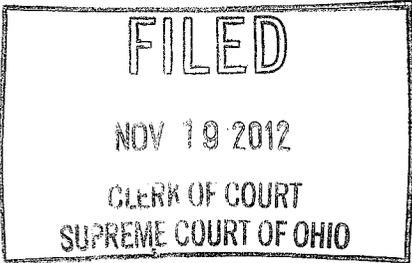


IN THE SUPREME COURT OF OHIO

ROBERT F. ALSFELDER, JR.,	:	Case No. 2012-1385
	:	
Appellant,	:	On Appeal from the Hamilton County
	:	Court of Appeals, First Appellate
v.	:	District
	:	
SALLY ALSFELDER,	:	Court of Appeals
individually and as co-executor	:	Case No. C-110681
of the Estate of Katherine F.	:	
Alsfelder, deceased,	:	
	:	
CATHY ALSFELDER,	:	
individually and as co-executor	:	
of the Estate of Katherine F.	:	
Alsfelder, deceased,	:	
	:	
ELIZABETH DITTO,	:	
	:	
SUSAN A. MAHER,	:	
	:	
and	:	
	:	
DEBORAH ALSFELDER,	:	
trustee of the Taylor-Alsfelder	:	
Trust	:	
	:	
Appellees	:	



MOTION FOR RECONSIDERATION OF ENTRY DECLINING JURISDICTION

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in their capacity as co-executors of
the Estate of Katherine F. Alsfelder,
deceased and Appellee Elizabeth Ditto***

Motion for Reconsideration of Entry Declining Jurisdiction

Pursuant to Rule XI of the Rules of Practice of the Supreme Court of Ohio, Appellant Robert F. Alsfelder, Jr. respectfully moves this Court to reconsider its decision declining jurisdiction to hear this appeal filed November 7, 2012. At a minimum, this appeal justifies a remand to the First Appellate District for reconsideration.

In its decision, the court relied exclusively on the *Steinberg* case and stated that Appellant had in fact established evidence of impairment, thus complying with *Steinberg v. Central Trust Co.*, 18 Ohio St.2n 33, 247 N.E.2d 303 (1969). That determination alone is sufficient under ORC Section 2107.71 for Appellant to proceed in prosecuting the merits of the will contest action. However, the court erred by requiring Appellant to produce a copy of the trust document, and thus not having done so, denied Appellant the right to proceed.

Appellant had placed an affidavit in the record prior to the filing of the motion for summary judgment by certain Appellees. Appellant filed his affidavit in response to a prior motion to dismiss, not in response to the motion for summary judgment. The trial court correctly overruled the motion to dismiss. The summary judgment motion filed by certain Appellees was nothing more than a reiteration of their unsuccessful motion to dismiss, disguised as a motion for summary judgment. And most importantly, **no new evidence was presented by these certain Appellees in support of their summary judgment motion. The only evidence advanced by these certain Appellees was Appellant's prior affidavit in opposition to their motion to dismiss.** Therefore, these certain Appellees as the moving party never met their initial burden under CR 56. This being the case, Appellant had no duty to respond with additional evidence.

The court improperly shifted the burden for summary judgment. Appellant is the nonmoving party. Appellees never produced any evidence to contradict Appellant's evidence

that was in the record prior to the filing of the motion for summary judgment. Therefore, under CR 56, certain Appellees never met their initial burden and therefore it has never been the obligation or requirement for Appellant to file a copy of the trust document.

If there was some concern over Appellant's standing as a beneficiary of the trust, **of which no contrary evidence has ever been presented**, then there is a material issue of fact in dispute as to that, precluding summary judgment. If Appellant's affidavit is disregarded as insufficient, then the trial court has granted, and the court of appeals sanctioned, a default summary judgment, impermissible under Ohio law. This Court has held:

[A] party seeking summary judgment, on the ground that the non-moving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the non-moving party's claims. *The moving party cannot discharge its initial burden under Civil Rule 56 simply by making a conclusory assertion that the non-moving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ. R. 56(C) which affirmatively demonstrates that the non-moving party has no evidence to support the non-moving party's claims.* *Vahila v. Hall* (1977), 77 Ohio St.3d 421, 674 N.E.2d 1164, 1171, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 295, 662 N.E.2d 264, 274. (Emphasis in original).

Since there is no "default" summary judgment under Ohio law, the moving party carries the burden of establishing that no genuine issue of material fact exists and that they are entitled to judgment as a matter of law. That was not done here, and it is not the non-moving party's duty to prove its case on summary judgment. It is the moving party's responsibility to establish the requirements of CR 56.

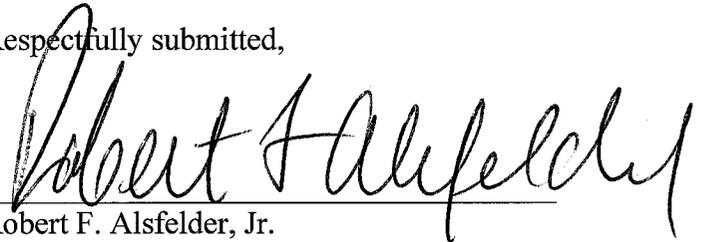
Appellant established evidence of impairment by affidavit, and the court acknowledged that impairment in its decision. By virtue of the court's decision, there is no dispute as to the existence of impairment.

Appellant established standing. If there was any question as to the evidence of standing, which was raised for the first time by the court, then this constitutes a material issue of fact in dispute and it was improper for the court to grant summary judgment. But in fact, there has never been any evidence presented to question Appellant's status as the beneficiary of a trust. Either way, the trial court and the court of appeals erred in finding that Appellant lacked standing and this Court should reconsider and reverse its decision declining jurisdiction and accept Appellant's Petition.

CONCLUSION

If left to stand, the First District's decision will have a dramatic impact upon Ohio's Rules of Civil Procedure as well as the ability for one to contest the validity of a will. Such threats present a matter of public and great general interest. Accordingly, Appellant respectfully requests that this Court reconsider its decision and accept jurisdiction in this case.

Respectfully submitted,



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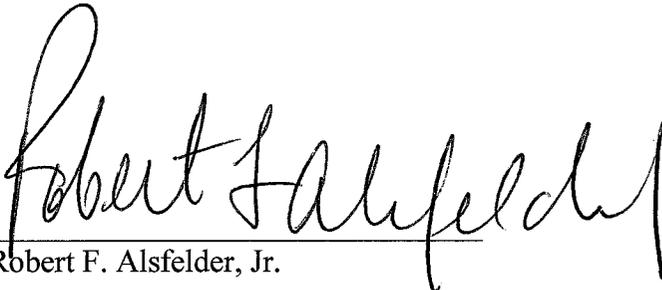
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Notice of Appeal was sent by ordinary United States mail, this 19th day of November, 2012, to the following:

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