

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

ROSEMAN BUILDING CO., LLC	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2009CA00009
VISION POWER SYSTEMS, INC., et	:	
al.	:	
	:	
	:	
Defendants-Appellants	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Stark County Court of  
Common Pleas Case No. 2008CV03230

JUDGMENT: AFFIRMED IN PART; REVERSED IN  
PART AND JUDGMENT ENTERED

DATE OF JUDGMENT ENTRY: January 25, 2010

APPEARANCES:

For Plaintiff-Appellee:

ROBERT E. SOLES, JR.  
KARA DODSON  
6545 Market Ave. N.  
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For Defendants-Appellants:

LARRY A. ZINK  
3711 Whipple Ave., NW  
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*Delaney, J.*

{¶1} Defendants-Appellants, Vision Power Systems, Inc. and Russell Spitz, appeal the December 22, 2008 judgment entry of the Stark County Court of Common Pleas granting summary judgment in favor of Plaintiff-Appellee, Roseman Building Co., LLC.

### **STATEMENT OF THE FACTS AND THE CASE**

{¶2} In October 2007, Roseman entered into a contract with Vision Power whereby Roseman agreed to perform certain construction services for Vision Power's construction project in Massillon, Ohio. Pursuant to the agreement, Vision Power agreed to pay Roseman draws as work progressed based upon written draw requests submitted by Roseman to Vision Power.

{¶3} Prior to June 2008, Vision Power made payments to Roseman based on the terms of the agreement. On May 5, 2008, Roseman made an application and certificate for payment to Vision Power in the amount of \$163,571.20. Russell W. Spitz, president of Vision Power, sent Roseman a letter on June 6, 2008. The letter read:

{¶4} "Enclosed please find our check for \$163,571.20 which we have dated for Friday, June 13<sup>th</sup>. I respectfully request the check is [sic] not deposited until the 13<sup>th</sup> to ensure the funds are in our account. I apologize for this delay in payment and assure you that all future invoices will be paid within ten days of receipt." (Appellants' Exhibit 1).

{¶5} Roseman abided by the terms of the letter and deposited Check No. 1870 on June 13, 2008. However, the check was returned to Roseman and marked "non-sufficient funds." Based on the bank dishonoring Vision Power's check, Roseman

incurred damages, such as bank charges and insufficient funds to cover checks drafted from Roseman's own account.

{¶6} Roseman notified Vision Power of the dishonor on June 20, 2008, by certified mail. On July 23, 2008, Roseman filed a complaint against Vision Power with the Stark County Court of Common Pleas. Roseman alleged five causes of action against Vision Power: Count 1, Breach of Contract; Count 2, Account; Count 3, Quantum Meruit; Count 4, Passing Bad Checks; and Count 5, Fraud. In Counts 1, 2, and 3, Roseman stated that Vision Power owed Roseman \$170,694.53 for materials and services provided under the agreement. Under Count 4, Roseman argued that because Vision Power passed a bad check in the amount of \$163,571.20, Roseman was entitled to recover treble damages in the amount of \$490,713.60. For Count 5, Roseman demanded judgment in excess of \$170,694.53.

{¶7} On August 13, 2008, Vision Power made a \$50,000 payment to Roseman.

{¶8} Vision Power filed a timely answer to the complaint and the case proceeded. On October 6, 2008, the parties filed joint stipulations. In the stipulations, the parties agreed to the following:

{¶9} "2. Defendant, Russell Spitz shall hereby be liable to Plaintiff in the amount of \$120,694.53 plus interest, attorney fees, court costs, and any other damages sustained by Plaintiff as a direct and proximate result of Defendant, Russell Spitz issuing Check No. 1870, which said interest, attorney fees, court costs, and damages shall be determined at a later date."

{¶10} Roseman filed a partial motion for summary judgment on October 16, 2008. It moved for judgment on Counts 1, 2, and 3 based on the pleadings and the joint

stipulations filed on October 6, 2008. The trial court granted Roseman's motion for summary judgment and awarded judgment in the amount of \$120,694.53.

