No. 127236

In the

Supreme Court of Illinois

JAVIER ROBINSON,

Plaintiff-Appellee,,

v.

THE VILLAGE OF SAUK VILLAGE, THE VILLAGE OF CRETE, OFFICER MARK BUGAJSKI, OFFICER ANDREW VAUGHN, OFFICER ALLEN RINCHICH, and OFFICER JUAN GARCIA,

Defendants-Appellants.

On Leave to Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-20-0223.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, 18 L 002000.
The Honorable **Melissa A. Durkin**, Judge Presiding.

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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E-FILED
1/5/2022 10:48 AM
CYNTHIA A. GRANT
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ARGUMENT

I. Coffey Was an Escaping Prisoner When he Struck Robinson

Plaintiff Javier Robinson (hereafter "Plaintiff") was crossing a street in Sauk Village when he was struck and injured by a stolen car driven by Mark Coffey (C 17-18, C 1760, 1768). Section 4-106(b) of the Tort Immunity Act (745 ILCS 10/4-106(b) (West 2016)) (hereafter "Act") provides blanket immunity for "[a]ny injury inflicted by an escaped or escaping prisoner." *Wright-Young v. Chi. State Univ.*, 2019 IL App (1st) 181073, ¶ 61; *Ries v. City of Chicago*, 242 Ill. 2d 205, 221 (2011).

If Coffey was an escaping prisoner when he struck Plaintiff, the Defendants, Village of Sauk Village, Village of Crete, Mark Bugajski, Andrew Vaughn, Juan Garcia, and Allen Rinchich (hereafter "Defendants"), are absolutely immune pursuant to section 4-106(b). Section 4-106 does not define "prisoner," but section 4-101 of the Act defines it as "a person held in custody," *Ries*, 242 Ill. 2d 205, 221 (quoting 745 ILCS 10/4-101 (West 2008)). However, the Tort Immunity Act does not define "custody." *Ries*, 242 Ill. 2d at 216. Plaintiff suggests that this Court "foresaw custody to denote some element of keeping a prisoner, or some element of control or dominion over the prisoner, even if minimal ***." (Pl. Br. p. 12). That view of this Court's holding in *Ries* is not consistent with portions of the opinion. For example, this Court found that section 4-106(b) "does not require formal arrest or imprisonment." *Ries*, 242 Ill. 2d 205, 216 (2011). This Court also noted that Black's Law Dictionary defined custody as the "detention of a person by virtue of lawful process or authority," and "physical custody" as "custody of a person (such as an arrestee) whose freedom is directly controlled and limited." *Id.* (quoting Black's Law Dictionary 1263 (9th ed. 2009)). This Court also cited to an earlier edition

of Black's which provided that the term custody is " 'very elastic and may mean actual imprisonment or physical detention or mere power, legal or physical, or imprisoning or of taking manual possession.' " *Id*. at 216-17. In fact, this Court seemingly rejected the view that "custody" means actual physical custody when it held, after reviewing *People v. Campa*, 217 Ill. 2d 243, 255 (2005), *abrogated in part by People v. Clark*, 2019 IL 122891, ¶41, that if "the legislature had meant the term 'custody' to be so restrictive as to include only imprisonment, the legislature almost certainly would have used the term imprisonment." *Id.*

In *Ries*, a Chicago police officer (Olivia) placed Demario Lowe (hereafter "Lowe") in the back seat of a squad car-leaving him unsupervised-after Lowe reportedly tried to leave the scene of an accident he caused. *Ries*, 242 Ill. 2d at 208. Lowe managed to gain control of the police car and drive off. Nevertheless, other police officers pursued Lowe, which ended when Lowe collided with a vehicle and injured its occupants. *Id.* This Court concluded that Lowe was in custody when he was placed in the back of a squad car because "his freedom of movement had been directly controlled and limited by Olivia's lawful authority," and a reasonable person placed in the back of a squad car would not feel free to leave. *Ries,* 242 Ill. 2d at 217.

