SUMMARY
May 18, 2023

2023COA41

No. 21CA0370, *Heidel v. Rio Blanco* — Torts — Wrongful Death; Government — Colorado Governmental Immunity Act — Immunity and Partial Waiver — Operation of Jail or Correctional Facility

The question presented in this wrongful death action is whether the plaintiffs' claims against the Rio Blanco Sheriff's Office are barred by the Colorado Governmental Immunity Act (CGIA). Under the CGIA, the State waives immunity for injuries sustained as a result of the negligent operation of a jail if the claimant is "incarcerated but not yet convicted of the crime for which such claimant[] [is] being incarcerated," but the waiver does not apply to "claimants who have been convicted of a crime and incarcerated in a . . . jail pursuant to such conviction." § 24-10-106(1)(b), (1.5)(a)-(b), C.R.S. 2022. At the time the decedent died by suicide in the county jail, she had been arrested and detained for, but not yet

convicted of, the offense of violation of a protection order. The protection order had been entered in an earlier harassment case, for which the decedent was serving a sentence of probation.

A division of the court of appeals holds that the waiver of immunity under section 24-10-106(1.5)(b) applies. Because the decedent was detained only for the offense of violation of a protection order and she had not yet been convicted of that offense, she was "incarcerated but not yet convicted of the crime for which" she was being incarcerated, notwithstanding that the protection order arose out of the earlier harassment conviction. Accordingly, the CGIA does not bar plaintiffs' claims.

COLORADO COURT OF APPEALS **2023COA41**

Court of Appeals No. 21CA0370
Rio Blanco County District Court No. 20CV1
Honorable John F. Neiley, Judge

Gary Heidel, Michele Aschbacher, Camille Rowell, Kersten Heidel, and Michael Rowell,

Plaintiffs-Appellees,

v.

Rio Blanco County Sheriff's Office; Anthony Mazzola, in his official capacity as Sheriff of Rio Blanco County and in his individual capacity; Jeremy Muxlow; Kim Cook; Clinton Kilduff; and Jonny Murray,

Defendants-Appellants.

ORDER AFFIRMED

Division VI
Opinion by JUDGE HARRIS
Dunn and Taubman*, JJ., concur

Announced May 18, 2023

Killian, Davis, Richter, Kraniak, PC, J. K. Killian, Damon J. Davis, Grand Junction, Colorado, for Plaintiffs-Appellees

Driscoll Law LLC, Jeffrey L. Driscoll, Fruita, Colorado, for Defendants-Appellants

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2022.

¶ 1 In this wrongful death action, defendants, the Rio Blanco County Sheriff's Office, Sheriff Anthony Mazzola, and several officers (collectively, the RBSO),[1] appeal the trial court's order denying their motion to dismiss the complaint filed by plaintiffs, the surviving spouse and heirs of decedent Catherine Rowell (the family).[2]

¶ 2 Under section 24-10-106(1)(b), C.R.S. 2022, of the Colorado Governmental Immunity Act (CGIA), the State waives immunity for injuries resulting from the negligent "operation of any . . . jail." The RBSO argued that the family's claims were barred under an exception to the waiver of immunity that applies to "claimants who have been convicted of a crime and incarcerated in a . . . jail pursuant to such conviction." § 24-10-106(1.5)(a), C.R.S. 2022. The trial court rejected that argument, reasoning that Rowell was a pretrial detainee, *see* § 24-10-106(1.5)(b), to whom the exception did not apply.

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[1] The officer defendants are Sergeant Jeremy Muxlow, Deputy Kim Cook, Deputy Clinton Kilduff, and Deputy Jonny Murray.

[2] The plaintiffs are Gary Heidel — Rowell's common law husband — and Michele Aschbacher, Camille Rowell, Kersten Heidel, and Michael Rowell — Rowell's children.

¶ 3 The RBSO appeals. Because we agree with the trial court's well-reasoned decision, we affirm.