{¶11} Roseman filed a second motion for summary judgment on December 4, 2008. In its second motion for summary judgment, Roseman argued it was entitled to judgment as a matter of law on the fourth and fifth causes of action in its complaint. Roseman requested judgment in the amount of \$441,940.89. Vision Power opposed the motion. On December 22, 2008, the trial court granted Roseman's motion for summary judgment and awarded Roseman treble damages in the amount of \$490,713.60. The trial court also found that the previous judgment granted in the case would be merged with the December 22, 2008 judgment as it related to the total amount due.

{¶12} It is from this judgment Vision Power now appeals.

#### **ASSIGNMENTS OF ERROR**

{¶13} Appellants raise five Assignments of Error:

{¶14} "I. GENUINE ISSUES OF MATERIAL FACT EXIST IS [SIC] TO WHETHER VISION POWER SYSTEMS ISSUED THE JUNE 13, 2008 CHECK IN THE AMOUNT OF \$163,157.20 WITH A 'PURPOSE TO DEFRAUD' AS REQUIRED BY O.R.C. 2913.11(B) AND THEREFORE THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO ROSEMAN ON ROSEMAN'S FOURTH CAUSE OF ACTION (PASSING BAD CHECKS) IN FINDING THAT ROSEMAN WAS ENTITLED TO LIQUIDATED TREBLE DAMAGES OF \$490,713.60 PURSUANT TO O.R.C. 2307.61(A)(1)(b).

{¶15} “II. THE TRIAL COURT ERRED WHEN IT AWARDED LIQUIDATED TREBLE DAMAGES PURSUANT TO O.R.C. 2307.61(A)(1)(b) WITHOUT FINDING THAT VISION POWER, ET AL. ENGAGED IN A ‘CRIMINAL ACT.’

{¶16} “III. THE TRIAL COURT ERRED IN NOT FINDING THAT ROSEMAN HAD MADE AN ELECTION PURSUANT TO O.R.C. 2307.61(A)(1)(a) TO RECOVER COMPENSATORY DAMAGES AND NOT TO RECOVER LIQUIDATED DAMAGES WHEN ROSEMAN PREVIOUSLY SOUGHT AND OBTAINED SUMMARY JUDGMENT ON ITS FIRST CAUSE OF ACTION (BREACH OF CONTRACT), SECOND CAUSE OF ACTION (ACCOUNT) AND THIRD CAUSE OF ACTION (QUANTUM MERUIT).

{¶17} “IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO ROSEMAN IN THE AMOUNT OF \$490,713.60 WHEN ROSEMAN’S SECOND MOTION FOR SUMMARY JUDGMENT SOUGHT \$441,940.80 [SIC] AND NO RECORD EVIDENCE WAS PRESENTED TO SUPPORT THE DOLLAR AMOUNT OF THE JUDGMENT.

{¶18} “V. THE DEMAND LETTER FROM ROSEMAN’S COUNSEL TO VISION POWER DID NOT, AS A MATTER OF LAW, COMPLY WITH THE ‘CONSPICUOUS NOTICE’ REQUIREMENT OF O.R.C. 2307.61(C).”

#### **STANDARD OF REVIEW**

{¶19} We will first address the standard of review applicable to Vision Power’s Assignments of Error. Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶20} “Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274.”

{¶21} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35.

## I., II.

{¶22} We consider Vision Power’s first and second Assignments of Error together as they raise interrelated issues. Vision Power asserts genuine issues of material fact exist as to whether Roseman suffered injury by a criminal act, i.e. whether Vision Power had a purpose to defraud Roseman.

{¶23} Roseman’s fourth cause of action alleged Vision Power violated R.C. 2913.11 in passing a bad check to Roseman. R.C. 2913.11(B) states, “No person, with purpose to defraud, shall issue or transfer or cause to be issued or transferred a check or other negotiable instrument, knowing that it will be dishonored or knowing that a person has ordered or will order stop payment on the check or other negotiable

instrument.” In Ohio, passing a bad check is considered a theft offense. R.C. 2913.01(K)(1).

{¶24} R.C. 2307.61 recognizes the availability of civil actions for victims of theft. *Red Ferris Chevrolet, Inc. v. Aylsworth*, 9th Dist. No. 07CA0072, 2008-Ohio-4950, ¶5 citing *Estate Planning Legal Services, P.C. v. Cox*, 12th Dist. Nos. CA2006-11-140, CA2006-12-141, 2008-Ohio-2258, at ¶10. R.C. 2307.61(A) specifically provides that a property owner may bring a civil action to recover damages from one who “commits a theft offense \* \* \* involving the owner’s property[.]” R.C. 2307.61 is premised on R.C. 2307.60(A) that requires proof of an injury “by a criminal act” before damages can be recovered. *Red Ferris Chevrolet*, supra, citing *Riley v. Supervalu Holdings, Inc.*, Hamilton App. No. C-040668, 2005-Ohio-6996, at ¶22.