Plaintiff argues (Pl. Brief pp. 8-9), and the appellate court seemed to agree (*Robinson v. Village of Sauk Village*, 2021 IL App (1st) 200223, ¶ 13), that *Ries* set out a two-part test for establishing custody: (1) that the putative prisoner's freedom of movement is directly controlled and limited and (2) that a reasonable person in that individual's position would not feel free to leave. However, neither Plaintiff, nor the court below (*Robinson,* 2021 IL App (1st) 200223, ¶ 18), dispute that no reasonable

person in Coffey's position would have felt free to leave. Therefore, assuming that section 4-106(b) requires freedom of movement to be directly controlled and limited, the question is whether the control or limitation may be accomplished by lawful authority short of "physical custody." In *Ries*, this Court held that it was not necessary to determine how broad the term "custody" may be, "as it is certainly broad enough to include situations such as this." That holding implies that something short of what occurred in *Ries* (placing a suspect in a squad car) is sufficient to establish "custody."

In *Townsend,* the appellate court determined that a backseat passenger who fled the scene of an ongoing traffic stop was escaping "custody" when he caused the traffic accident resulting in the plaintiff's injuries. *Townsend v. Anderson*, 2019 IL App (1st) 180771, ¶ 34. At approximately 6:30 p.m., Chicago police officers Higgins and Lewandowski stopped a red 2007 Toyota Solara operating at dusk without its headlights illuminated. *Id.* ¶ 6. The Toyota was occupied by four men, including backseat passenger Ricky Anderson (hereafter "Anderson"). *Id*. ¶ 3. After the driver and front-seat passenger exited the car and were handcuffed, Anderson slipped into the driver's seat and drove away from the scene. *Id.* Several minutes later, Anderson struck a vehicle in which the plaintiff (Townsend) was a passenger. *Id*.

The plaintiff in *Townsend* attempted to distinguish *Ries* by arguing that, unlike Lowe in *Ries*, Anderson was neither arrested nor placed into the back of a police car when he fled the scene and caused the accident. *Townsend*, 2019 IL App (1st) 180771, ¶ 29. Furthermore, plaintiff argued, Anderson was never told that he was suspected of a crime and had not been spoken to by either officer. I*d.* Defendants countered that, notwithstanding that Anderson had not been arrested, he was in "custody" because no

reasonable person in his position would have felt free to leave the scene of the traffic stop. *Id.* The *Townsend* court sided with the defendants. *Id.* ¶ 30.

The *Townsend* court noted that the officers took positions on both sides of the vehicle during the traffic stop, curtailing the occupants' freedom of movement. *Id.* ¶ 31 (citing *Ries*, 242 Ill. 2d at 217 (explaining that an individual is in "custody" for purposes of the Act when his "freedom of movement has been directly controlled and limited"). Moreover, although there was no evidence that the officers suspected Anderson of any criminal activity, "we do not believe that a reasonable person in his position would have objectively felt free to leave ***." *Townsend*, 2019 IL App (1st) 180771, ¶ 32.

The *Townsend* court held that courts reviewing traffic stops have recognized that police exercise control over all of the occupants of a vehicle subjected to a traffic stop. *Id.*, citing *Brendlin v. California*, 551 U.S. 249, 255, 257 (2007) (recognizing that "during a traffic stop an officer seizes everyone in the vehicle, not just the driver" and that "no passenger would feel free to leave in the first place"); see also, *People ex. rel. Ryan v. Village of Hanover Park*, 311 Ill. App. 3d 515, 531 (1st Dist. 1999) (being stopped by a municipal police officer for a traffic violation is considered an arrest).

Finally, the *Townsend* court held that Anderson's conduct supported the conclusion that he did not subjectively feel free to leave. *Townsend*, 2019 IL App (1st) 180771, ¶ 33. Anderson maneuvered into the driver's seat, avoided an attempt to "grab at" him, and drove away at a high rate of speed. *Id.* "The mere fact that Anderson had not been handcuffed or formally arrested prior to fleeing the scene of the traffic stop does not, as Townsend appears to suggest, preclude a finding that he was in custody within the meaning of section 4-106(b) of the Tort Immunity Act because the term is not limited to

situations involving " 'formal arrest or imprisonment.' " *Id*., citing *Ries*, 242 Ill. 2d at 216.