I. Background

¶ 4 In August 2015, Rowell was arrested and charged with third degree assault of her common law husband, Gary Heidel, with whom she shared a home. The next day, the court entered a mandatory protection order pursuant to section 18-1-1001(1), C.R.S. 2022, that required Rowell to vacate the home and prohibited her from having any contact with Heidel.

¶ 5 About six weeks later, Rowell pleaded guilty to harassment, a class 3 misdemeanor, *see* § 18-9-111(1)(a), C.R.S. 2022, and the assault charge was dismissed. The county court sentenced Rowell to one year of probation. As noted on the sentencing order, the mandatory protection order remained in effect for the probationary period.

¶ 6 On February 12, 2016, police responded to Heidel's home on a report that he had assaulted a third party. Rowell was at the home. Police arrested Rowell and charged her with violation of a protection order, a class 1 misdemeanor. *See* § 18-6-803.5(2)(a), C.R.S. 2022. The booking form showed Rowell's status as "pre-dispo":

Charge Details

Code #	Code Description			
18-6-803.5 [M1]	CRIME OF VIOLATION OF A PROTECTION ORDER (M1)			
Charge Description				
Charge Level	**Sentence Length**	**Charge Status**	**Misc Code**	**Bail Type**
Misdemeanor 1		PRE-DISPO		cash/surety bond
Bail				
1000.00				

¶ 7 Three days later, on February 15, 2016, Rowell died by suicide at the Rio Blanco County Jail.

¶ 8 In April 2020, the family sued the RBSO in state court, asserting wrongful death claims.[3] The RBSO moved to dismiss the complaint, arguing, as relevant here, that the claims were barred by the CGIA and not subject to any statutory waiver of immunity. According to the RBSO, the immunity waiver for negligent operation of a jail did not apply because, at the time of her death, Rowell had "been convicted of a crime" — harassment — and was "incarcerated in a . . . jail pursuant to such conviction." *See* § 24-10-106(1.5)(a).

¶ 9 In a comprehensive and carefully reasoned written order, the trial court denied the motion. The court concluded that although

[3] The family initially filed suit in federal court, asserting both federal and state claims. The federal district court granted summary judgment for the RBSO on the federal claims based on qualified immunity and declined to exercise pendent jurisdiction over the remaining state claims. *See Heidel v. Mazzola*, No. 18-cv-00378-REB-GPG (D. Colo. Jan. 27, 2020) (unpublished order).

Rowell had been convicted of harassment in 2015, she was detained in February 2016 on the separate offense of violation of a protection order, an offense "for which she was presumed innocent until a conviction [was] entered on that allegation either by way of a plea or verdict." And even if the protection order violation could be construed as a violation of probation (though it was not charged as such), the court reasoned that Rowell could not be "convicted" of a probation violation — and, therefore, could not be incarcerated "pursuant to" the harassment conviction — until the new criminal conduct charge had "been heard and finally adjudicated." Accordingly, the court determined that because Rowell was "incarcerated but not yet convicted of the crime for which [she was] being incarcerated," § 24-10-106(1.5)(b), the waiver of immunity applied and the CGIA did not bar the family's claims.

II. Discussion

¶ 10 The RBSO contends that the trial court erred by finding that Rowell was not incarcerated pursuant to her harassment conviction. We disagree.

A. Applicable Law and Standard of Review

¶ 11 The CGIA generally bars actions against public entities for injuries that lie in tort or could lie in tort. *Bilderback v. McNabb*, 2020 COA 133, ¶ 7; *see* § 24-10-106(1). But the CGIA also "withdraws and restores this immunity through a series of immunity waivers, exceptions to those waivers, and, in some cases, conditions relating to the exceptions." *Bilderback*, ¶ 7 (quoting *Corsentino v. Cordova*, 4 P.3d 1082, 1086 (Colo. 2000)).

