DISTRICT COURT, EL PASO COUNTY, COLORADO P.O. Box 2980 Colorado Springs, CO 80901 Telephone: (719) 452-5449	DATE FILED: February 26, 2019 9:36 AM CASE NUMBER: 2018CV32870
Plaintiff: Saul Cisneros v. Defendant: Bill Elder, in his official capacity as Sheriff of El Paso County, Colorado	▲ **COURT USE ONLY** ▲ Case No. : **18CV32870** Division: 8 Courtroom: W550

ORDER RE MOTION TO DISMISS

Before the Court is Defendant Elder's motion, pursuant to C.R.C.P. 12(b)(1), to dismiss the Complaint for lack of jurisdiction under the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, et seq. ("CGIA"). I have reviewed the motion, the response, and the reply, along with the parties' supplemental briefs, and I am familiar with the case files in this case and the related case, 18CV30549, as well as applicable law.

I. Factual Background.

The facts, as alleged in the Complaint and not disputed by Elder, are as follows: On November 24, 2017, Plaintiff Saul Cisneros was booked into the El Paso County Criminal Justice Center ("Jail"). Compl., ¶ 11. He was charged with two misdemeanor offenses, and the court set his bond at $2,000. *Id.*, ¶¶ 11–12. On November 28, 2017, Mr. Cisneros's eldest daughter posted the bond and obtained a receipt. *Id.* Sheriff Elder, however, did not release Mr. Cisneros. *Id.*, ¶¶ 13–17. Instead, under his policies and practices at the time, the Sheriff held

Mr. Cisneros on an indefinite "ICE hold," because U.S. Immigration and Customs Enforcement ("ICE") had sent the Jail a detainer and an administrative warrant requesting that the Sheriff continue to hold Mr. Cisneros. *Id.*, ¶¶ 13–17, 37–50. The Complaint alleges that this continued detention after Mr. Cisneros had posted bond constituted the tort of false imprisonment, for which he is entitled to damages. *Id.*, ¶¶ 60-65.

Mr. Cisneros and one other plaintiff then sued Sheriff Elder in his official capacity for declaratory and injunctive relief on behalf of themselves and a class of similarly situated persons. *Id.*, ¶ 51 (Cisneros v. Elder, Case No. 18CV30549 (District Court, El Paso County) (assigned to this division) (the "Related Case")). On March 19, 2018, the Court in the Related Case issued a preliminary injunction enjoining the Sheriff from relying on ICE immigration detainers or ICE administrative warrants as grounds for refusing to release plaintiffs from custody when they post bond. The Court ruled that, if the plaintiffs posted bond, Sheriff Elder must release them pending resolution of their criminal matters. Compl., ¶¶ 51-52. After Mr. Cisneros's eldest daughter again posted bond on March 20, 2018, he was released from the Jail. *Id.*, ¶¶ 53.

On September 27, 2018, Mr. Cisneros and his co-plaintiff moved for summary judgment, a declaratory judgment, mandamus relief, and a permanent injunction in the Related Case. This Court granted the motion on December 6, 2018. The Court then entered a judgment declaring that Sheriff Elder exceeded his authority under Colorado law and violated the Colorado Constitution by failing to release prisoners who post bond, complete their sentence, or otherwise resolve their criminal cases. (Judgment, Case No. 18CV30549, ¶¶ A, D). Sheriff Elder filed an appeal on January 23, 2019. (19CA136.)

II. Applicable Law.

A. Procedure on a motion to dismiss under the CGIA.

A motion to dismiss on governmental immunity grounds must be treated as a motion to dismiss for lack of subject matter jurisdiction pursuant to C.R.C.P 12(b)(1). The plaintiff bears the burden of establishing jurisdiction. When a court reviews a complaint under Rule 12(b)(1), it should weigh the evidence and satisfy itself as to the existence of its power to hear the case; it need not treat the facts alleged by the non-moving party as true. However, where, as here, the defendant does not dispute the facts alleged in the complaint, the Court may proceed by applying the law to those alleged facts. *See Medina v. State*, 35 P.3d 443, 452 (Colo. 2001).

B. Governmental Immunity.

The CGIA provides, in pertinent part, that:

> (1) A public entity shall be immune from liability in all claims for injury which lie in tort or could lie in tort … except as provided otherwise in this section. Sovereign immunity is waived by a public entity in an action for injuries resulting from:
>
> ****
>
> (b) The operation of any … correctional facility … or jail by such public entity;

C.R.S. § 24-10-106(1)(b).

The waiver set forth in subsection (1)(b) "does not apply to claimants who have been convicted of a crime," but it "does apply to claimants who are incarcerated but not yet convicted … if such claimants can show injury due to negligence." C.R.S. § 24-10-106(1.5)(a), (b).

III. Analysis.

Cisneros alleges that his claim of false imprisonment falls within the waiver of CGIA immunity for injuries resulting from the operation of a jail. Sheriff Elder contends it does not. He raises several distinct arguments in his motion and reply.

A. Waiver of immunity for injuries resulting from operation of a jail.

Sheriff Elder contends, first, that Cisneros' claim is barred by the CGIA because his claimed injuries do not result from the "operation" of the Jail.

The CGIA defines "operation" to mean "the act or omission of a public entity or public employee in the exercise or performance of the powers, duties, and functions vested in them by law with respect to the purposes" of the facility. C.R.S. § 24-10-103(3)(a). Sovereign immunity is waived "only if the activity at issue relates to the facility's purpose." *Pack v. Arkansas Valley Correctional Facility,* 894 P.2d 34, 37 (Colo. App. 1995)

The primary purpose of a jail is to confine, safely and effectively, persons charged with crimes and awaiting trial, or serving short sentences. *Cf. Peck*, 894 P.3d at 37 ("The primary purpose of a correctional facility is to confine safely and effectively, for the duration of their sentence, persons convicted of crimes"; contrasting that maintenance of the parking lot, which the court found fell outside that purpose). Cisneros alleges he suffered injury from being detained unlawfully for almost four months after he had posted bond and was entitled to be released. To contend, as the Sheriff does, that his decision not to release Cisneros was "ancillary" to the Jail's operation is Orwellian. I find that the Sheriff's determination of whether or not to release an inmate lies at the very heart of the Sheriff's duties and is intimately related to the purpose and operation of the Jail. Accordingly, this contention fails.

B. "Willful and wanton" conduct.

Sheriff Elder contends, next, that because Cisneros named him as an individual defendant rather than naming the Sheriff's Office, Cisneros is required to show that he engaged in "willful and wanton" conduct with respect to Plaintiff's rights, pursuant to C.R.S. § 24-10-110(5)(a). This contention is mistaken.

The CGIA permits suits against both public entities and public employees. *See* C.R.S. § 24-10-106(1)(a), (3). Cisneros did not sue the Sheriff as a public employee in his individual capacity; he sued the Sheriff in his official capacity. Compl. ¶ 9.

"[W]aivers of immunity for acts or omissions that are willful and wanton only apply to public employees, not to public entities." *Gray v. Univ. of Colo. Hosp. Auth.,* 284 P.3d 191, 196 (Colo. App. 2012). "If the action is determined to be against the Sheriff in his official capacity, it is effectively an action against his office, and the immunity principles applicable to suits against the state or public entities apply." *Carothers v. Archuleta,* 159 P.3d 647, 652 (Colo. App. 2006).

Accordingly, Elder errs in contending that Cisneros is required to prove "willful and wanton" conduct.

C. Remedy limited to habeas corpus.

Elder contends that if any jail inmate wishes to challenge the legal authority of his or her detention, the inmate must do so while he or she is in custody, and the appropriate mechanism is a writ of habeas corpus under C.R.S. § 13-45-101. Elder is unable to cite any authority in support of this contention, and I find it to be without merit.

D. "Injury due to negligence."

In his reply, Sheriff Elder contends that Cisneros cannot meet the requirement of section 106(1.5)(b), which requires that, in order to fall within the waiver of immunity for operation of a jail, he must "show injury due to negligence." C.R.S. § 24-10-106(1.5)(b).

Upon review of the motion, response, and reply, I ordered the parties to provide additional briefing on the following issue:

> C.R.S. 24-10-106(1.5)(b) provides that the waiver of immunity for operation of a jail applies to claimants who are incarcerated but not yet convicted of a crime "if such claimants can show injury due to negligence." The Complaint does not allege negligence, but rather that Defendant, through the unlawful practice of complying with ICE detainer requests, "knowingly and intentionally restricted Plaintiff's freedom of movement." Was it the intent of the legislature to waive immunity when the claim is, as here, an intentional tort?

The parties submitted supplemental briefing on the issue and attached legislative history.

When the statutory language lends itself to alternative constructions and its intended scope is unclear, a court may look to pertinent legislative history to determine the purpose of the legislation. *State v. Nieto*, 993 P.2d 493, 501 (Colo. 2000). The legislative history of subsection 106(1.5)(b), as attached to Cisneros' supplemental briefs, shows the following:

As originally drafted, the House version of the bill (H.B. 94-1284) would not have included "correctional facility" and "jail" in the list of facilities exempted from sovereign immunity in section 24-10-106(a)(b). This was intended to prevent frivolous inmate lawsuits.

When the bill moved to the Senate, a floor amendment was proposed to distinguish between inmates who had, and had not, been convicted at the time of injury. The amendment (a) reinstated sovereign immunity for those convicted of crimes and incarcerated, and (b) waived

sovereign immunity for those "incarcerated but not yet convicted of a crime" if they could show an injury due to negligence. As drafted, this amendment stated that the incarcerated-but-not-yet-convicted person could recover "only" for injuries resulting from negligence. (Pl.'s Ex. 2.)

The bill was further amended in the Senate Third Reading. (Pl.'s Ex. 3). Notably, the word "only" was removed. The bill's sponsor, Senator Mutzebaugh, was questioned about his intent in requiring negligence as a prerequisite for a waiver of immunity. His answer was clear in one respect, namely that he intended "to set a minimum kind of standard that someone has to meet before they can pursue their claim"; and so gross negligence would qualify as well as simple negligence. (Pl.'s Ex. 3, pp. 7-8). He was less clear, however, as to whether an intentional act would also qualify. He appeared to equate intentional acts with civil rights violations, and he stated, "I don't want to get into that area particularly." (Pl.'s Ex. 3, pp. 6-7).

I find this legislative history is inconclusive as to whether the legislature intended to waive immunity with respect to injuries in a jail resulting from intentional acts. The applicable rules of construction, however, are more helpful.

A statute must be construed to further the legislative intent represented by the entire statutory scheme. In doing so, a reviewing court must follow the statutory construction that best effectuates the intent of the General Assembly and the purposes of the legislative scheme. The statute should be construed so as to reach a just and reasonable result, and to avoid an interpretation that leads to an absurd result. *Nieto*, 993 P.2d at 501. "Because governmental immunity under the CGIA is in derogation of common law," the reviewing court must "narrowly construe the CGIA's immunity provisions," and, as a logical corollary," it must "broadly

construe the CGIA's waiver provisions." *Daniel v. City of Colo. Springs*, 327 P.3d 891, 895 (Colo. 2014).

Construing the waiver of immunity broadly, and avoiding an absurd result, I conclude the legislature intended to waive governmental immunity for claims by incarcerated-but-not-yet-convicted detainees, not only if the claimant suffered an injury due to negligence but also for injuries due to anything greater than negligence, including both gross negligence and intentional actions. To conclude otherwise would be to apply a narrow, rather than a broad, construction of this ambiguous waiver provision, and it would lead to the absurd result that a detainee could sue for negligent actions committed in a jail but not for intentional torts. Such a result would not be just and reasonable, nor would it effect the purposes of the CGIA.

IV. Conclusion.

Accordingly, for the reasons set forth above, I find that Cisneros' claim of false imprisonment falls within the waiver of CGIA immunity for injuries resulting from the operation of a jail. Accordingly, Sheriff Elder's motion to dismiss on grounds of governmental immunity is DENIED.

DONE and ORDERED February 26, 2019.

BY THE COURT:

_____

Eric Bentley
District Court Judge