Townsend concluded, and the court below agreed (*Robinson*, 2021 IL App (1st) 200223, ¶ 16)), that two police officers approaching the car in which Anderson was a passenger was sufficient to satisfy the first prong of the *Ries* test. *Townsend*, 2019 IL App (1st) 180771, ¶ 31. Again, Plaintiff does not dispute that no person in Coffey's position would feel free to leave (the second prong) (*Robinson*, 2021 IL App (1st) 200223, ¶¶ 16, 18). Therefore, assuming that *Ries* did set forth a two-prong test for determining custody under section 4-106(b), the only issue is whether Coffey's freedom of movement was directly controlled and limited as Lowe's was in *Ries*, and Anderson's was in *Townsend*.

Coffey was not handcuffed or formally arrested. While handcuffing is generally indicative of an arrest (*People v Wells*, 403 Ill. App. 3d 849, 857 (1st Dist. 2010)), so is a show of authority. *People v. Marcella*, 2013 IL App (2d) 120585, ¶ 31 ("Accordingly, the defendant was restrained by physical force, when handcuffed, and by a show of authority, when surrounded by at least six agents with guns pointed at him. No reasonable person in defendant's situation would have felt free to leave"). Although Lowe was placed in the back of a squad car in *Ries*, in *Townsend*, Anderson was not. The restraint of freedom of movement that both Plaintiff and the court below agreed was sufficient to satisfy the first prong of the test set out in *Ries*, was officers approaching the car in which Anderson was riding on opposite sides. *Townsend*, 2019 IL App (1st) 180771, ¶ 31; *Robinson*, 2021 IL App (1st) 200223, ¶ 16. Plaintiff did not argue, and the court below did not hold, that *Townsend* represented an unwarranted extension of this

Court's decision in *Ries*. Rather, Plaintiff, and the appellate court (*Robinson*, 2021 IL App (1st) 200223, ¶¶ 16, 18), distinguished *Townsend* because Coffey was approached on only one side of his car. That is not a principled distinction.

Coffey was approached on one side of the car (not on opposite sides as in *Townsend*)[1], but six police vehicles from three jurisdictions took up positions near Coffey's stopped car. (C 1453-54). Furthermore, unlike *Townsend*, the police were pointing guns at Coffey, and giving Coffey commands to show his hands and exit the car. (C 1307, C 1457-58) (Sup.1, E 8, m-25 2.avi, 5:06). If Anderson's freedom of movement was curtailed by two police officers approaching on opposite sides; notwithstanding that their guns were not drawn, they gave no commands to Anderson to exit, and Anderson was not suspected of any crime (Pl. Br. p. 14), Coffey's freedom of movement was likewise curtailed. Coffey, unlike Anderson, was driving a stolen car and fled a traffic stop. When he stopped at the church parking lot, he was suspected of at least two felonies, and while his vehicle was not approached on opposite sides, multiple police officers with weapons drawn were giving him commands, which he ignored. Under these circumstances, Coffey was in "custody" no less than Anderson was.

Plaintiff contends that another critical difference between this case and *Townsend* is that Anderson was physically touched. (Pl. Br. p. 13-14). There are several flaws to this contention. First, although Plaintiff contends that Anderson was physically touched, it is not clear from the court's opinion that was the case, much less a significant factor in the court's decision. *Townsend,* 2019 IL App (1st) 180771, ¶ 33 ("Anderson***evaded Officer Higgins attempt to 'grab at' him, and drove away at a high rate of speed.")

[1] Rinchich believes there was a curb preventing such an approach here. (C 1308).

Nothing in *Townsend's* holding that suggests the police grabbing at (or grabbing) Anderson was material to the determination that Anderson's freedom of movement was directly controlled and limited. *Townsend*, 2019 IL App (1st) 180771, ¶ 31. In fact, contrary to Plaintiff's argument, whether Anderson was physically touched does not appear to have carried any weight in determining whether the first factor (freedom of movement) was satisfied. *Robinson*, 2021 IL App (1st) 200223, ¶ 16 (finding that the individual who was found to have been escaping custody [in *Townsend*] had his freedom of movement effectively controlled and limited "when two police officers took up positions on both sides of the vehicle in which the individual was riding."). Instead, *Townsend* addressed the purported grabbing of Anderson in the context of it supporting "[t]he conclusion that he did not subjectively feel free to simply exit the Solara and walk away from the scene of the traffic stop." *Id*. ¶ 33. According to Plaintiff, that is the second prong of the test *Ries* established (Pl. Br. p.13), and it is not disputed that no reasonable person in Coffey's position would have felt free to leave. *Robinson*, 2021 IL App (1st) 200223, ¶¶ 16, 18.

