[Cite as *Balli v. Zukowski*, 2004-Ohio-6702.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

MATTHEW BALLI,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
- vs -	:	**CASE NO. 2004-G-2560**
MARY H. ZUKOWSKI, et al.,	:	
Defendants,	:	
JOHN QUIVILA, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 03 P 000191.

Judgment: Affirmed.

Joseph A. Pfundstein, 24100 Chagrin Boulevard, #330, Beachwood, OH 44122 (For Plaintiff-Appellant).

Abraham Cantor, Johnnycake Commons, 9930 Johnnycake Ridge Road, #4-F, Concord, OH 44060 (For Defendants-Appellees).

JUDITH A. CHRISTLEY, J.

{¶1} Appellant, Matthew Balli, appeals from a final judgment of the Geauga County Court of Common Pleas, granting summary judgment in favor of appellees,

Chester Police Department and John Quivila ("Quivila"). For the reasons set forth below, we affirm the judgment of the trial court.

{¶2} Appellant was employed as a sergeant with the East Cleveland Police Department. On April 12, 1999, he was the officer in charge of his shift. Without informing anyone, he abandoned his duties and drove to the home of his ex-girlfriend, Mary Zukowski ("Zukowski"), in Chesterland, Geauga County, Ohio. At that location, appellant and Zukowski were involved in a domestic incident, and this ultimately led to appellant's arrest that day. The details of appellant's arrest are in dispute but are not relevant to the instant matter.

{¶3} Although the record of the criminal matter was not made part of the record in the instant matter, it is apparent that appellant was charged with assault and resisting arrest. Also, Zukowski may have considered filing a complaint against appellant for domestic violence. The resisting arrest charged was dismissed, and plea negotiations ensued. On September 10, 1999, appellant entered a plea agreement in which he pleaded guilty to disorderly conduct, entered into a consent agreement for a civil protection order regarding Zukowski, and signed the release which is at issue in this matter.

{¶4} The release stated, "[w]ith the intent to be legally bound, [I] do hereby release, discharge, cancel, and hold harmless, Chester Township, the Chester Township Police Department, Chester Township Police Officers John Kuivila [sic], ***, the Village of Gates Mills, the Gates Mills Police Department, Gates Mills Police Officers Seargent [sic] R. Wolf and C. Strasshoffer, an any of their agents, administrators, and

employees from any and all claims, demands, rights, and causes of action of every kind, nature or description whatsoever, which I may now or may hereafter have or assert against said political subdivisions, police departments, and referenced personnel."[1] The release further stated that it expressly intended to include all "expenses, costs, losses, damages, death, or loss of income *** incurred by reason of or in any manner connected with the incident that occurred on April 12, 1999, and resulted in the officers identified herein stopping [appellant] on River Road in Gates Mills, and subsequent arrest and prosecution."

{¶5} Further, according to the release, appellant warranted and represented that he was fully informed as to the information contained in the release, and he was fully authorized and competent to execute the release and did so voluntarily. Appellant was represented by counsel when he signed the release.

{¶6} On March 5, 2003, appellant filed a complaint against Zukowski, Quivila, the Chester Police Department, the Gates Mills Police Department, and Sergeant R. Wolf and Officer C. Strasshoffer of the Gates Mills Police Department. In this complaint, appellant alleged that, when he was driving from Chesterland back to East Cleveland in the early morning hours of April 12, 1999, Quivila, Wolf, and Strasshoffer "unlawfully and maliciously assaulted [him] by pepper spraying [him]" and detaining him, causing injury. Appellant alleged that he suffered physical and emotional pain as a result of this "assault and battery."

{¶7} In his complaint, appellant put forth fourteen counts. Against Quivila, Wolf, and Strasshoffer, appellant alleged negligence; intentional infliction of emotional

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1. The complaint and the appellate briefs refer to Officer John Quivila. However, the remaining materials contained within the record refer to Officer John Kuivila. For the purposes of this opinion, we will utilize

distress; false imprisonment; and violations of Section 1983, Title 42, U.S. Code.

