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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CRAIG TETER, Plaintiff and Respondent, v. CITY OF NEWPORT BEACH, Defendant and Appellant.	G025239 (Super. Ct. No. 786037) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John M. Watson, Judge. Affirmed.

Glen E. Tucker for Defendant and Appellant.

Michael R. Cully & Associates, Michael R. Cully; Jean Ballantine for Plaintiff and Respondent.

* * *

Respondent Craig Teter sued appellant City of Newport Beach (the City) for negligence, seeking damages for injuries received while he was detained in the City's jail. A jury returned a verdict in Teter's favor after determining the City's negligence was a cause of his injuries. The City appeals the verdict, challenging the trial court's pretrial determination the City was not immune from Teter's claims. The City argues both Government Code section 844.6, subdivision (a)(2) (immunity for injury to a prisoner) and section 820.2 (discretionary act immunity) preclude Teter's claims. Teter argues he was not a "prisoner" within the meaning of section 844.6, subdivision (a)(2), and the acts that led to his injuries were not "discretionary." We agree and therefore affirm.

I

FACTS

Teter was arrested on the evening of June 8, 1997, at approximately 8:00 p.m. for violating Penal Code section 647, subdivision (f).[1] (All subsequent references are to the Penal Code unless otherwise noted.) He was transported to the City's jail, processed and placed in a cell to "sleep it off."

The City's policy required that anyone arrested for violating section 647, subdivision (f) be released pursuant to section 849, subdivision (b)(2) and section 851.6 if the individual met certain criteria: 1) he or she had not been arrested for public intoxication three times in the prior year; 2) he or she had not been combative during the arrest and the incident did not involve combative behavior; and 3) he or she is not

[1] In relevant part, this section states it is a misdemeanor to be "found in any public place under the influence of intoxicating liquor . . . in such a condition that he or she is unable to exercise care for his or her own safety or the safety of others, or by reason of his or her being under the influence of intoxicating liquor . . . interferes with or obstructs or prevents the free use of any street, sidewalk, or other public way." (Pen. Code, § 647, subd. (f).)

currently on probation for alcohol or drugs.[2] Prior to 6:30 the next morning, the City had determined that Teter was eligible for such a release, and pending a final check of his condition at 8:00 a.m., the City planned to release him without filing charges.

At approximately 7:00 a.m., another prisoner, Waldon, was placed in the same cell where Teter was sleeping. Waldon had been arrested for sleeping on the beach and had not been positively identified at the time he was placed in the cell with Teter, although the police suspected he might be a sex offender. Although the cell had an interior door which could have been used to separate the two men, this door was left open. Waldon severely beat Teter, resulting in a broken eye socket and a concussion. Teter spent approximately 12 days in the hospital and suffered permanent scarring and continued vision problems.

Teter sued the City for damages. Before the trial, the legal issue of governmental immunity was decided by the court in Teter's favor. The City argued two sections of the Government Code provided immunity from Teter's claims. Government Code section 844.6 provides that government entities are immune for any injury to a prisoner. The court determined that because the City had decided to release Teter from custody pursuant to section 849, subdivision (b)(2) before the attack occurred, he was not a "prisoner" within the meaning of Government Code section 844.6.

The City also argued that the jailer's decision to place Waldron in the same cell as Teter was a "discretionary act" within the meaning of Government Code section 820.2, and the City was therefore immune from any liability arising from that act. The court disagreed and denied the City's motion for nonsuit.

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[2] Under section 849, subdivision (b)(2), a person arrested only for intoxication may be released from custody without appearing before a magistrate if "no further proceedings are desirable." Section 851.6, subdivision (b) states that anyone released without having charges filed "shall be issued a certificate by the law enforcement agency which arrested him describing the action as a detention."

Various causes of action were disposed of through pretrial motions. The case went to the jury on the issue of the City's negligence in monitoring the conditions in the jail. The jury decided in Teter's favor and awarded him $172,867.88 in damages. The City now appeals solely on the grounds of governmental immunity.