Furthermore, it is not clear that the court in *Townsend* intended to insert a subjective component to the second prong, given that the standard is whether "a reasonable person in his position would have *objectively* felt free to leave ***." (Emphasis added.) *Townsend*, 2019 IL App (1st) 180771, ¶ 32. Nevertheless, the *Townsend* court determined that the officer's attempt to "grab at" Anderson supported the conclusion that not only would Anderson not *objectively* feel free to leave, he did not even *subjectively* feel free to leave. *Id*. ¶ 33. Whether Anderson was physically touched had no bearing on whether Anderson's freedom of movement was being curtailed (the

first prong). Although the second prong is not in dispute in this case, as it was in *Townsend*, Coffey's conduct supports the conclusion that he did not subjectively feel free despite the lack of an attempt to "grab at" him. *Id*. ¶ 33. Coffey, after stopping the stolen car he was driving in a church parking lot, was approached by multiple police officers, with guns drawn, and ordered to show his "hands" and exit the car. (Sup. 1, E 8, m-25 2.avi, 5:06) (C 1307). After refusing those commands, Coffey pointed various objects at the officers and demanded that they "shoot" him. (C 1455-58). He then fled the parking lot. (C 1311, Sup.1, E 8, m-25 2.avi, 5:07)). Coffey's actions suggest that he did not subjectively feel free to drive away any more than Anderson did.

Curtailing freedom of movement does not require handcuffing or arrest. *Ries*, 242 Ill.2d at 216 (section 4-106 "does not require a formal arrest or imprisonment."). Nor does "custody" equate with curtailing freedom of movement to the extent that escape is impossible. For example, Lowe and Anderson both escaped, notwithstanding that their freedom of movement was curtailed sufficiently to deem them to be in "custody" for purposes of section 4-106(b). *Ries*, 242 Ill. 2d at 217; *Townsend*, 2019 IL App (1st) 180771, ¶ 31.

Next, Plaintiff argues that the police did not curtail Coffey's freedom of movement because they did not block escape routes, and no officer got within 10-15 feet of him. (Pl. Brief p. 3, 5). Following the stop at the church parking lot, the dashcam reflects that, at least momentarily, Officer Rinchich was much closer than that. (Sup. E 8 m-25 1: 506:56). But, the purported distinction is unavailing in any event. Although nothing blocked Coffey's path, nothing blocked Anderson's path in *Townsend*, or Lowe's path in *Ries*. In *Ries*, plaintiff argued that section 4-106(b) did not cover Olivia's conduct

or the conduct of the pursuing officers because their case was about the City (through its officers) failing to properly restrain Lowe initially and then in recklessly pursuing him through the streets of Chicago. *Ries*, 242 Ill. 2d at 218. This Court rejected that argument as mere semantics. Neither *Ries* nor *Townsend* held that defendants must prevent the escape in the first place. This Court held that accepting such an argument "could essentially render section 4-106(b) a nullity. Anytime a prisoner escapes from custody, a plaintiff would likely be able to point to some failure by those responsible for keeping the prisoner in custody." *Ries*, 242 Ill. 2d at 219. The issue is not whether Coffey escaped (he did, just as Lowe and Anderson did), but whether he was in custody when he did so.

Although Plaintiff submits that a show of authority is insufficient to establish custody, it is sufficient in others contexts. An individual is considered under arrest "when their freedom of movement has been restrained by either physical force or a show of authority." *United States v. Mendenhall*, 446 U.S. 544, 553 (1980); *People v. Eddmonds*, 101 Ill. 2d 44, 61 (1984). Furthermore, it is not disputed that no reasonable person in Coffey's position would have felt free to leave, and this Court has explained, "a person has been seized when, considering the totality of the circumstances, a reasonable person would believe he is not free to leave." *People v. Almond*, 2015 IL 113817, ¶ 57. The following *Mendenhall* factors generally indicate a seizure has occurred even though the person has not attempted to leave: "(1) the threatening presence of several officers; (2) the display of a weapon by an officer; (3) some physical touching of the person; or (4) using language or tone of voice compelling the individual to comply with the officer's requests." *Id.* Applying the *Mendenhall* factors here leads to the inescapable conclusion that Coffey was "seized." Although certain cases have distinguished "arrests" and

