STATE OF MICHIGAN

COURT OF APPEALS

CATHLEEN LOUISE POLONY, a/k/a CATHLEEN LOUISE POLONEY,

Plaintiff-Appellant,

v

CITY OF STERLING HEIGHTS, THOMAS MCMULLEN and KENNETH DWINNELLS,

Defendants-Appellees.

UNPUBLISHED
February 20, 2001

No. 212958
Macomb Circuit Court
LC No. 96-002385-NO

Before: Kelly, P.J., and White and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendants summary disposition on the basis of a release, MCR 2.116(C)(7), in this case alleging false arrest, assault and battery, constitutional violations, and intentional infliction of emotional distress. We affirm.

The instant suit arises from an underlying case in which plaintiff was arrested for driving under the influence of intoxicating liquor, MCL 257.625; MSA 9.2325. She eventually pleaded guilty of careless driving, a civil infraction, in exchange for dismissal of the OUIL charge. The facts pertinent to the underlying case are that shortly after 4:30 a.m. on September 24, 1995, defendants McMullen and Dwinnells, police officers for defendant City, on routine patrol, observed a car driving on M-53 well below the posted speed limit, swerving from one side of the road to another, and straddling the lanes. The officers effected a traffic stop, and Officer Dwinnells approached the vehicle and spoke to the driver, plaintiff in the instant case. Plaintiff smelled of intoxicants, had bloodshot eyes, slurred her speech, and said she had been drinking and was on her way home. The incident report stated that plaintiff was unable to walk without assistance when asked to leave the vehicle and step to the shoulder of the road. The officers testified at deposition that plaintiff cooperated throughout, was handcuffed at some point, arrested for driving under the influence of intoxicating liquor, MCL 257.625; MSA 9.2325, and taken to the police station. Plaintiff was booked at 4:50 a.m. and three breath tests were administered beginning at 5:05 and ending at 5:13 a.m., all of which registered "invalid sample." Plaintiff was then taken to the Utica police station for a fourth breath test, which was administered at 5:40 a.m. The breathalyzer printout states "refused" after "subject sample." An affidavit submitted by plaintiff states that at 7:00 a.m. that morning she was given orange juice

and sweets and that her condition soon after dramatically improved. A Sterling Heights Police Department medication log states that plaintiff was given a number of medications at 10:00 a.m. that morning. The parties dispute the point at which plaintiff requested medical care. Officers Dwinnels and McMullen submitted affidavits stating that plaintiff "did not request medical care or treatment or transport to the hospital, nor did it appear . . . that [she] was in need [of such" while in their custody. Plaintiff's affidavit, on the other hand states:

> 1. That on the night that I was arrested for drunk driving, I made repeated requests of the two officers to allow me to take some sugar or something sweet.
>
> 2. That I repeatedly informed them that I was diabetic and in need of help, and that I was suffering from a diabetic reaction.
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> 3. That as a diabetic, I carry sugar or sweets in my purse.
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> 4. That on the night in question I had a package of chuckles candy which are a soft chewable sweet sugar coated candy.
>
> 5. That at the time that I was pulled over I was attempting to remove the chuckles from my pursue [sic] because of my diabetic condition.
>
> 6. That I advised the officers that I had candy in my pursue [sic] and repeatedly made requests for them to allow me to take it. Those requests were denied.
>
> 7. That I made repeated requests after being placed in the police car and taken to the police station for help because of my diabetic reaction and made repeated requests for sugar or something sweet to eat. All of these requests were denied.
>
> 8. At approximately 7:00 a.m., an older male officer gave me an orange juice and three packages of sugar.

Defendant officers testified at deposition that plaintiff made no such requests to them. The booking report states that plaintiff's husband posted a $100 bond at 5:00 p.m. that day.

On March 14, 1996, plaintiff pleaded guilty of the reduced charge of careless driving, a civil infraction. Plaintiff subsequently filed the instant civil suit, alleging unlawful arrest and detention, assault and battery, violation of constitutional rights, refusal to provide medical assistance; and intentional infliction of emotional distress.

Defendants in the instant case filed motions for summary disposition arguing, inter alia, that plaintiff 's claims were barred by a release she had signed as part of the plea bargain.