¶ 12 For example, as relevant here, the CGIA expressly waives immunity "in an action for injuries resulting from" the negligent "operation of any . . . jail by [a] public entity." § 24-10-106(1)(b). The statute also explains when the waiver of immunity applies to incarcerated people:

> (1.5)(a) The waiver of sovereign immunity created in paragraph[] (b) . . . of subsection (1) of this section *does not apply* to claimants[4] who have been convicted of a crime and incarcerated in a correctional facility or jail pursuant to such conviction . . . .

[4] In this case, Rowell is the claimant, even though her spouse and heirs are the plaintiffs. *See Duke v. Gunnison Cnty. Sheriff's Off.*, 2019 COA 170, ¶¶ 23-25 (for purposes of section 24-10-106(1.5), C.R.S. 2022, the "claimant" in a wrongful death action is the decedent, because a party is liable for a death only if the decedent could have "maintain[ed] an action and recover[ed] damages . . . if death had not ensued" (quoting § 13-21-202, C.R.S. 2022)).

> (b) The waiver of sovereign immunity created in paragraph[] (b) . . . of subsection (1) of this section *does apply* to claimants who are incarcerated but not yet convicted of the crime for which such claimants are being incarcerated . . . .

§ 24-10-106(1.5)(a)-(b) (emphases added); *see also Cisneros v. Elder*, 2022 COA 106, ¶ 11 (immunity was waived where there was "no dispute that [the] plaintiff was being held pending trial and had not been convicted of the crime for which he was being held").

¶ 13 Whether immunity is waived under the CGIA is an issue of subject matter jurisdiction. *Burnett v. State Dep't of Nat. Res.*, 2015 CO 19, ¶ 11. Where the factual allegations are undisputed or the issue is purely one of law, we review the jurisdictional matter de novo. *Woo v. El Paso Cnty. Sheriff's Off.*, 2020 COA 134, ¶ 8, *aff'd on other grounds*, 2022 CO 56.

¶ 14 Because governmental immunity under the CGIA is in derogation of Colorado's common law, we strictly construe the statute's immunity provisions and broadly construe its waiver provisions to promote "the interest of compensating victims of

governmental negligence." *Springer v. City & Cnty. of Denver*, 13 P.3d 794, 798 (Colo. 2000); *Cisneros v. Elder*, 2022 CO 13M, ¶ 25.

B. The Family's Claims Are Not Barred by the CGIA

¶ 15 It is undisputed that Rowell was convicted of harassment in 2015. The question is whether, at the time of her death in February 2016, she was incarcerated "pursuant to [that] conviction." *See* § 24-10-106(1.5)(a).

¶ 16 To answer that question, we must interpret section 24-10-106(1.5), a task that is guided by familiar principles. Our fundamental duty in construing statutes is to give effect to the legislature's intent. *Educ. ReEnvisioned BOCES v. Colo. Springs Sch. Dist. 11*, 2022 COA 128M, ¶ 9. To do so, we consider the statute as a whole "in order to give consistent, harmonious, and sensible effect to all of its parts, and we apply words and phrases in accordance with their plain and ordinary meanings." *Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, ¶ 12 (citation omitted). We may neither add nor subtract words from the statute. *Id.* And when the plain language is unambiguous, we apply the statute as written. *Vigil v. Franklin*, 103 P.3d 322, 327 (Colo. 2004).

¶ 17 The RBSO contends that Rowell was incarcerated "pursuant to" her harassment conviction because the protection order violation was closely related to that conviction. According to the RBSO, compliance with the protection order was required only because of the harassment conviction; therefore, a violation of the protection order was part and parcel of the original conviction. In other words, it says Rowell was incarcerated "pursuant to" the harassment conviction because "but for" that conviction, she would not have been subject to a protection order and would not have been arrested or incarcerated in February 2016.

¶ 18 Like the trial court, we conclude that this interpretation cannot be squared with the statute's plain language or with the applicable case law.