{¶25} Vision Power contends that there is a genuine issue of material fact as to whether Vision Power acted with “purpose to defraud” when it issued Check No. 1870 for \$163,571.20. The essential elements of passing a bad check under R.C. 2913.11(B) are that Vision Power (1) with purpose to defraud, (2) issued a check, (3) knowing that it will be dishonored. A person is presumed to know that a check will be dishonored if the check was properly refused payment for insufficient funds upon presentment within thirty days and that it is not satisfied within ten days of notice of the dishonor. R.C. 2913.11(C).

{¶26} Upon our *de novo* review, the Civ.R. 56 evidence demonstrates there is no genuine issue of material fact that Vision Power issued Check No. 1870 and it was dishonored and not satisfied. The issue then is whether the Civ.R. 56 evidence establishes there was “purpose to defraud.”

{¶27} A person acts “purposefully” when “it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.” R.C. 2901.22(A). R.C. 2913.01(B) defines “defraud” as “to knowingly obtain, by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another.” “Deception” is defined as “knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.” R.C. 2913.01(A).

{¶28} In support of its argument that the Civ.R. 56 evidence did not demonstrate a purpose to defraud, Vision Power relies in part on its June 6, 2008 letter to Roseman. In the June 6, 2008 letter to Roseman (submitted as Civ.R. 56 evidence through the affidavit of Appellant, Russell Spitz), Vision Power states that it has enclosed a check for \$163,571.20 dated for June 13, 2008. Vision Power requests that Roseman not deposit the check until June 13<sup>th</sup> to ensure that funds are in Vision Power’s account. The affidavit of Sean Roseman, President of Roseman Building Co., states that he deposited Check No. 1870 on June 13, 2008 and it was subsequently dishonored for non-sufficient funds.

{¶29} Vision Power cites *State v. Creachbaum* (1970), 24 Ohio App.2d 31, 263 N.E.2d 675, *State v. Edwards* (2001), 141 Ohio App.3d 388, 751 N.E.2d 510, and *State*

v. *Boyd*, Montgomery App. No. 19158, 2003-Ohio-2406, in support of the proposition that there can be no purpose to defraud when the payee knows that a check is not collectible at the time it is tendered. On the contrary, we find the Civ.R. 56 evidence submitted shows the opposite: Vision Power told Roseman, the payee, that the check would be collectible on June 13, 2008. Roseman relied upon Vision Power's representation, deposited the check on June 13, 2008, and the check was subsequently dishonored.

{¶30} We further reject Vision Power's argument that its subsequent payment of \$50,000 mitigates the inference of an intent to defraud. Vision Power was to pay \$163,571.20 on June 13, 2008. Vision Power did not tender the \$50,000 payment until August 13, 2008. Vision Power made the partial payment after Roseman had notified Vision Power of the dishonor and after Roseman had filed its complaint against Vision Power. We find the fact of Vision Power's subsequent partial payment does not create a material issue of fact on the issue of Vision Power's purpose to defraud. Regardless of the \$50,000 payment, Vision Power has failed to make good on the debt, giving rise to a statutory presumption on an intention not to pay what is owed to Roseman. *Red Ferris*, supra, at ¶28.

{¶31} Reviewing the evidence in a light most favorable to the non-moving party, we find the evidence demonstrates there is no genuine issue of material fact that Vision Power knowingly deceived or caused Roseman to be deceived by its false and misleading representation that the funds necessary to cover Check No. 1870 would be available on June 13, 2008.

{¶32} Vision Power further argues the trial court did not specifically find in its December 22, 2008 judgment entry that there had been an injury by a criminal act to warrant damages in favor of Roseman. As stated above, R.C. 2307.61 is premised on R.C. 2307.60(A), which requires injury “by a criminal act.” A guilty plea or criminal conviction is not a precondition to a determination that the owner’s property was “willfully damaged or that a theft offense involving the owner’s property has been committed[.]” R.C. 2307.61(G)(1).

