

ORIGINAL

IN THE SUPREME COURT OF OHIO

ROBERT F. ALSFELDER, JR. : Case No. 14-1949

and :

DEBORAH T. ALSFELDER :

Appellants, : On Appeal from the Hamilton County

v. : Court of Appeals, First Appellate

: District

HARTGE SMITH NONWOVENS, LLC : Court of Appeals

Appellee. : Case No. C-130383

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS
ROBERT F. ALSFELDER JR. AND DEBORAH T. ALSFELDER

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FILED
 NOV 10 2014
 CLERK OF COURT
 SUPREME COURT OF OHIO

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**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES
A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case presents critical issues for every attorney and party involved in litigation in the State of Ohio. In addition to the basic tenets of fairness and due process in civil procedure, this cause specifically deals with Ohio Civil Rule 36, Requests for Admission, and Civil Rule 56, Summary Judgment.

The matter for review appears to be one of first impression in the State of Ohio. There does not appear to be another case where the sole basis for granting summary judgment was admissions being deemed admitted even though they were never received by the parties against whom they were being held (the Appellants) and where those parties had no opportunity to even know that they existed. Further, not only were the admission requests not received either in the mail or electronically in accordance with CR 36, but they were not contemporaneously filed with the court at the time of their alleged service. Therefore, it was impossible for the Appellants to timely answer them because of the fact that Appellants did not know and could not have known of their existence. All of these facts were placed in the record before the trial court by way of affidavits.

The trial court then prejudiced Appellants' rights under the Ohio and U.S. Constitutions by failing to hold a hearing on this, even though an oral argument was requested. Because the issue of whether Appellants received the admissions was disputed, the trial court then improperly granted summary judgment under CR 56 based solely on the unanswered admission requests and despite the presence of a disputed material issue of fact as to service and receipt of the admission

requests, as well as the existence of a defense on the merits, and request for oral argument.

In this case, requests for admissions had purportedly been mailed by counsel for Appellee to the Appellants using the address listed in their answers. They were purportedly mailed using ordinary mail service, and not by certified mail, nor was a certificate of mailing used. In addition, no electronic copy was ever sent as required by CR 36 even though the email addresses of the Appellants were listed in their answers. Further, the requests for admissions were never filed with the court which would have at least allowed the Appellants the opportunity to have been made aware of them and the ability to view them on the clerk of courts website. And finally, there was never any contact or effort made whatsoever by counsel for Appellee to communicate to the Appellants that there were outstanding admission requests. Therefore, it was an absolute and complete impossibility for the Appellants to know or have any knowledge of the outstanding admission requests and, therefore, impossible for the Appellants to timely answer them.

However, in spite of all these circumstances, including the deficiencies in service by Appellee by not sending an electronic copy as required by CR 36, the trial court deemed the admissions admitted following the passage of the 28 day period under CR 36, which date began on the date that counsel for Appellee purportedly mailed them. The Court ruled against Appellants even though they had filed affidavits under oath in opposition to summary judgment that they had not received admission requests, either by mail or electronically, and that nothing had been communicated to them about the outstanding admission requests. Following that, the trial court then proceeded with the granting of summary judgment against Appellants based solely on the unanswered admissions that had never been received. The judgment against the Appellants is in the amount of \$287,954.84. There was no oral argument allowed on the matter,

even though one had been requested. The trial court did not cite to any case law in its decisions.

The court of appeals upheld the trial court's decisions citing cases that had different fact patterns that were not at all analogous or similar to the facts in this case. In all of the cases cited by the court of appeals, the admission requests had in fact all been received by the opposing party or their counsel but had remained unanswered for various different reasons. This is substantially different from the facts of this case, where the admission requests had not been received, had not been sent electronically and had not been filed with the court or communicated to the Appellants, and therefore the Appellants had absolutely no opportunity whatsoever to timely answer them. Appellants were kept in the dark about the outstanding admission requests and then were completely and unfairly blindsided by the motion for summary judgment based on unanswered admission requests. The perverse effect of the courts' rulings undermine the basic fairness rule that is inherent in all litigation in Ohio, as well as denying and stripping procedural due process from a litigant.