II

DISCUSSION

A. Immunity for Injury to a Prisoner

Government Code section 844.6 states that a public entity is not liable for an injury caused to or by a "prisoner." Government Code section 844 defines "prisoner" "as an inmate of a prison, jail, or penal or correctional facility. For the purposes of this chapter, a lawfully arrested person who is brought into a law enforcement facility for the purpose of being booked . . . becomes a prisoner, as a matter of law, upon his or her initial entry into a prison, jail, or penal or correctional facility, pursuant to penal processes."

The City argues Teter was arrested and booked and was therefore a "prisoner" under this section. However, section 647, subdivision (g) states: "When a person has violated subdivision (f) of this section, a peace officer, if he or she is reasonably able to do so, shall place the person . . . in civil protective custody. The person shall be taken to a facility, designed pursuant to Section 5170 of the Welfare and Institutions Code, for the 72-hour treatment and evaluation of inebriates. . . . No person who has been placed in civil protective custody shall thereafter be subject to any criminal prosecution . . . based on the facts giving rise to this placement." According to the record on appeal, no such facility is available in or near Newport Beach.

The question, then, is whether someone arrested for a violation of section 647, subdivision (f) but not taken to a treatment facility pursuant to subdivision (g), who is later released without charges being filed, is a "prisoner" or a "civil detainee." The

trial court ruled that at the time the City chose to release Teter pursuant to sections 849, subdivision (b)(2) and 851.6, his status was converted from "prisoner" to "civil detainee." Because the attack took place after this decision was made, although it was subject to a final review at the time of release, Teter was not a "prisoner" when he was attacked and the immunity did not apply.

We agree with the trial court's decision, although depart somewhat from its reasoning. The parties do not cite us to a case, and we are unable to find one, directly on point. The facts in this case, however, closely parallel *Meyer v. City of Oakland* (1980) 107 Cal.App.3d 770. Unlike the City in this case, Oakland had a detoxification facility that it regularly used. It was Oakland's policy to take those arrested for violating section 647, subdivision (f) to the facility when space was available. (*Id.* at p. 773.) The jail was supposed to call the facility to determine if space was available, but it was unclear if such a call was ever made. (*Ibid.*) Meyer was assaulted after he was placed in a holding cell, resulting in severe injuries. (*Id.* at pp. 773-774.)

The court decided that a person held at the jail in "civil protective custody" pursuant to section 647, subdivision (g) was not being held pursuant to a "penological or correctional objective" and was therefore not a "prisoner" within the meaning of Government Code section 844. Immunity, therefore, did not apply. (*Meyer v. City of Oakland*, *supra*, 107 Cal.App.3d at p. 778.) The court reasoned that one purpose of section 647, subdivision (g) was to provide medical treatment, rather than criminal penalties, for being drunk in public. (*Id.* at p. 777.) The report of the Law Revision Commission, when recommending changes to the prisoner immunity statute, was based on the view that immunity was a necessary part of penology and corrections. (*Ibid.*)

The case at bar is not directly parallel to *Meyer* because a detoxification facility was not available (according to the record). Thus, Teter was not placed in civil custody pursuant to section 647, subdivision (g), but arrested pursuant to subdivision (f),

and later released without charges, pursuant to sections 849, subdivision (b), and 851.6. The ultimate question, then, is whether there is any principled reason to treat someone differently because he or she is arrested and detained in a city with a detoxification facility but never brought there, as in *Meyer*, or arrested and detained in a City without such a facility. We conclude any such distinction would be without merit and contrary to logic; such a ruling could discourage cities from providing detoxification facilities, clearly contradicting the legislature's intent in enacting section 647, subdivision (g).

Moreover, section 849, subdivision (b)(2), when read together with section 851.6, supports our conclusion on somewhat different grounds. Section 849, subdivision (b)(2) permits the release of a person arrested only for intoxication when "no further proceedings are desirable" and section 851.6 describes the status of anyone released without charges being filed as "a detention." Logically, the person's status as a "detainee" should be construed retroactive to the time of their arrest for the purpose of applying Government Code section 844.6.