"seizures" (*People v. Agnew*, 404 Ill. App. 3d 218, 231-32 (2d Dist. 2010) (O'Malley, J., concurring)), even if the terms are not synonymous, section 4-106(b) does not require a formal arrest.[2] *Ries*, 242 Ill. 2d at 216. Although *Ries* declined to determine how broad the term "custody" was (*Id*.), Defendants submit that Coffey was in "custody" for purposes of section 4-106(b) immunity both because no reasonable person would have felt free to leave, and because his freedom of movement was restrained by multiple police officers, with guns drawn, shouting commands at him.

II. The Plain Language of Section 4-106(b)

Plaintiff argues that the plain language of section 4-106(b) does not suggest that a show of authority is sufficient to constitute custody under the Act. The plain language of the Act does not define what custody is at all. That is why this Court in *Ries* was left to ascertain and give effect to the legislative intent. There is nothing in the plain language of section 4-106(b) that suggests that Lowe, who was placed in a squad car on suspicion of trying to flee the scene of an accident he caused, was an escaping prisoner when he stole the police car. But, *Ries* held he was. *Ries*, 242 Ill. 2d at 217. Plaintiff suggests that the "plain" language of section 4-106(b) is limited to those situations implicating some function or form of the traditional incarceration custodial dynamic. (Pl. Br. p. 17). That is belied by this Court's interpretation of the term "custody" for purposes of section 4-106(b) in *Ries*, which held that "custody" under section 4-106(b) is broader than Plaintiff-Appellee suggests. *Ries*, 242 Ill. 2d at 216.

Moreover, in the more than nine years since *Ries* determined that section 4-106(b) does not require formal arrest or imprisonment, the legislature has not amended the Act

[2] " 'Arrest' means the taking of a person into custody." 725 ILCS 5/102-5 (West 2016).

to align with Plaintiff's preferred interpretation. When the legislature does not address by way of amendment a judicial construction of a statute by the court, it is presumed that the legislature has acquiesced in that interpretation (*People v. Espinoza*, 2015 IL 118218, ¶ 27), and such a construction becomes as much a part of the statute as if plainly written into it. *People v. Williams*, 235 Ill. 2d 286, 293-94 (2009).

III. Plaintiff's Arguments About Confusion by Lower Courts is Unpersuasive

Plaintiff argues that a finding that Defendant-Appellees are entitled to immunity pursuant to section 4-106(b) will leave courts "helplessly hamstrung" (Pl. Br. p. 18) because courts will be forced to draw arbitrary lines as to what constitutes custody. Those concerns are unjustified. The issue of whether an immunity applies is a question of law to be resolved by the court. *Monson v. City of Danville*, 2018 IL 122486, ¶ 14. Courts often resolve legal issues, such as whether a duty exists. *Bajwa v. Metropolitan Life Insurance Co.*, 208 Ill. 2d 414, 422 (2004) ("Whether a duty of care exists is a question of law to be determined by the court.") In fact, there are many areas in which courts must make determinations similar to whether a duty exists, or an immunity applies. For example, courts determine whether the statement of a criminal defendant was "voluntary" under a set of standards developed by courts (*People v Timmsen*, 2016 IL 118181, ¶ 9), whether the "totality of the circumstances" establishes probable cause (*People v. Sims*, 192 Ill. 2d 592, 615 (2000)), or whether a person has been "seized." *People v Cosby*, 231 Ill. 2d 262, 277-78 (2008). There is no reason to believe that courts could not determine what constitutes "custody" by looking at the facts of each case.

Secondly, Plaintiff proceeds as though a finding that Defendants are entitled to immunity, in this case, would be contrary to a settled point of law. To the extent the law

is unsettled, it is because the court below unconvincingly attempted to distinguish *Townsend*. A more accurate view is that a finding that this case implicates section 4-106(b) would be consistent with *Townsend*, which resolves an unsettled point.