STATEMENT OF THE CASE AND FACTS

Appellants timely filed their appeal on June 21, 2013. It was taken from the trial court's Entry Granting Plaintiff's Motion For Summary Judgment issued by Judge Robert C. Winkler of the Hamilton County Court of Common Pleas and entered May 22, 2013.

The underlying basis of this case arises out of litigation involving Appellee and only one of the Appellants, Robert Alsfelder, in which an award for money was awarded to Appellee against Appellant Robert Alsfelder in 2008. On September 17, 2012, Appellee filed a complaint against both Appellants alleging that Appellant Robert Alsfelder fraudulently transferred an asset to Appellant Deborah Alsfelder in 2004, four (4) years prior to Appellee being awarded its

underlying judgment against Appellant Robert Alsfield. On October 19, 2012, Appellants timely filed separate answers to the complaint and both included their mailing addresses as well as their email addresses.

On April 19, 2013, counsel for Appellee filed a motion for summary judgment which included (1) a request for admissions to be deemed admitted and (2) her affidavit that stated that she served discovery requests on Appellants on February 15, 2013 by mailing them to the address that Appellants provided in their respective answers. She made no mention of an electronic copy being sent.

On May 2, 2013, Appellants filed a Motion to Deny Plaintiff's Request to Have Admissions Deemed Admitted based on the fact that they had never received the admission requests either by mail or electronically and further, had never once been contacted by counsel for Appellee concerning the outstanding admission requests. On the same date, Appellants also filed a Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and separate affidavits in which both Appellants stated under oath that, among other matters, they never received the purported admission requests, either by mail or electronically, and that neither had any communication with or from counsel for Appellee concerning any discovery requests at all. Further, Appellant Deborah Alsfield attached to her affidavit, by way of exhibits, her meritorious defense to the claim for fraudulent conveyance consisting of her personal checks written from her sole personal account to purchase the asset that was purportedly the subject of the alleged fraudulent transfer.

On May 13, 2013, Appellee filed a Memorandum in Opposition to Appellants' Motion to Deny Plaintiff's Request to have Admissions Deemed Admitted. In addition, Appellee filed a

Reply Memorandum in Support of its Motion for Summary Judgment with Oral Argument Requested.

On May 22, 2013, prior to the expiration of time allowed for Appellants to file their reply and without an oral hearing as requested, the trial court filed an Entry Denying Appellants Motion to Deny Appellee's Request to Have Admissions Deemed Admitted and an Entry Granting Appellee's Motion for Summary Judgment and a judgment in favor of Appellee against Appellants in the amount of \$287,954.84. The trial court did not cite to any case law in support of its decisions.

Appellants timely filed their appeal to the First District Court of Appeals. On September 24, 2014, the court issued its decision upholding the rulings of the trial court and cited to two cases, *Cleveland Trust v. Willis*, 20 Ohio St.3d 66, 67, 485 N.E.2d 1052 (1985) and *Depaz v. Bahramian*, 1st Dist. Hamilton Nos. C-130128 and C-130317, 2013-Ohio-5510, para. 13, in support for its decision that admission requests that were not timely answered due to non-receipt and lack of knowledge of them being outstanding can be used as the sole basis for granting a motion for summary judgment.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The Court should provide guidance to the lower courts regarding whether summary judgement could be rendered solely upon unanswered admission requests where the party against whom such relief is sought avers non-receipt of the requests and seeks to contest the action.

The trial court violated Appellants' fundamental procedural due process rights by granting summary judgment in this case. This is a clear violation of procedural due process,

including a party's right to notice. The Due Process Clause of the Ohio Constitution provides that "every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law," and the Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits any state from depriving "any person of life, liberty, or property, without due process of law * * *." Despite their different wording, the Ohio Supreme Court has held that these provisions afford "equivalent" protections. *In re: Raheem L.*, 993 N.E.2d 455, (1 App Dist. 2013), *citing Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540, 544, 38 N.E.2d 70 (1941). Procedural due process requires "that an individual be given an opportunity to be heard at a meaningful time and in a meaningful manner." *Id.*, *citing Morrison v. Warren*, 375 F.3d 468, 475 (6th Cir.2004), *citing Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). It "also embodies the concept of fundamental fairness." *Id.*, *citing Sohi v. State Dental Bd.*, 130 Ohio App.3d 414, 422, 720 N.E.2d 187 (1st Dist.1998).