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the spelling contained within the complaint and the appellate materials.

Appellant also alleged that Quivila violated R.C. 2935.03. Against the Chester Police Department and the Gates Mills Police Department, appellant alleged negligent training; violations of Section 1983, Title 42, U.S. Code; and liability under the doctrine of respondeat superior. Further, appellant's claims against Zukowski included defamation, slander, intentional infliction of emotional distress, and abuse of process.

{¶8} All defendants answered the complaint. Zukowski counterclaimed against appellant for a declaratory judgment with respect to his right to possess a gun, and she requested punitive damages and compensatory damages for trespass and assault and battery. Zukowski also filed a third-party complaint against the East Cleveland Police Department, which was timely answered.

{¶9} Quivila and the Chester Police Department moved for summary judgment on June 5, 2003, arguing that the release signed by appellant barred the claims against them. Attached to this motion was a copy of the release signed by appellant and unanswered requests for admissions which were propounded upon appellant on March 17, 2003.

{¶10} Appellant failed to respond to the following requests for admissions:

{¶11} "1. [Appellant] signed the release dated September 10, 1999 ***.

{¶12} "2. At the time of signing the release, [appellant] was represented by an attorney and counseled by that attorney, Mark Marein.

{¶13} "3. The release was part of a plea bargain entered into by [appellant].

{¶14} "4. As a result of the plea bargain, the criminal charge of domestic violence

{¶15} against [appellant] for his conduct alleged by [Zukowski] was dismissed.[2]

{¶16} "5. [Zukowski] attempted to and did receive a civil protection order against [appellant] on or about September 13, 1999. ***

{¶17} "6. The purpose of the release signed by [appellant] in the plea bargain included to achieve finality to the litigation between [appellant], the Chester Township Police Department, and John Kuivila [sic]."

{¶18} Appellant timely replied to appellees' motion for summary judgment. Attached to his motion were the release and a letter, dated August 13, 1999, from James M. Gillette ("Gillette"), the prosecutor for Chardon, Ohio, to appellant's counsel. The letter enclosed the release and the civil protection order. According to the letter, if appellant did not sign the release and the civil protection order, Gillette would instruct Quivila to re-file the resisting arrest complaint and file a motion to consolidate the resisting arrest matter with the assault matter which was scheduled for trial on October 14, 1999. However, appellant did not attach any affidavit indicating that he was under duress when signing the release.

{¶19} Quivila and the Chester Police Department filed a surreply.

{¶20} The trial court issued a January 30, 2004 judgment entry, granting appellees' motion for summary judgment. In its decision, the trial court stated, "[i]t is [appellant's] position that he did not sign the Release voluntarily. [Appellant] contends that the Release was forced upon him in order to keep him from facing possible jail time if convicted. It is [appellant's] position that we signed the Release under duress and

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2. The accuracy of this statement is unclear. Although the record of the original criminal matter was not made part of the record in the instant matter, the record in the instant matter indicates that Quivila had originally filed a complaint against appellant for *resisting arrest*. The complaint was dismissed, and the prosecutor intended to instruct Quivila to re-file that complaint if appellant did not sign the release and the

because of that duress, the Release is a contract that may be avoided or declared invalid. ***

{¶21} "[Appellant] has offered to this Court no evidence of duress. He wishes this Court to state that whenever a defendant in a criminal case accepts a plea agreement that defendant should be permitted to avoid the consequences of the plea agreement because the defendant may have risked jail if he didn't enter into the agreement. Although [appellant] argues, he had not [sic] choice but to sign the release, there is absolutely no evidence before this Court in support of that argument. [Appellant] was represented by counsel, who is presumably a competent attorney. [Appellant] does not claim that he didn't understand the agreement; he doesn't say he was confused or misled. [Appellant] presents no evidence that he was not competent or that he was under such stress or mental anguish that his signing of the agreement was not an act of free will. ***

{¶22} "*** In regards to [appellant's] claim that he was coerced, if he refused to sign the Release the consequences of the refusal would be a trial, not incarceration. [Appellant] had the right to contest the charges against him and have the matter tried to a jury or the judge."