Plaintiff's stated concern about section 4-106(b) being invoked in every case in which an attempted traffic stop results in a pursuit is unavailing as well. As this Court pointed out, in most pursuit cases, section 2-202 (745 ILCS 10/2-202 (West 2016)) will apply. *Ries v. City of Chicago*, 242 Ill. 2d at 220 (recognizing that section 2-202 "[h]as "been applied to police chases generally."). Section 4-106 will apply and prevail over section 2-202 only when it is the more specifically applicable immunity. *Id*. As *Ries*, and *Townsend* make clear, the circumstances in which section 4-106 will apply and prevail over section 2-202, will be limited. Finally, *Ries* rejected a similar argument. *Ries* at 218-19 (rejecting argument that it made "no sense that the City cannot be held liable for willful and wanton misconduct here when it could have been if Lowe had not been an escaping prisoner. That is an argument for the legislature.")

The fact that sometimes policing results in unintended injuries is no reason to depart from language of the Act, which was enacted precisely because injuries and tort claims arising from provision of government services are inevitable, and the General Assembly wished to preserve public funds for their intended purposes. *Murray v. v. Chicago Youth Center*, 224 Ill. 2d 213, 229 (2007).

Lastly, while Plaintiff believes that granting immunity in cases involving police pursuits is bad public policy, the determination of public policy is primarily a legislative function. *Coleman v. East Joliet Fire Prot. Dist*., 2016 IL 117952, ¶ 58; *Dixon Distributing Co. v. Hanover Insurance Co*., 244 Ill. App. 3d 837, 852 (5th Dist. 1993)

("Courts are ill equipped to determine what public policy should be ***. Further, establishing public policy may entail the balancing of political interests. This is a function of the legislature, not the courts.") To the extent that Plaintiff contends that section 4-106(b) is being interpreted in a way that is contrary to legislative intent, those concerns should be directed to the General Assembly. Indeed, Plaintiff argues that similar issues are being debated. (Pl. Br. p. 24).

IV. Plaintiff's Argument on Submission to a Seizure is Misplaced

Plaintiff argues that in order for a seizure to take place, the putative arrestee must submit to a show of authority. (Pl. Br. pp. 25-27). That argument misses the point. Anderson was an escaping prisoner when he fled a traffic stop, despite the fact that he was not suspected of any crime, was not removed from the car, was not arrested, and had not even been spoken to by either officer. *Townsend,* 2019 IL App (1st) 180771, ¶ 29. If Coffey, or Anderson, actually submitted to the show of authority, they would be formally arrested, and *Ries* disavowed that the immunity of section 4-106(b) is dependent upon formal arrest or imprisonment. *Ries*, 242 Ill. 2d at 216.

What Plaintiff-Appellee advocates for is holding a local government or employees liable for its conduct in allowing a prisoner to escape or in attempting to apprehend the prisoner. But, "[i]f a plaintiff could plead around section 4-106(b) merely by arguing that this case is really about the conduct of those who let the prisoner escape, then it is difficult to see how section 4-106(b) would have any real effect." *Ries*, 242 Ill. 2d at 219.

V. The Argument of the Illinois Trial Association is Immaterial

In response to Crete's motion for summary judgment (C 1978-1991), Plaintiff attempted to distinguish *Townsend*. (C 1982-1985). Plaintiff's brief in the appellate court

argued similarly. (Robinson App. Br. pp. 12-16). Before this Court, Plaintiff again attempts to distinguish *Townsend*. (Pl Br. pp. 15-16). The failure to argue that *Townsend* was wrongly decided before the trial court resulted in that argument's forfeiture. *First Bank of Highland Park v. Sklaraov*, 2019 IL App (2d) 190210, ¶ 32 ("And as the final nail in the coffin of this argument we must observe that Sklaraov did not raise this argument in the trial court and thus we need not consider it on appeal.")

Although Plaintiff did not argue in the trial court, the appellate court, or this Court that *Townsend* was wrongly decided, ITLA's *amicus* brief does. ITLA contends that *Townsend* was wrongly decided for the reasons set forth in the dissent. ITLA's attempt to raise an issue forfeited by Plaintiff should be rejected. *Oswald v. Hamer*, 2018 IL 122203, ¶ 41 ("An *amicus* takes the case as it finds it, with the issues framed by the parties. Accordingly, this court has repeatedly rejected attempts by *amici* to assert issues not raised by the parties."), citing *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 15 n. 1. Plaintiff's argument in the trial and appellate court was that *Townsend* was distinguishable from the case *sub judice*, not that it was wrongly decided. Nevertheless, even the rationale contained in the dissent in *Townsend*, which ITLA endorses, results in section 4-106(b)'s immunity applying to this case. Much of the dissent's criticism of the majority's ruling appears to be with the finding that Anderson would not have felt free to leave (second prong). But, whether Coffey would have felt free to leave is not an issue here. So, many of the reasons outlined in the dissent, which ITLA finds compelling, do not apply in this case.