It is a basic tenet of Ohio jurisprudence that cases should be decided on their merits. *Perotti v. Ferguson*, 7 Ohio St.3d, 1, 3, 454 N.E.2d 951 (1983) and further, Ohio courts have disfavored "opportunism" that seeks to take advantage of the opposing party's unfortunate circumstances. *Cleveland Mun. Sch. Dist. v. Farson*, 8th Dist. Cuyahoga No. 89525, 2008-Ohio-912, para. 15.

Appellants opposed the summary judgment motion, procedurally and substantively. This included the filing of affidavits from Appellants, with testimony confirming that they never received the admission requests. Therefore, it was impossible for them to have timely answered the requests. Counsel for Appellee never presented any evidence to contradict Appellants' testimony that they did not receive the requests. Nor did counsel for Appellee ever present

evidence that the admissions were sent electronically as required under CR 36 or that she had made any effort or attempt at contacting the Appellants concerning the outstanding admission requests.

The affidavits filed by Appellants, at a minimum, created a material issue of fact as to whether Appellants received the requests, precluding summary judgment. Pursuant to Civil Rule 56, all facts are to be viewed in the light most favorable to the non-moving party, in this case, the Appellants. Because their testimony was uncontroverted, the court should have found non-receipt by Appellants, and had the admissions not deemed admitted and denied the motion for summary judgment. At a minimum, there was a disputed issue of material fact as to receipt, which made summary judgment improper on that basis as well.

Here, the court handed Appellants a hasty and harsh summary judgment. Appellee was awarded summary judgment in the amount of \$287, 954.84 on the sole basis of unanswered requests for admissions that had never been received by Appellants, despite numerous contested issues of fact.

A truly great miscarriage of justice in this case is being levied against Appellant Deborah Alsfelder, an innocent party caught up in prior litigation involving Appellee and Appellant Robert Alsfelder, and in which she was not a party or a participant. Appellant Deborah Alsfelder was not a party to nor did she play any part in that case and she has no knowledge of the facts and circumstances surrounding that prior case.

By its granting of summary judgment, the trial court's actions violated the principles of due process and fundamental fairness. The trial court sanctioned and permitted procedural non-compliance by the moving party (Appellee) to inure to the detriment of and substantially

prejudice the non-moving party (Appellants).

Additionally, the Court of Appeals erred when it cited to the *Cleveland Trust* and the *Depaz* cases as support for allowing admission requests that were never received to be admitted and used as the sole basis for summary judgment.

The facts in the *Cleveland Trust* case are not similar and therefore clearly distinguishable from the current facts. In that case, Charles Willis acknowledged that he had received the admissions but had failed to timely respond. In the case at bar, the admissions were never received.

The same in the *Depaz* case. There, admission requests were served on the opposing party's counsel. There was no denial by Bijan Bahramian that the admission requests had been received. Again, in the case at bar, there were not only denials by way of affidavits placed in the record that the admission requests were not received by mail, but also that they had never been received electronically.

The law in Hamilton County has always been clear that unanswered requests for admissions cannot be considered on a summary judgment motion. The only First District case to consider the issue held that a trial court should not consider such evidence. *Carroll v. Lucas*, 39 Ohio Misc. 5, 313 N.E.2d 864 (1st Dist. 1974). Even those Ohio courts that will consider deemed admissions on a summary judgment motion require that written admissions first be properly filed with the Court. *Kanu v. George Development, Inc.*, 6th Dist. Lucas Nos. L-02-1139, L-02-1140, 2002-Ohio-6456, Paragraph 12; *Millisor v. Motorists Ins. Companies*, 4th Dist. Ross No. 1657, 1990 WL 193443, at *2 n.4 (Nov. 19, 1990) (attaching copy of responses to memorandum does not mean they were filed); see also *Zimmerman v. Fischer*, 1st Dist. Hamilton No. C-860624,

1987 WL 18278, at *1 (Oct 14, 1987) (unfiled, unanswered requests for admission should not be considered on summary judgment motion).

In this case, Appellee simply attached the admission requests to its motion for summary judgment. This did not constitute a proper filing. Appellee could not even cite to deemed admissions let alone rely on them as a basis for its summary judgment motion.

The detrimental implications of the instant case decision are substantial and far reaching. If this case decision is allowed to stand, it will allow, and indeed encourage counsel to engage in gamesmanship and opportunistic tactics. At the outset of a case, there will be nothing to stop counsel from alleging that admission requests had been mailed, not doing anything to allow the opposing side to be made aware of outstanding admission requests, and then completely blindsiding the other side by filing a summary judgment motion at the earliest opportunity based on the unanswered admission requests. This course of practice will impede cooperation during discovery by discouraging open communication and meaningful meet-and-confers. There is no other context in which a court would preclude a party from presenting its case simply because a month had passed in responding to discovery requests that the party was completely unaware of. Such a harsh result is anomalous and completely contrary to the intent of the Ohio Rules of Civil Procedure.

This Court should provide guidance to the lower courts regarding whether summary judgment could be rendered solely upon unanswered admission requests where the party against whom such relief is sought avers non-receipt of the requests and seeks to contest the action.

Proposition of Law No. II: It was improper to allow summary judgment to be rendered against a party who is seeking to defend solely on the basis of unanswered admission requests and without a hearing where that party avers non-receipt constitutes a deprivation of notice and a hearing guaranteed by the due process clause.

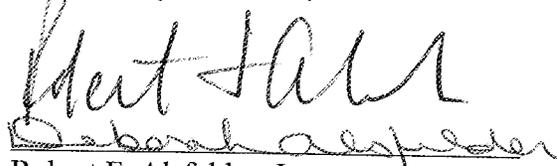
Procedural due process requires a party to get notice and an opportunity to be heard. *In re: Raheem L., supra.* In this case, there was no hearing on the summary judgment motion, despite the fact that oral argument was requested. Further, under the circumstances, the judgment rendered against Appellants was harsh and substantial. The trial court violated Appellants' due process rights by granting summary judgment, under these circumstances.

CONCLUSION

The decision below is fundamentally wrong in its reasoning and extremely dangerous in its implications for all litigants and civil litigation in the State of Ohio as the decision undermines the fundamental basis of our legal system.

Therefore, the decision below must be reversed.

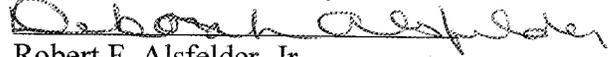
Respectfully submitted,



Robert F. Alsfield, Jr.
Deborah T. Alsfield
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Phone: (513) 271-8240

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy has been served on Angela Wallace at the Blessing Law Firm, located at 119 East Court Street, Suite 500, Cincinnati, Ohio 45202, via ordinary U.S. mail this 10th day of November, 2014.



Robert F. Alsfelder, Jr.
Deborah T. Alsfelder

ENTERED
SEP 24 2014

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

HARTGE SMITH NONWOVENS, LLC, : APPEAL NO. C-130383
Plaintiff-Appellee, : TRIAL NO. A-1207307
vs. : JUDGMENT ENTRY.
ROBERT F. ALSFELDER, JR., :
and :
DEBORAH T. ALSFELDER, :
Defendants-Appellants :



We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. See S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

In a single assignment of error, defendants-appellants Robert F. Alsfelder, Jr., and his wife, Deborah T. Alsfelder, contest the trial court's entry of summary judgment in favor of plaintiff-appellee Hartge Smith Nonwovens, LLC, ("HSN") on its fraudulent-transfer claim.

In August 2004, after receiving an adverse ruling in a then-pending lawsuit in which he was jointly and severally liable to HSN, Robert Alsfelder transferred his shares of R&S Properties LLC to Deborah Alsfelder for no consideration. In 2008, HSN received a \$1.6 million judgment in the underlying litigation. As of the date of HSN's summary-judgment motion here, \$287,575.84 remained due on the judgment.