{¶23} The trial court stated in the judgment entry that there was no just cause for delay.

{¶24} From this judgment, appellant appeals and sets forth the following assignment of error:

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civil protection order. Other than these interrogatories, nothing in the record in the instant matter affirmatively indicates the existence of a *domestic violence* charge or threat thereof.

{¶25} "[1.] There exist [sic] a genuine issue of material fact as to whether Plaintiff-Appellant was under duress when he signed the release at issue in this matter."

{¶26} An appellate court reviews a trial court's decision on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. Pursuant to Civ.R. 56, summary judgment is appropriate when: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can reach only one conclusion, which is adverse to the party against whom the motion is made, such party being entitled to have the evidence construed most strongly in his favor. Civ.R. 56(C); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389; *Leibreich v. A.J. Refrigeration, Inc.*, 67 Ohio St.3d 266, 268, 1993-Ohio-12; *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146.

{¶27} Material facts are those facts that might affect the outcome of the suit under the governing law of the case. *Turner v. Turner*, 67 Ohio St.3d 337, 340, 1993-Ohio-176, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248. To determine what constitutes a genuine issue, the court must decide whether the evidence presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law. *Turner* at 340.

{¶28} A party seeking summary judgment on the grounds that the nonmoving party cannot prove its case bears the initial burden of informing the trial court of the basis for the motion and of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107. Accordingly, the moving party must specifically point to some evidence of the type listed in Civ.R. 56(C)

which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claim. Id. If the moving party satisfies its initial burden under Civ.R. 56(C), the nonmoving party has the reciprocal burden to respond, by affidavit or as otherwise provided in the rule, so as to demonstrate that there is a genuine issue of fact. Id. However, if the nonmoving party fails to do so, then the trial court may enter summary judgment against that party. Id.

{¶29} In appellant's sole assignment of error, he argues that there existed a genuine issue of material fact as to whether he was under duress when he signed the release. We disagree.

{¶30} In *Tallmadge v. Robinson* (1952), 158 Ohio St. 333, the Supreme Court of Ohio declared that threats may be held to constitute duress "if such threats overcome the will of such person, remove his capacity to act for himself and cause him to perform an act he is not legally bound to perform ***." Id. at paragraph one of the syllabus. Further, the Restatement of the Law 2d, Contracts (1981), Section 175(1), states that "[i]f a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim."

{¶31} Accordingly, the Supreme Court of Ohio adopted a three-prong test for duress, to wit: (1) one side involuntarily accepted the terms of another; (2) circumstances permitted no other alternative; and (3) the said circumstances were the result of coercive acts of the opposite party. *Blodgett v. Blodgett* (1990), 49 Ohio St.3d 243, 246.

{¶32} Further, in *Newton v. Rumery* (1987), 480 U.S. 386, 397, the United States Supreme Court held that dismissal release agreements are not invalid per se.

That Court noted that dismissal release agreements may further legitimate public interests. Id.

{¶33} The Court indicated, "[w]e agree that some release-dismissal agreements may not be the product of an informed and voluntary decision. The risk, publicity, and expense of a criminal trial may intimidate a defendant, even if he believes his defense is meritorious. But this possibility does not justify invalidating *all* such agreements. In other contexts criminal defendants are required to make difficult choices that effectively waive constitutional rights. For example, it is well settled that plea bargaining does not violated the Constitution even though a guilty plea waives important constitutional rights. *** We see no reason to believe that release-dismissal agreements pose a more coercive choice than other situations we have accepted. *** 'Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.' *Crampton v. Ohio*, decided with *McGautha v. California*, 402 U.S. 183, 213 (1971)." (Internal citations omitted.) *Newton* at 393-394.