For instance, one of the dissent's reasons for disagreeing with the majority's decision was that the escapee in *Ries* (Lowe) knew he was under suspicion of a crime, but

in *Townsend*, the officers did not indicate to Anderson that he was the subject of suspicion. *Townsend*, 2019 IL App (1st) 180771, ¶ 41 (Hyman, J., dissenting). Like Lowe in *Ries*, Coffey was a suspect in a crime. Rinchich attempted to stop the (stolen) car Coffey was driving, pursued him into Indiana, and then, when he stopped, ordered him to show his hands and exit the car at gunpoint. (C 1262, C 1307, Sup.1, E 8, m-25 2.avi, 4:49.21, C 1307).

The majority in *Townsend* held that Anderson was aware of the officers' efforts to restrain him, and his asking "why" they were attempting to do so suggested that he did not subjectively feel free to leave. *Townsend*, 2019 IL App (1st) 180771, ¶ 33. The dissent held that Anderson's words and actions suggested the opposite. *Id*. ¶ 41 (Hyman, J., dissenting). Here, there is no dispute, Plaintiff agrees that no reasonable person in Coffey's position would have felt free to leave. *Robinson v. Village of Sauk Village, et al.*, 2021 IL App (1st) 200223, ¶¶ 16,18. Coffey's actions indicate that he was well aware of the officers' efforts to restrain him, and he did not subjectively feel he was free to drive away. Coffey did not question why the officers who had been pursuing him were pointing guns at him, and demanding he show his hands and exit the car. As depicted in the video (Sup.1, E 8, m-25 2.avi, 5:06), his actions indicate that he did not subjectively feel like he was free to terminate the encounter and drive away.

The dissent in *Townsend* also held that "[o]nly a highly strained definition of 'custody,' when read in the context of 'prisoner,' would apply to a backseat passenger in a car pulled over for a run-of-the-mill traffic stop-and even more so here, where the officers made no attempt to communicate to Anderson that he could not leave." *Id*. ¶ 50 (Hyman, J., dissenting). Here, not only was this not a run-of-the-mill traffic stop, the

officers did communicate to Coffey that he could not leave. Coffey was the driver of a vehicle reported stolen, and it was made clear to him by multiple officers displaying weapons that he was subject to their control. (C 1469, C 1473, Sup.1, E 8, m-25 2.avi, 5:06.44). Although there is no evidence that the officers told Coffey he could not leave, he was ordered to show his hands and exit the car (C 1307, C 1457-58), with multiple police officers, one with an AR15 (C 1459, C 1469, C 1854), on the scene. While it is true that Coffey did not *submit* to the officers' authority, if he had, he would have been under formal arrest, and *Ries* disavowed that the Act requires formal arrest. *Ries*, 242 Ill. 2d at 216.

The dissent in *Townsend* noted that to benefit from immunity, "officers must ensure they have communicated to the person that he or she is subject to their control." *Townsend*, 2019 IL App (1st) 180771, ¶ 51 (Hyman, J., dissenting). In *Townsend* not only did the officers fail to communicate to Anderson that he was subject to their control, they did not communicate with him at all. *Townsend*, 2019 IL App (1st) 180771, ¶ 29. Here, the officers directly communicated to Coffey that he was subject to their control because multiple officers with guns pointed at him, ordered him to show his hands and exit the car. (C 1307, Sup.1, E 8, m-25 2.avi, 5:06, C 1446-58) Even if Anderson could have felt free to leave the traffic stop in *Townsend*, no reasonable person in Coffey's position would.