On February 15, 2013, HSN served discovery requests in this case on the Alsfelders, including requests for admissions. The documents included requests for admissions by the Alsfelders that they were married, that in 2004, Robert Alsfelder had

transferred his interests in R&S Properties to Deborah Alsfelder and had received no value in exchange, and that in 2009, R&S Properties had redeemed the shares in Deborah Alsfelder's possession for \$365,000. The requests were sent to the address provided by the Alsfelders in their answer, the same address at which they had received service of the complaint. No return of the discovery requests was made by the postal service.

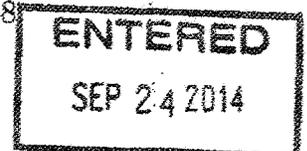
Nonetheless, the Alsfelders did not respond to the request for admissions. One month after the Alsfelders' responses were due, HSN moved for summary judgment on its claim that Robert Alsfelder had fraudulently transferred the shares to his wife in an attempt to defraud HSN, his creditor. *See* R.C. 1336.04. Its motion was supported by the affidavit of Robert Alsfelder's business partner, including tax and business documents related to the 2004 share transfer, a transcript of the judgment-debtor examination of Robert Alsfelder, the affidavit of HSN's counsel stating the facts surrounding the service of the discovery requests, and the unanswered February 15 requests for admissions.

On May 2, 2013, 45 days beyond the time limit to respond to the requests for admissions, the Alsfelders filed a memorandum in opposition to the summary-judgment motion and a motion to "Deny [HSN's] Request to Have Admissions Deemed Admitted." The motions were supported by the Alsfelders' affidavits in which they denied receiving the discovery requests, and denied the fraudulent transfer.

Three weeks later, the trial court granted summary judgment in favor of HSN, with damages in the amount of the unpaid judgment remaining in the underlying litigation, plus interest and costs. We note that not until May 31, 2013, 105 days after the service of the requests for admissions, and 11 days after the entry of summary judgment, did the Alsfelders finally file responses to HSN's discovery requests.

In their sole assignment of error, the Alsfelders argue that the trial court erred in entering summary judgment. We review cases decided on summary judgment *de novo*.

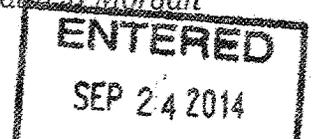
See Comer v. Risko, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8.



Summary judgment is available to a party seeking to recover upon its claim. See Civ.R. 56(A). Where, as here, a party seeks affirmative relief on its own claim as a matter of law, it bears the burden of affirmatively demonstrating that there are no genuine issues of material fact with respect to every essential element of its claim. See Civ.R. 56(A); see also *Capital Fin. Credit, LLC v. Mays*, 191 Ohio App.3d 56, 2010-Ohio-4423, 944 N.E.2d 1184, ¶ 4 (1st Dist.). Only when the movant has met its initial burden does the nonmoving party's reciprocal burden to establish the existence of triable, genuine issues of material fact, by the means listed in Civ.R. 56(C) and 56(E), arise. See *Capital Fin. Credit, LLC* at ¶ 5; see also *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).

The Alsfelders maintain that because they stated in their affidavits that they had never received the requests for admissions, the requests cannot be deemed admitted and used to support summary judgment. They also argue that because HSN's requests for admissions had not been filed, moved for admission, and formally adopted by the trial court, the admissions could not be considered as evidence for purposes of summary judgment. We disagree.

It is well established that the failure to respond to requests for admissions results in the requested matters being conclusively established, even when they go "to the heart of the case." *Cleveland Trust Co. v. Willis*, 20 Ohio St.3d 66, 67, 485 N.E.2d 1052 (1985); see Civ.R. 36(A)(1) and (B); *Depaz v. Bahramian*, 1st Dist. Hamilton Nos. C-130128 and C-130317, 2013-Ohio-5510, ¶ 13. Requests for admissions are self-executing, and thus the matters in the requests are admitted without any further action required by the requesting party. See *Depaz* at ¶ 13. Unanswered requests for admissions are a written admission and may be the basis for the entry of summary judgment. See *Depaz* at ¶ 13. Moreover, a party cannot challenge matters already conclusively established due to their failure to respond to requests for admissions by submitting contradictory affidavits. See *Farah v. Chatman*, 10th Dist. Franklin No. 06AP-502, 2007-Ohio-697, ¶ 16; see also *IPMorgan*



Chase & Co. v. Indus. Power Generation, 11th Dist. Trumbull No. 2007-T-0026, 2007-Ohio-6008, ¶ 37.