The release at issue is contained in a standardized form used by the Sterling Heights City Attorney's office, entitled "Motion to Approve Plea Agreement." The form states that plaintiff would plead guilty to an amended charge of careless driving in exchange for the dismissal of the OUIL charge, and that the reasons for the motion were that the totality of the circumstances warranted a lesser offense, and there were "[e]videntiary problems in meeting burden of proof."

There is no dispute that plaintiff and plaintiff's attorney signed this form, as well as the City Attorney. The form is dated February 7, 1996, although plaintiff's criminal defense attorney testified at deposition that he and plaintiff signed the form the day the plea was placed on the record. The release, set forth at paragraph nine of the standardized "Motion to Approve Plea Agreement" form and initialed by plaintiff, stated:

> RELEASE: DEFENDANT AGREES, AS A CONDITION OF THIS PLEA AGREEMENT, TO RELEASE THE CITY, ITS OFFICERS, EMPLOYEES, AND AGENTS FROM ANY CLAIMS, DAMAGES OR CAUSES OF ACTION OF ANY KIND BECAUSE OF ALLEGED INJURIES OR OTHER DAMAGES SUFFERED BY DEFENDANT THAT MAY ARISE FROM THE INCIDENT WHICH GAVE RISE TO THIS CSAE OR FROM PROSECUTION OF THIS CASE. ____ Initials.

The form stated at paragraph eleven "[b]y executing this Agreement, Defendant and/or Defendant's attorney, approve this Agreement in form and substance and waive any irregularities relating to these proceedings."

At the bottom of the form, below the signature lines containing plaintiff's, her counsel's and the city attorney's signatures, is a section entitled "Order Approving Plea Agreement" that states "IT IS ORDERED that the above Plea Agreement be approved in accordance with the above terms and any Order of Deferred Sentence or Probation Order entered by the Court relating to this case." A signature line for the District Judge is provided and is blank.

Applying *Stamps v City of Taylor*, 218 Mich App 626; 554 NW2d 603 (1996), the circuit court granted defendants summary disposition, concluding that plaintiff entered into the plea agreement voluntarily, and that the release therefore barred her civil suit. The circuit court did not address the remainder of defendants' arguments addressing governmental immunity and failure to state a claim.

I

Plaintiff argues that the circuit court erred by ruling that she agreed to release defendants as part of the plea agreement where the release was not incorporated into or acknowledged on the record. Plaintiff argues that MCR 6.610(E)(5) requires that the plea agreement be part of the record and that the court determine that the parties agreed to all the terms of the agreement. She also argues that courts speak through their orders, and that the form containing the release was not signed by the trial court.

We review the circuit court's ruling on a motion for summary disposition de novo. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340; 573 NW2d 637 (1997). The pleadings and any affidavits, admissions, or documentary evidence submitted by the parties must be considered in ruling on a motion brought under MCR 2.116(C)(7). *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Maiden v Rozwood*, 461 Mich

109, 119; 597 NW2d 817 (1999). Affidavits and other documentary evidence must be accepted as true and construed in the plaintiff's favor. *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 77; 592 NW2d 112 (1999). Summary disposition should not be granted if there is a material factual dispute that could provide a basis for recovery upon factual development. *Id.*

Plaintiff did not preserve the issue whether the release was properly considered a term of the plea agreement. Rather, plaintiff argued below that her claim was not barred by the release because she did not voluntarily enter into the plea agreement and there was evidence of prosecutorial misconduct. Because plaintiff did not preserve this argument below and the court did not address it, the issue is not properly before this Court, and we decline to address it.[1]

II

Plaintiff also argues that she did not voluntarily enter into the release agreement.