{¶33} Roseman argues that by granting summary judgment in its favor on its cause of action for passing bad checks and awarding it treble damages, the trial court impliedly found that Vision Power engaged in a criminal act for which Roseman suffered injury. We agree.

{¶34} R.C. 2307.61 is a civil remedy and it is not necessary to find that Vision Power committed a criminal act “beyond a reasonable doubt.” *H & W Door Co. v. Stemple* (Mar. 31, 1994) 11th Dist. No. 93-P-0031. We find, based on our above *de novo* analysis, the Civ.R. 56 evidence demonstrates there is no genuine issue of material fact that the elements of R.C. 2913.11(B) have been met in that Vision Power engaged in a criminal act causing caused injury to Roseman.

{¶35} Vision Power’s first and second Assignments of Error are therefore overruled.

### III.

{¶36} Vision Power’s third Assignment of Error argues that Roseman was not entitled to liquidated damages for its fourth cause of action because it had previously elected to seek compensatory damages.

{¶37} R.C. 2307.61 sets out a range of damages for which an aggrieved property owner may seek for claims that satisfy R.C. 2307.60. It states:

{¶38} “(A) If a property owner brings a civil action pursuant to division (A) of section 2307.60 of the Revised Code to recover damages from any person who willfully damages the owner's property or who commits a theft offense, as defined in section 2913.01 of the Revised Code, involving the owner's property, the property owner may recover as follows:

{¶39} “(1) In the civil action, the property owner may elect to recover moneys as described in division (A)(1)(a) or (b) of this section:

{¶40} “(a) Compensatory damages that may include, but are not limited to, the value of the property and liquidated damages in whichever of the following amounts applies:

{¶41} “(i) Fifty dollars, if the value of the property was fifty dollars or less at the time it was willfully damaged or was the subject of a theft offense;

{¶42} “(ii) One hundred dollars, if the value of the property was more than fifty dollars, but not more than one hundred dollars, at the time it was willfully damaged or was the subject of a theft offense;

{¶43} “(iii) One hundred fifty dollars, if the value of the property was more than one hundred dollars at the time it was willfully damaged or was the subject of a theft offense.

{¶44} “(b) Liquidated damages in whichever of the following amounts is greater:

{¶45} “(i) Two hundred dollars;

{¶46} “(ii) Three times the value of the property at the time it was willfully damaged or was the subject of a theft offense, irrespective of whether the property is recovered by way of replevin or otherwise, is destroyed or otherwise damaged, is modified or otherwise altered, or is resalable at its full market price. \* \* \*”

{¶47} In Roseman’s complaint, Roseman brought five causes of action against Vision Power. In the first three Counts of the complaint, Roseman alleged breach of contract, account, and quantum meruit and requested compensatory damages in the amount remaining on the agreement. Roseman moved for summary judgment on those counts, based partly on joint stipulations in which the parties agreed that Vision Power was liable for \$120,694.53 under the agreement. The trial court granted the motion for summary judgment.

{¶48} Roseman’s fourth and fifth causes of action against Vision Power were for passing bad checks and fraud. The fourth and fifth counts were brought specifically for damages caused by Check No. 1870 in the amount of \$163,571.20. In the complaint, Roseman requested treble damages in the amount of \$490,713.60 pursuant to R.C. 2307.61. Roseman moved for summary judgment on Counts 4 and 5, requesting \$441,940.89 in damages. The amount Roseman requested was based on the \$50,000 payment made by Vision Power on August 13, 2008 and \$1,227.29 in damages Roseman incurred as a result of Vision Power’s issuance of the bad check. The trial court granted Roseman’s motion for summary judgment, but awarded Roseman \$490,713.60 in damages. The trial court also merged the damages awarded in the two summary judgments.

{¶49} Vision Power argues that because Roseman was suing under R.C. 2307.61(A), it was required to elect its remedy from the options provided in R.C. 2307.61: (A)(1)(a) compensatory damages or (A)(1)(b) liquidated damages. Vision Power contends that Roseman elected to seek compensatory damages when it initially moved for summary judgment and was awarded compensatory damages; thereafter, Roseman was not entitled to also receive treble damages on its second motion for summary judgment. We disagree.