Here, the evidence that HSN had properly placed before the trial court through the admissions, unanswered at the time of summary judgment, plus its other evidentiary material conclusively established that Robert Alsfelder, well aware that an unfavorable judgment was likely against him in the underlying lawsuit, transferred substantially all of his assets to his wife, an “insider” under R.C. 1336.04(B), and did not receive any value in exchange for the value of the shares—essential elements of HSN’s fraudulent-transfer claim. See *Huntington Natl. Bank v. Winter*, 1st Dist. Hamilton No. C-090482, 2011-Ohio-1751, ¶ 9; see also *Lifesphere v. Sahnd*, 179 Ohio App.3d 685, 2008-Ohio-6507, 903 N.E.2d 379 (1st Dist.) (summary judgment may be entered in claims brought under R.C. 1336.04(B)).

Thus, HSN was entitled to judgment as a matter of law, and the trial court did not err by granting summary judgment based on the request for admissions and the other evidentiary material in support of the motion. The assignment of error is overruled.

Therefore, the trial court’s entry granting summary judgment is affirmed.

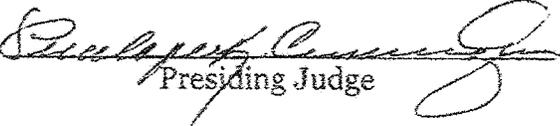
A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., HENDON and DEWINE, JJ.

To the clerk:

Enter upon the journal of the court on September 24, 2014

per order of the court

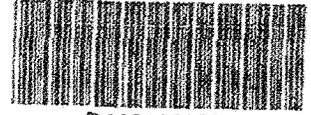

Presiding Judge

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

ENTERED
MAY 22 2013

HARTGE SMITH NONWOVENS, :
LLC :

Case No. A1207307



D102199053

Plaintiff, :

-vs- :

ROBERT F. ALSFELDER, JR. :

ENTRY DENYING DEENDANTS'
MOTION TO DENY PLAINTIFF'S
REQUEST TO HAVE ADMISSIONS
DEEMED ADMITTED

and :

DEBORAH T. ALSFELDER :

Defendants. :

This cause is before the Court on Defendants' Motion to Deny Plaintiff's Request to Have Admissions Deemed Admitted, filed May 2, 2013. Upon consideration of Defendants' motion and Plaintiff's memorandum in opposition, the Court finds the Defendants' motion is not well taken and should be denied.

SO ORDERED.

Robert C. Winkler, Judge

5-22-13

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

HARTGE SMITH NONWOVENS,
LLC

Plaintiff,

-vs-

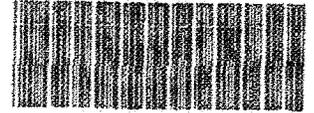
ROBERT F. ALSFELDER, JR.

and

DEBORAH T. ALSFELDER

Defendants.

Case No. A1207307



D102199060

ENTRY GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

ENTERED

MAY 22 2013

This matter came before the Court on Plaintiff's motion for summary judgment. Upon consideration of Plaintiff's motion, Defendants' memorandum in opposition, deposition testimony, submitted affidavits, and other material submitted by the parties, the Court finds that Plaintiff's motion is well taken and should be granted.

Viewing the evidence most strongly in Defendants' favor, reasonable minds can come to but one conclusion as to the fraudulent nature of Robert Alsfelder's transfer of R&S Properties shares to his wife Deborah Alsfelder. Accordingly, summary judgment is hereby granted in favor of Plaintiff in the amount of \$287,954.84, plus interest. Defendants to bear costs.

SO ORDERED.

FOR COURT USE ONLY

S.C. 18
Line #: _____

COURT OF COMMON PLEAS
ENTER

Robert C. Winkler
ROBERT C. WINKLER, Judge
THE CLERK SHALL SERVE NOTICE
TO PARTIES PURSUANT TO CIVIL
RULE 58 5-22-13 FILED
AS COSTS HEREIN