Although a release that relinquishes a criminal defendant's right to file a civil suit in exchange for the dismissal of criminal charges is not invalid per se, the release must be rigorously scrutinized in accordance with standards set forth in *Town of Newton v Rumery*, 480 US 386; 107 S Ct 1187; 94 L Ed 2d 405 (1987). *Stamps v City of Taylor*, 218 Mich App 626, 628; 554 NW2d 603 (1996). "[B]efore a court properly may conclude that a particular release-dismissal agreement is enforceable, it must specifically determine that (1) the agreement was voluntary; (2) there was no evidence of prosecutorial misconduct; and (3) enforcement of the agreement will not adversely impact relevant public interests." *Id.* at 632, quoting *Coughlen v Coots*, 5 F3d 970 (CA 6, 1993) (applying *Rumery, supra*). A determination of whether the defendant voluntarily entered into the release-dismissal agreement requires the trial court to consider six factors: (1) the sophistication of the defendant; (2) whether the release was signed while the defendant was in custody; (3) whether the defendant was represented by counsel; (4) whether the defendant was given ample time to consider the agreement; (5) whether any unwillingness was expressed by the defendant; and (6) whether the release is clear on its face. . *Stamps, supra* at 632-633.

Plaintiff argues that a question of fact remained on the issue of her sophistication. Although at deposition plaintiff responded to the question whether she knew that as a condition of the plea agreement she was giving up her right to sue the city or the police officers by saying "Not that I know of," she also testified that her attorney was present when she signed the plea, that she had an opportunity to discuss the plea agreement with her attorney before signing it, that she understood that she had a right to proceed to trial on the underlying charges, and that she initialed the paragraph containing the release. Additionally, the attorney who represented plaintiff in the plea agreement testified that he had discussed the release paragraph with plaintiff before signing the plea agreement, and had explained to her the risks of proceeding to trial.

[1] We do not agree with the dissent that the circuit court improperly decided a question of fact and failed to view the facts and draw inferences in plaintiff's favor. Our review of the record leads us to conclude that the court was never presented with, and consequently never addressed, the issue whether the release was part of the plea agreement.

Although the attorney testified that he did not think plaintiff was overly bright, he also testified that he thought plaintiff had enough sophistication to weigh the pros and cons of signing the plea agreement. Plaintiff was thirty-five years old at the time of the plea hearing. She had been married for fourteen years, and was the mother of two children. We find no error in the circuit court's assessment that plaintiff had sufficient sophistication to assess the consequences of signing the release.

Plaintiff also claims that, although she was not incarcerated at the time that she signed the release-dismissal agreement, her signing of the agreement was "tantamount to a coercive choice," because of the looming threat of returning to jail. However, at the district court plea hearing on March 14, 1996, plaintiff stated that she understood what was happening, understood that she did not have to plead responsible to anything, that she had a right to proceed to a hearing before a judge, that it was the People's burden to prove her responsible by a preponderance of the evidence, and that she still wanted to indicate she was responsible for careless driving on the date in question. Plaintiff's attorney stated on the record:

> MR. SULEK: Yes, your Honor. Miss Poloney has an absolutely spotless record. I know it is very unusual to have this kind of disposition because I know what she was originally charged with.
>
> I would just indicate to the Court that I know Miss Poloney's dad very, very well. She has had probably every medical ailment known to mankind including kidney transplants and just dramatic, dramatic medical problems. And that was –without getting into all the details, that was part of the problem that occurred on this evening.
>
> THE COURT: I remember your comments last time, Mr. Sulek. All right. With regard to this matter, I think counsel's comments are correct, Miss Poloney, that certainly it is a rather unusual circumstance. But I think that your circumstances are somewhat unusual.
>
> Obviously, I'm not happy to hear that you have all these medical problems. I'm sure you are not happy either. You probably with you didn't, but the point is, you know, that whatever happened here, if I remember correctly, there was – you did have a couple of drinks.
>
> THE DEFENDANT: Yes.
>
> THE COURT: And, possibly with all the medical problems, you shouldn't be drinking at all. So, I'm not belaboring that with you and I am not criticizing you, I'm just suggesting that, you know, it's a good disposition. Mr. Sulek worked it out for you; take advantage of it.
>
> I'm going to fine you $150, but that's it. Are you in a position to take care of that?
>
> THE DEFENDANT: Yes.