{¶50} R.C. 2307.61 creates a civil action for the recovery of damages from one whose person or property has been damaged by the criminal acts of others, i.e., a theft offense of passing bad checks. As stated above, Roseman's first three causes of action were for breach of contract, account, and quantum meruit for which Roseman requested compensatory damages. None of these causes of action were brought under the authority of R.C. 2307.61 or R.C. 2307.60. Rather, Roseman based Count 4 of the complaint on the criminal act of Vision Power, seeking treble damages under R.C. 2307.61. We find that Roseman properly elected to pursue treble damages under R.C. 2307.61(A)(1)(b) for its civil claim of passing bad checks under R.C. 2307.60 and R.C. 2913.11 in Count 4.

{¶51} Further, the trial court in its December 22, 2008 judgment entry stated that the "previous judgment granted on the underlying obligation will be merged within the current judgment as it relates to the total amount due." As such, any error by the trial court was rendered harmless.

{¶52} Vision Power's third Assignment of Error is overruled.

**IV.**

{¶53} Vision Power argues in its second Assignment of Error that the trial court's award of \$490,713.60 in treble damages was incorrect. We agree.

{¶54} In its motion for summary judgment, Roseman argued it was entitled to damages in the amount of \$441,940.89. The different amount requested by Roseman in its motion for summary judgment was based on Vision Power's payment of \$50,000 on August 13, 2008 and the inclusion of \$1,227.29 in damages based on the bad check. Roseman originally stated in its complaint that it was requesting treble damages in the amount of \$490,713.60. The trial court in its December 22, 2008 judgment entry awarded Roseman the amount requested in Roseman's complaint.

{¶55} However, we find the Civ.R. 56 evidence presented, demonstrates there is no genuine issue of material fact that Roseman was entitled to damages in the amount of \$441,940.89.

{¶56} Vision Power's fourth Assignment of Error is sustained.

**V.**

{¶57} Vision Power argues in its fifth Assignment of Error that the June 20, 2008 demand letter sent by Roseman did not meet the statutory requirements under R.C. 2307.61(A)(2)(b).

{¶58} The statute states in pertinent part:

{¶59} "(2) In a civil action in which the value of the property that was willfully damaged or was the subject of a theft offense is less than five thousand dollars, the property owner may recover damages as described in division (A)(1)(a) or (b) of this section and additionally may recover the reasonable administrative costs, if any, of the

property owner that were incurred in connection with actions taken pursuant to division (A)(2) of this section, the cost of maintaining the civil action, and reasonable attorney's fees, if all of the following apply:

{¶60} “\* \* \*

{¶61} “(b) The demand conforms to the requirements of division (C) of this section and is sent by certified mail, return receipt requested.

{¶62} “\* \* \*

{¶63} “(C) For purposes of division (A)(2) of this section, a written demand for payment shall include a conspicuous notice to the person upon whom the demand is to be served that indicates all of the following: \* \* \*”

{¶64} Vision Power argues the June 20, 2008 demand letter did not meet the requirements of a “conspicuous notice.” However, as pointed out by Roseman, the requirements of R.C. 2307.61(A)(2) have no application to the present case because the value of the property that is subject of the theft offense is more than \$5,000.

{¶65} Vision Power’s fifth Assignment of Error is overruled.

{¶66} The judgment of the Stark County Court of Common Pleas is therefore affirmed in part; reversed in part and judgment is entered in favor of Plaintiff-Appellee, Roseman Building Co., LLC, in the amount of \$441,940.89 pursuant to App.R. 12.

By: Delaney, J.

Wise, J. concurs separately,

Hoffman, P.J. dissents

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HON. PATRICIA A. DELANEY

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HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE

PAD:kgb

*Wise, J., concurring*

{¶67} I concur with the opinion of Judge Delaney. I write separately only as to the issues raised under appellant's First and Second Assignments of Error.

{¶68} As Judge Delaney notes, R.C. 2913.11(B) sets forth the elements of the offense of passing bad checks. In turn, R.C. 2913.11(C) sets forth the requirements for establishing a rebuttable presumption of knowingly dishonoring a check:

{¶69} "(C) For purposes of this section, a person who issues or transfers a check or other negotiable instrument is presumed to know that it will be dishonored if either of the following occurs:

{¶70} "(1) The drawer had no account with the drawee at the time of issue or the stated date, whichever is later;

{¶71} "(2) The check or other negotiable instrument was properly refused payment for insufficient funds upon presentment within thirty days after issue or the stated date, whichever is later, and the liability of the drawer, endorser, or any party who may be liable thereon is not discharged by payment or satisfaction within ten days after receiving notice of dishonor."