¶ 19 We do not read section 24-10-106(1.5)(a) as creating or endorsing a "but for" test. If the legislature had meant the immunity waiver exception to apply when a person's conviction was the "but for" cause of her incarceration, we think it would have said so, rather than using the term "pursuant to." *See Goodman v. Heritage Builders, Inc.*, 2017 CO 13, ¶ 7 (courts do not presume that the legislature used language idly). "Pursuant to" means "in

accordance with" or "[i]n carrying out." Black's Law Dictionary 1493 (11th ed. 2019). So under the statute's plain language, the exception applies when the claimant has been convicted of a crime; she is incarcerated; and the incarceration is in accordance with, or to carry out, that conviction. Thus, "pursuant to" describes a more circumscribed or restrictive relationship between the conviction and the incarceration than a "but for" connection. *See, e.g.*, *In re Steven Daniel P.*, 309 P.3d 1041, 1044 (Nev. 2013) (explaining that the term "pursuant to" has a "restrictive effect" and collecting cases); *see also Stocker v. Sheehan*, 786 N.Y.S.2d 126, 131 (App. Div. 2004) (explaining that the phrase "pursuant to" is more restrictive than "consistent with").

¶ 20 And the RBSO's argument largely ignores subsection (1.5)(b). Under that provision, the waiver of immunity applies to claimants who are "incarcerated but not yet convicted of the crime for which [they] are being incarcerated." § 24-10-106(1.5)(b). Contrary to the RBSO's interpretation, subsection (1.5) presents a binary decision: for purposes of applying the operation-of-a-jail waiver or its exception, a claimant is either incarcerated pursuant to a particular

conviction or incarcerated but not yet convicted of a particular offense.[5]

¶ 21 Read together, the provisions make clear that "the operative event revoking the waiver of immunity is a[n] adjudication of guilt." *Grady v. Jefferson County*, Civ. A. No. 07-cv-01191-WDM-CBS, 2008 WL 178923, at *5 (D. Colo. Jan. 17, 2008) (unpublished order) ("It is . . . consistent with the purpose of the statute to construe the dividing line to fall at the determination of guilt . . . ."). Put another way, immunity is waived when claimants are detained pre-adjudication, and that waiver is revoked for those detained post-adjudication.

¶ 22 Here, as the trial court found, the sole basis for Rowell's incarceration in February 2016 was her arrest for the misdemeanor offense of violation of a protection order. She could not have been

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[5] We agree with the RBSO that a claimant can be incarcerated pursuant to a conviction and, simultaneously, detained awaiting adjudication on new charges — for example, where a person is convicted of a felony and sentenced to incarceration, and then, while incarcerated, is charged with possessing contraband. But even then, the claimant must qualify as *either* a pretrial detainee *or* a convicted inmate for purposes of section 24-10-106(1)(b). The statute does not create a third category comprised of persons detained for offenses "related to" an underlying conviction for which they are not incarcerated.

incarcerated pursuant to her 2015 harassment conviction because, with respect to that conviction, she was still on probation in February 2016.[6] *See People v. Brown*, 119 P.3d 486, 491 (Colo. App. 2004) ("A sentence to probation is not a form of incarceration."), *cert. granted, judgment vacated on other grounds, and case remanded*, No. 04SC587, 2005 WL 697079 (Colo. Mar. 28, 2005) (unpublished order); *see also People v. Smith*, 2014 CO 10, ¶ 8 (explaining that probation is an "alternative" to incarceration).

¶ 23 Nor had there been an adjudication of guilt on the offense for which Rowell was arrested and detained — violation of a protection order. It is axiomatic that an accused may not be adjudged guilty based on "the fact of h[er] arrest, [criminal charges], or custody." *People v. Young*, 16 P.3d 821, 825 (Colo. 2001) (quoting *Bell v. Wolfish*, 441 U.S. 520, 533 (1979)).[7]

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[6] Before Rowell's arrest for violating the protection order, the prosecution filed a complaint alleging that Rowell had violated the terms of her probation by failing to pay court fees and complete her community service. The parties agree that Rowell's February 2016 arrest and incarceration were not related to the probation complaint.

[7] That a violation of a protection order is a mandatory arrest offense, *see* § 18-6-803.5, C.R.S. 2022, as the RBSO points out in its briefing, does not mean that Rowell was adjudged guilty of the

¶ 24 Even if we assume that Rowell is identically situated to a probation violator — the position the RBSO appeared to take at oral argument — the RBSO's argument does not fare any better.

¶ 25 A person on probation is not subject to incarceration at any time based only on her status as a probationer. *See People v. Scura*, 72 P.3d 431, 433 (Colo. App. 2003) (probationers have a conditional liberty interest and cannot be deprived of that interest without due process). Before a court may reconsider an initial sentence to probation, it must first find that the prosecution has met its burden to prove that the probationer committed any of the alleged violations. *See* § 16-11-206(5), C.R.S. 2022 ("*If the court determines that a violation of a condition of probation has been committed*, it shall . . . either revoke or continue the probation.") (emphasis added); *People v. Ruch*, 2013 COA 96, ¶ 32 ("Revocation of a defendant's probation involves a two-step process. First, the trial court must determine whether the defendant violated the conditions of his or her probation. . . . Second, if the trial court

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offense upon her arrest. Therefore, this fact is irrelevant to the applicability of the immunity waiver.

[finds a violation], it then has the discretion to revoke probation based on the violation."), *rev'd on other grounds*, 2016 CO 35.

¶ 26 Thus, probationers are unlike detainees incarcerated pursuant to a conviction. With respect to the latter category, the prosecution has carried its burden to prove beyond a reasonable doubt the criminal conduct that allows the court to curtail the defendant's liberty. But with respect to pre-revocation hearing probationers, the prosecution has merely alleged violations. A probationer does not forfeit her liberty interest unless and until the prosecution proves the violations at a hearing. *See* § 16-11-206(2)-(3) (explaining that at a revocation hearing, the probationer must "plead guilty or not guilty" to the "charges against [her]," and the prosecution must prove the violations by a preponderance of the evidence or beyond a reasonable doubt if the violation alleged is new criminal conduct).

¶ 27 For this reason, "[m]ost courts classify individuals [who have not yet been found guilty of probation violations] as . . . pre-trial detainee[s]." *Johnson v. NaphCare, Inc.*, No. 19-cv-054, 2022 WL 306981, at *12 (S.D. Ohio Feb. 2, 2022) (unpublished order) (considering whether the plaintiff, a probationer, was a pretrial

detainee or a convicted prisoner for purposes of a deliberate indifference to a serious medical need claim).

¶ 28 The only Colorado case to have directly addressed whether, for purposes of section 24-10-106(1.5), an alleged probation violator is a pretrial detainee or one incarcerated pursuant to a conviction is *Montoya v. Newman*, 115 F. Supp. 3d 1263 (D. Colo. 2015). In that case, the plaintiff was arrested and detained in the county jail for an alleged violation of his probation. *Id.* at 1268. A week later, and "[w]ithout any intervening court proceedings," he was released by his probation officer to an inpatient treatment program. *Id.* The plaintiff later sued the county sheriff (and other government employees) for negligence, alleging that he had contracted a severe illness while incarcerated. *Id.* at 1270. The defendants moved to dismiss the plaintiff's claim as barred by the CGIA, on the theory that the waiver of immunity for the negligent operation of a jail did not apply because the plaintiff had been incarcerated pursuant to the conviction for which he was serving a sentence of probation. *Id.* at 1289.

¶ 29 The federal district court rejected that argument. It determined that the plaintiff had not been sentenced to

incarceration on the underlying conviction, and, therefore, he was detained based only on the alleged probation violation, which was "unadjudicated" at the time of his release from jail. *Id.* at 1290. Because, under section 16-11-205, C.R.S. 2022, a probationer charged with violating conditions of probation has "all of the rights afforded . . . to persons incarcerated before trial of criminal charges," the district court concluded that the plaintiff was properly classified as a pretrial detainee under section 24-10-106(1.5)(b). *Id.*

¶ 30 Like the trial court in this case, we find the *Montoya* court's analysis persuasive and adopt it.