Unlike the trial court's suggestion that an arrestee's status changes from "prisoner" to "detainee" at the time his or her fate is decided, we hold that it is the outcome that controls, for both practical and policy reasons. As a practical matter, it is often difficult to determine exactly when a decision is made about an arrestee's status, and liability should not be determined by such technical matters. From a policy standpoint, we do not wish to encourage police departments to hold off on such decisions until the last possible moment to decrease the likelihood of liability.

Finally, the purpose of arresting someone intoxicated in public is because he or she is "unable to exercise care for his or her own safety or the safety of others . . . . " (§ 647, subd. (f).) Presumably, the statute's purpose in taking such individuals into custody is their safety as well as the safety of others; that purpose is completely frustrated if a city, which has chosen not to make a detoxification facility

available, is immune from the results of its negligence. Teter's serious injuries could have been prevented by simply closing an internal door, separating him from Waldon. To hold the City immune from the consequences of its conduct would only encourage similar incidents of negligence toward people who are in custody for the express purpose of promoting their safety.

B. Discretionary Act Immunity

The City argues the jailer's decision to place Waldron in the same cell as Teter was "discretionary," within the meaning of Government Code section 820.2, and therefore, the City is immune from liability. Government Code section 820.2 provides that a "public employee is not liable for an injury resulting from his act or omission where the act or omission was a result of the exercise of the discretion vested in him, whether or not such discretion be abused." (Gov. Code, § 820.2.)

The leading California Supreme Court case interpreting Government Code section 820.2 is *Johnson v. State of California* (1968) 69 Cal.2d 782. In *Johnson*, the court drew an important distinction. Basic policy decisions were to be considered "a result of the exercise of the discretion" vested in the employee and within the meaning of Government Code section 820.2, but implementation of those decisions was to be construed as "ministerial" and therefore not within the scope of the immunity. (*Id.* at pp. 787, 793.) The policy reason behind the distinction is the need for "judicial abstention in areas in which the responsibility for *basic policy decisions* has been committed to coordinate branches of government." (*Id.* at p. 793.)

For example, in *Caldwell v. Montoya* (1995) 10 Cal.4th 972, the California Supreme Court held that a school board's decision to terminate the superintendent's employment was a discretionary act within the scope of Government Code section 820.2. This kind of personnel decision was precisely the type of policy decision that had been

committed to a coordinate branch of government under the Education Code. (*Id.* at p. 982.)

Caldwell also discussed the types of factual circumstances in which the court has rejected discretionary act immunity: "[W]e have rejected claims of immunity for a bus driver's decision not to intervene in one passenger's violent assault against another (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 793-795), a college district's failure to warn of known crime dangers in a student parking lot (*Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 815), a county clerk's libelous statements during a newspaper interview about official matters (*Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 415-416), university therapists' failure to warn a patient's homicide victim of the patient's prior threats to kill her (*Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 444-447), and a police officer's negligent conduct of a traffic investigation once undertaken (*McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252, 261-262)." (*Caldwell v. Montoya, supra*, 10 Cal.4th at pp. 981-982, parallel citations omitted.)

The type of act at issue here is similar to other "ministerial" acts cited by the Supreme Court in *Caldwell*. A civilian jailer's decision to place Waldron in the same cell as Teter is not the kind of "basic policy decision" discussed in *Johnson* or its progeny. It is a textbook example of a low-level ministerial act and is therefore not subject to immunity under Government Code section 820.2.

Motion to Augment the Record

Pursuant to California Rule of Court 12 (a), Teter's motion to augment the record on appeal to include three of the trial exhibits, Teter's opposition to the City's motion for nonsuit, and Teter's request for judicial notice is granted.

III

DISPOSITION

The judgment of the trial court is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.