{¶34} In the instant matter, the trial court correctly granted summary judgment to appellees, as there existed no genuine issue of material fact that appellant was not under duress when he signed the release and that he did so voluntarily. Appellees put forth evidence of the type listed in Civ.R. 56(C), demonstrating that appellant was not under duress when he signed the release and that he did so knowingly and voluntarily. Specifically, appellees attached to their motion for summary judgment the release, in which appellant specifically stated he intended to release appellees from all claims arising out of the April 12, 1999 incident. The release also stated, "I further warrant and

represent that I have fully informed myself as to all information contained in this Release. I am fully authorized and competent to execute this release and do so voluntarily."

{¶35} Pursuant to *Finch v. Kabana* (1990), 67 Ohio App.3d 29, 31, a presumption arises that an injury has been fully satisfied when a release is unqualified and absolute in its terms. The release operates as a later claim encompassed within the release. *Haller v. Borror Corp.* (1990), 50 Ohio St.3d 10, 13. Because the release in the instant matter was unqualified and absolute in its terms, we presume appellant's injuries have been fully satisfied. Appellant must rebut this presumption for his claims to survive summary judgment.

{¶36} Appellees also attached to their reply requests for admissions which appellant failed to answer. Requests for admissions conclusively establish facts for the purpose of the pending action. *Cleveland Trust Co. v. Willis* (1985), 20 Ohio St.3d 66. Further, unanswered requests for admissions are a written admission fulfilling the requirements for summary judgment, pursuant to Civ.R. 56.

{¶37} The unanswered requests for admissions in this matter conclusively establish that appellant signed the release when represented by counsel; the release was part of a plea bargain in which the state agreed to dismiss or not re-file an additional charge against appellant; and the release was intended to reach finality in regard to any litigation between appellant and Quivila and the Chester Police Department. Accordingly, appellees satisfied their burden to put forth evidence demonstrating the absence of a genuine issue of material fact that appellant was not under duress when he signed the release and that he did so voluntarily.

{¶38} Appellant's reply failed to put forth any affirmative evidence demonstrating the existence of a genuine issue of material fact as to whether he was subject to duress. Appellant claims that he "was given no choice but to execute said release and accept the *** plea" because if he did not, an additional charge would be re-filed against him. According to appellant, "Ohio law is clear that a contract can be considered voided if entered into under fraud or duress." Appellant brings our attention to *Graves v. Mental Health Mgt., Inc.* (Dec. 19, 1991), 8th Dist. No. 59668, 1991 Ohio App. LEXIS 6094, and he argues that to avoid a contract on the grounds of duress, a party must demonstrate he was subject to a threat that deprived him of his unfettered will. Appellant contends he was subject to such a threat because he would face an additional charge if he did not take the plea.

{¶39} Appellant's recitation of the law is valid outside the context of a dismissal release agreement. However, appellant's argument, as pertaining to the facts of the instant matter, is void of merit. We cannot conclude that appellant was under duress from the fact that appellant faced a choice. See, e.g., *Newton* at 393. Appellant could have accepted the plea agreement, including the release, or he could have contested the charges against him and have the matter tried before a jury or a judge. If appellant refused to sign the release, he would only face trial, not necessarily incarceration. If the charges were without substance, he would be acquitted and still be able to file his civil suits. Such a choice itself does not amount to duress. See *Newton* at 393-394.

{¶40} Appellant failed to satisfy the three-prong test for duress that was adopted by the Supreme Court of Ohio in *Blodgett*. Appellant put forth no evidence demonstrating duress other than the mere existence of the agreement. The United

States Supreme Court has held that such agreements are not per se invalid. *Newton* at 397. Likewise, appellant put forth no evidence rebutting the presumption that his injuries had been fully satisfied by the terms of the release or that appellant had no reasonable alternative.

{¶41} In summary, appellant failed to counter appellees' motion for summary judgment with anything other than bald allegations, and mere allegations in appellant's pleadings are insufficient to affirmatively demonstrate a genuine issue of material fact. *Dresher* at 293. Appellant failed to meet his reciprocal burden to affirmatively demonstrate a genuine issue of material fact as to his claims against appellees. Appellant's sole assignment of error is without merit, and we hereby affirm the judgment of the trial court.

DONALD R. FORD, P.J.,

WILLIAM M. O'NEILL, J.,

concur.