# 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,

Defendant-Appellees.

---

UNPUBLISHED
February 20, 2001

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

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

KELLY, P.J. *(dissenting*).

I respectfully dissent.

I believe plaintiff is the victim of a serious miscarriage of justice and I do not think the Court of Appeals should acquiesce in the circuit court's grant of summary judgment by interpreting the release provision to be part of the plea agreement where it was not incorporated into the plea, or otherwise acknowledged on the record, and the order was not signed by the trial court. The majority is in effect permitting the trial court to decide a question of fact. Moreover, in deciding that question of fact, the trial court improperly interpreted all inferences in favor of defendants instead of in favor of plaintiff, as it should have.

It is plaintiff's claim that she was having an insulin reaction due to low blood-sugar when she was apprehended by the defendant police officers. The prosecutor in charge of the case and defense counsel agreed to arrange for a polygraph examination for plaintiff. The polygraph examination was conducted by a Sterling Heights police sergeant who indicated the plaintiff was truthful during the examination and was not intoxicated on the night of the incident in question. The prosecutor then agreed to dismiss the charge of OUIL, but inserted into the equation a requirement that plaintiff plead to a civil infraction, careless driving. When that concession was agreed to by her attorney, a preprinted form entitled, "Motion to Approve Plea Agreement," which included eleven clauses pre-designed to clear police officers and any governmental factotem from any civil liability whatsoever, was signed by plaintiff. The portion relied on by the defense in this case is contained in paragraph nine of the form. However, this form was never incorporated in the plea agreement and was never signed by or referred to by the court that accepted the plea. In fact, there was no reference whatsoever on the record to adopting the form

containing the proported release. The district court did not even mention, much less acknowledge, that Mrs. Polony had possibly forfeited her right to bring suit against defendants. The complete plea agreement, as set forth on the record, was simply a plea of careless driving and a dismissal of the original charge of OUIL. Nothing more.

MCR 6.610(E)(5) requires that "[t]he court shall make the plea agreement a part of the record and determine that the parties agree on all the terms of the agreement. The court shall accept, reject or indicate on what basis it accepts the plea." The circuit court erred in finding that plaintiff agreed to release the city and its employees from any and all civil liability where such a term was never made part of the plea agreement.

Simply put, plaintiff has not had her day in court. I would reverse and remand for trial.

/s/ Michael J. Kelly