We conclude that plaintiff presented insufficient evidence to raise a genuine issue of fact on the question whether she was coerced into signing the release agreement. The record of her plea indicates that it was voluntary. There was no overwhelming threat of incarceration where plaintiff had been released from custody and had no prior record. And plaintiff never sought to have the plea set aside on the grounds that it was involuntary. Plaintiff's criminal defense attorney testified that he advised plaintiff that the release was probably not enforceable. However, plaintiff chose to sign the plea agreement, initialing the release provision, and gave no indication to the court, either before or after tendering the plea, that she did not voluntarily accept the terms of the agreement. Thus, applying the six voluntariness factors set forth in *Stamps, supra*, the circuit court did not err in concluding that there was no genuine issue of material fact regarding whether the agreement was voluntary.

III

Plaintiff also argues that the release was not valid because there was evidence of prosecutorial misconduct. The party seeking to enforce the release agreement has the burden of showing that the release-dismissal agreement resulted from a case-specific concern for the public interest, not from a concern for the private interests of government officials. *Stamps, supra* at 633. Prosecutorial misconduct occurs where the police or the prosecution file unfounded or frivolous charges against the defendant in order to protect the police officers from civil liability for excessive force. *Stamps, supra* at 633-634.

Plaintiff did not present any evidence that unfounded or frivolous charges were brought against her in an attempt to protect the police officers from civil liability. Plaintiff testified that when she was having a diabetic reaction, she behaved as though she was, and could appear to be, drunk. She does not dispute that her driving was erratic on the evening in question or that she had had several drinks earlier in the evening. Plaintiff presented no evidence that the police used excessive force. Given the lack of evidence regarding prosecutorial misconduct, a question of fact did not exist on the issue. The prosecutor's actions in securing an initialed release under the instant circumstances was consistent with a case-specific concern regarding the possibility of plaintiff raising future claims of misconduct arising from a situation where the city and its agents appeared to have acted properly under the circumstances known to the prosecutor, rather than a concern for the private interests of governmental officials to insulate overreaching conduct from suit.

Plaintiff also argues that the release-dismissal was not valid because enforcement of the agreement would adversely affect public interest. Plaintiff argues that she took a polygraph test at the request of the prosecutor, with the understanding that the charges against her would be dismissed if she passed. Plaintiff contends that "it is contrary to the public's interest in the fair and proper administration of justice for a person to be put through a polygraph examination on the promise of a specific result if successful, only to be denied what had been promised."

A copy of the polygraph report before us states that the examiner concluded that plaintiff was likely truthful in her statements that she had no more than two drinks that night, that she had them before 11:00 p.m., and that she had suffered a diabetic reaction. Plaintiff's criminal defense

attorney testified at deposition that in his initial discussions with the prosecutor, he requested that a polygraph be administered:

> I had a phone conversation prior to appearing in court with the Assistant City Attorney . . . And I talked to him on the phone, because I thought this case had a very peculiar set of circumstances, very unusual from the cases that you normally get. Okay. And I asked if he would make arrangement [sic], or what could be done relative to a plea; specifically, I asked for a polygraph to be taken on behalf of my client, and a polygraph was indeed arranged. So there was a lot of discussion prior to us even appearing in court on, I assume, February 7th of this year. As I understood, the agreement . . . was that if indeed Miss Polony passed the polygraph **relative to the issue of whether she had been drinking that night**, if she passed and was truthful in her answer, the case was going to be dismissed. And obviously, that is not what happened, because if you read this plea here and my testimony already, that is not what we ended up doing.

We conclude there is insufficient evidence in the record to raise a genuine issue of fact regarding prosecutorial misconduct. Although it appears that plaintiff's counsel and the prosecutor may at one point have discussed plaintiff's taking a polygraph test and the dismissal of the OUIL charge being contingent on the polygraph results, the excerpts before us of plaintiff's counsel's deposition testimony do not support misconduct. The prosecutor did in fact dismiss the OUIL charge, and proceeded on the amended charge of careless driving, a civil infraction. Neither plaintiff nor her criminal defense attorney asserted a contrary agreement before the district court.

We conclude that plaintiff did not establish the existence of any questions of fact concerning the validity of the release agreement. Therefore, summary disposition was properly granted in favor of defendants.

Affirmed.

/s/ Helene N. White
/s/ Kurtis T. Wilder