The dissent in *Townsend* found that "[a]bsent direct communication or action by the officers, like the ones they took for the driver and front seat passenger, I cannot agree that Anderson and the other back seat passenger were in 'custody' within the meaning of this provision of the Tort Immunity Act." *Id*. ¶ 52 (Hyman, J., dissenting). The direct

communication absent in *Townsend* was present here. The officers communicated to Coffey by their words and actions that he was not free to leave. Although Coffey was not removed from the car and handcuffed as the driver and front seat passenger in *Townsend* were (*Townsend*, 2019 IL App (1st) 180771, ¶ 3), that does not mean Coffey was not in custody. *Ries* held that something short of arrest is sufficient for custody for purposes of the Act. *Ries*, 242 Ill. 2d at 216. While *Ries* did not indicate how far short of an actual arrest "custody" was, it is broad enough to include the situation here.

Coffey was the driver of a stolen car. (C 1254-58). When he stopped in the church parking lot, Officer Rinchich advanced on him with his gun drawn and ordered him to show his hands. (C 1307, Sup.1, E 8, m-25 2.avi, 5:06). Officer Garcia did as well. (C 1459). A total of six police cars arrived at the church, all of which had their emergency lights activated (and some with sirens). (C 1453-54). Coffey ignored commands to show his hands and exit his vehicle (C 1307, C 1457-58) and repeatedly yelled "shoot me." (C 1455). Unlike Anderson, who was a backseat passenger in a car stopped for an equipment violation (*Townsend*, 2019 IL App (1st) 180771, ¶ 6), who was never suspected of any criminal activity, ordered out of the car at gunpoint, or even spoken to by any officer (*Id*. ¶ 29), Coffey was suspected of criminal activity, he was spoken to, and weapons were displayed. All of this suggests that Coffey was in custody, even if there could be disagreement whether Anderson was.

A reasonable person in Coffey's situation would believe they were escaping some type of custody by leaving the parking lot in the face of multiple officers pointing guns and issuing commands to get out of the car. (C 1311, C 1460, Sup.1, E 8, m-25 2.avi, 5:07.56). So, even if it was reasonable for Anderson to believe that he was not escaping

any type of custody by fleeing from the traffic stop (*Id.* ¶ 52 (Hyman, J., dissenting)), it was not reasonable for Coffey to believe that.

The dissent in *Townsend* held that "custody" for purposes of the Act suggests a "custodial situation much closer to formal arrest." *Townsend,* 2019 IL App (1st) 180771, ¶50 (Hyman, J., dissenting). Although formal arrest is not required to establish "custody" under the Act (*Ries,* 242 Ill. 2d at 216), even a person not under formal arrest is in custody when a reasonable person would not feel free to leave under the circumstances. *Brendlin v. California*, 551 U.S. 249, 255 (2007). The circumstances presented here were much closer to a formal arrest than in *Townsend*. Coffey was in "custody" when multiple police officers approached his vehicle, displayed their weapons, and gave him commands to show his hands and exit the car. *People v Almond*, 2015 IL 113817, ¶ 57. While *Townsend* reflects differing conclusions on whether Anderson was in "custody," the circumstances present here do not implicate the same concerns.

Ries made clear that section 4-106 provides blanket immunity that applies in circumstances falling short of formal arrest or imprisonment. Defendants submit that Coffey was in custody when he stopped the stolen car he was driving, and it was made clear to him that he was subject to the officers' control.

CONCLUSION

WHEREFORE, the Defendants-Appellants, Village of Sauk Village, Mark Bugajski, Andrew Vaughn, Village of Crete, Officer Allen Rinchich, and Officer Juan Garcia respectfully request this Honorable Court reverse the decision of the appellate court, affirm the decision of the trial court, and for such other and further relief as this Court deems just and proper.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance and the certificate of service is 19 pages.

/s/ Patrick H. O'Connor
Patrick H. O'Connor

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

JAVIER ROBINSON,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 127236
	)	
THE VILLAGE OF SAUK VILLAGE,	)	
THE VILLAGE OF CRETE,	)	
OFFICER MARK BUGAJSKI, et al.,	)	
	)	
Defendants-Appellants.	)	

The undersigned, being first duly sworn, deposes and states that on January 5, 2022, there was electronically filed and served upon the Clerk of the above court the Reply Brief of Defendants-Appellants. On January 5, 2022, service of the Reply Brief will be accomplished by email as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that thirteen copies of the Reply Brief bearing the court's file-stamp will be sent to the above court.

/s/ Patrick H. O'Connor
Patrick H. O'Connor

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Patrick H. O'Connor
Patrick H. O'Connor