts of this pursuit, under *City of Miami* v. *Horne*, 198 So.2d 10 (Fla.1967), approved in *City of Pinellas Park* v. *Brown*, 604 So.2d 1222 (Fla. 1992), come nowhere near sort of facts which must be plead and proven to sustain a claim for negligent pursuit. The undisputed facts show that this "high speed pursuit" virtually began and ended before the deputy could catch up to the Lyons' car. The alleged policy violations involve the BOWDENS' interpretation of the facts and the police policies which must be governed by the particular facts of each case. But no interpretation transforms this pursuit into the reckless and wanton conduct required to make a legally sufficient showing for a negligent pursuit.

CONCLUSION

The BOWDENS claims cannot be sustained under Florida law. The trial court's orders of final summary judgements should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this reply was furnished to R. KENT LILLY, ESQUIRE, 800 South Florida Avenue, Lakeland, Florida 33801 by United States Mail, this 15th of June 1998.

DARRELL D. DIRKS, ESQUIRE
Florida Bar No.: 309664
MANUEL J. ALVAREZ, ESQUIRE
Florida Bar No.: 298522
RYWANT, ALVAREZ, JONES,
RUSSO & GUYTON, P.A.
Perry Paint & Glass Building
109 North Brush Street, Ste. 500
Tampa, Florida 33602
(813) 229-7007
Attorneys for Defendant/Petitioner
Cal Henderson, as Sheriff
of Hillsborough County