¶ 31 We are not convinced that any Colorado case is to the contrary. *Whiteman v. El Paso Criminal Justice Center*, No. 10-cv-02430-WYD-KLM, 2011 WL 2610202 (D. Colo. July 1, 2011) (unpublished order), on which the RBSO relies, is consistent with our reading of the statute. That case involved a plaintiff who was incarcerated *after* his probation (or parole — the opinion uses the terms interchangeably) had been revoked. *Id.* at *10.[8] Thus, "at the

[8] To the extent the RBSO argues that it is unclear whether the plaintiff in *Whiteman v. El Paso Criminal Justice Center*, No. 10-cv-02430-WYD-KLM, 2011 WL 2610202 (D. Colo. July 1, 2011) (unpublished order), had been adjudicated guilty of the probation

time th[e] action was brought," the plaintiff had been convicted of the underlying crime and was "incarcerated pursuant to that conviction after he violated his parole [or probation] conditions." *Id.*

¶ 32 *Medina v. Petross*, No. 08-cv-01125-REB-CBS, 2010 WL 1258083 (D. Colo. Feb. 25, 2010) (unpublished recommendation), *adopted*, 2010 WL 1258085 (D. Colo. Mar. 29, 2010) (unpublished order), and *Duke v. Gunnison County Sheriff's Office*, 2019 COA 170, also do not advance the RBSO's argument because neither case addressed this issue.

¶ 33 In *Medina*, the plaintiff suffered an injury while incarcerated at the jail "for violation of an injunction, contempt of court, and being a fugitive from justice in relation to his prior convictions for child abuse, domestic violence, and trespass." 2010 WL 1258083, at *2. The federal district court concluded that the CGIA barred the plaintiff's negligence claim because, at the relevant time, he was "incarcerated as a convicted inmate." *Id.* at *4. But the plaintiff's

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violation, we disagree. The court indicated that the plaintiff had had his probation (or parole) revoked and was "*sentenced* to incarceration only after committing [a violation]." *Id.* at *10 & n.3 (emphasis added). Both of those outcomes must be preceded by an adjudication of guilt on the alleged violation.

adjudication status was not a contested issue in the case, and the court's decision does not explain whether there was an adjudication involving the violations, so the basis of the court's conclusion is unknown.

¶ 34 Similarly, in *Duke*, ¶ 23, the plaintiffs did not contest that their son, the claimant, was a convicted inmate for purposes of the CGIA. The opinion addresses a different issue — whether the parents could bring a wrongful death action even though their son would have been precluded from doing so. *Id.* at ¶¶ 25-26.[9]

¶ 35 In sum, when a claimant is incarcerated for an alleged, but unadjudicated, violation of probation, she is "incarcerated but not yet convicted of the crime for which [she is] being incarcerated." § 24-10-106(1.5)(b). Conversely, when incarceration results from the revocation of probation, the claimant is convicted of a crime and incarcerated "pursuant to such conviction." § 24-10-106(1.5)(a).

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[9] We note as well that the claimant in *Duke*, ¶ 2, was a parolee, not a probationer. (The plaintiff in *Whiteman* might also have been a parolee. *See* 2011 WL 2610202, at *10.) We need not address whether a parolee whose alleged parole violations have not been adjudicated is, like a pre-revocation hearing probationer, a pretrial detainee for purposes of section 24-10-106(1)(b) and (1.5).

¶ 36 Because, at the time of her death, Rowell was incarcerated for violation of a protection order, an offense (or probation violation) that had not yet been adjudicated, she was "not yet convicted" of the offense (or violation) for which she was being incarcerated. Therefore, section 24-10-106(1)(b)'s waiver of immunity applied.

III. Disposition

¶ 37 The order is affirmed.

JUDGE DUNN and JUDGE TAUBMAN concur.