{¶72} In the case sub judice, I conclude Roseman has established a rebuttable presumption under R.C. 2913.11(C). This Court has recognized: "A presumption effectively reverses the burden of coming forward with evidence to support a proposition of fact, causing the fact to be deemed established unless sufficient proof is presented to rebut the presumption." *In re J.J.F.*, Stark App.No. 2009CA00133, 2009-Ohio-4736, ¶46, quoting *In re C.E.*, Champaign App. No.2005-CA-11, 2005-Ohio-5913, ¶ 14, citing *Evans v. National Life & Acc. Ins. Co.* (1986), 22 Ohio St.3d 87, 488 N.E.2d 1247,

paragraph one of the syllabus. Furthermore, I note R.C. 2913.01(B) defines “defrauding” in part as knowingly obtaining a benefit to oneself by deception. Under the circumstances presented, I find Roseman has established, for purposes of shifting the summary judgment burden, that Vision Power intended to defraud via its post-dated check and written assurance of negotiability as of June 13, 2008. See *State v. Lowenstein* (1924), 109 Ohio St. 393, 403. Therefore, it is incumbent to look closely at the affidavit Vision Power submitted in response to the second motion for summary judgment. This affidavit alleges several matters, but in regard to rebutting an inference of fraud, it references the payment by Vision Power of \$50,000.00, which was subsequent to the dishonoring of the check and the filing of Roseman’s suit. I find the evidence of the \$50,000.00 payment to be irrelevant in this case to the statutory fraud question under R.C. 2913.11, particularly where Vision Power has provided no factual explanation of the lack of sufficient funds available at the agreed time of presentment. Without such explanation, via Civ.R. 56(E) evidence, I would hold that Vision Power has not rebutted the presumption created by R.C. 2913.11(C), and that Roseman has established fraud for purposes of summary judgment.

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JUDGE JOHN W. WISE

*Hoffman, P.J., dissenting*

{¶73} I respectfully dissent from the majority opinion.

{¶74} The majority concludes there is no genuine issue of material fact Vision Power knowingly deceived or caused Roseman to be deceived by its false and misleading representation the funds necessary to cover Check No. 1870 would be available on June 13, 2008.<sup>1</sup> I disagree.

{¶75} I concede a presumption exists Vision Power knew the check would be dishonored when it failed to satisfy the check within ten days of the notice of dishonor. However, that presumption is rebuttable. I find the subsequent payment of \$50,000, within 60 days of the notice of dishonor; albeit, after Roseman instituted litigation, when considered in the light most favorable to Vision Power, constitutes sufficient evidence to create a genuine dispute as to whether Vision Power intended to defraud Roseman. While the trier-of-fact may ultimately decide in Roseman's favor, I believe granting summary judgment was premature.

{¶76} I find a genuine dispute exists whether the check was issued with a purpose to defraud. As noted in Judge Delaney's opinion, R.C. 2913.01(B) defines "defraud" as "to knowingly obtain, by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another." Based upon the fact the check was drawn to cover work already performed by Roseman under the terms of the contract, I question whether the check was issued to obtain some benefit by Vision Power or to cause some detriment to Roseman. It appears at the time the check was issued, the benefit had already been received and the detriment caused.

{¶77} Accordingly, I would grant Vision Power's first assignment of error and would find the remaining assignments of error premature based thereon.

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HON. WILLIAM B. HOFFMAN

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<sup>1</sup> Delaney, J., Opinion at ¶31.

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

ROSEMAN BUILDING CO., LLC	:	
	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
VISION POWER SYSTEMS, INC., et	:	
al.	:	
	:	
	:	Case No. 2009CA00009
Defendants-Appellants	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed in part; reversed in part and judgment entered in favor of Plaintiff-Appellee, Roseman Building Co., LLC, in the amount of \$441,940.89 pursuant to App.R. 12. Costs assessed to Appellants.

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HON. PATRICIA A. DELANEY

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HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE