[Cite as *Beneficial Fin. I., Inc. v. Saunders*, 2019-Ohio-3577.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
GALLIA COUNTY

BENEFICIAL FINANCIAL I INC.,	:	
Plaintiff-Appellee,	:	Case No. 18CA5
vs.	:	
DOYLE J. SAUNDERS, et al.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellants.	:	

APPEARANCES:

Marc E. Dann and Emily White, Cleveland, Ohio, for appellants.

Matthew J. Richardson, Columbus, Ohio, for appellee.

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 8-28-19
ABELE, J.

{¶ 1} Doyle J. Saunders and Sharon A. Saunders, defendants below and appellants herein, appeal a Gallia County Common Pleas Court summary judgment in favor of Beneficial Financial I Inc., successor in interest to HFTA Corporation, successor by merger to HFTA First Financial Corporation, formerly known as Transamerica, on its foreclosure action.

{¶ 2} Appellants assign one error for review:

FIRST ASSIGNMENT OF ERROR:

> "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF APPELLEE WHERE APPELLEE WAS BARRED AS A MATTER OF LAW FROM ENFORCING A LOST NOTE IT ACQUIRED FROM AN UNIDENTIFIED ASSIGNOR, AND WHERE IT FAILED TO PRESENT ADMISSIBLE EVIDENCE DEMONSTRATING THE TERMS OF THE PROMISSORY NOTE,

DEFAULT IN PAYMENTS, OR AMOUNT OWED."

{¶ 3} In January 1997, Sharon and Doyle Saunders (appellants) executed a $64,513.19 promissory note payable to Transamerica Financial Services. The note was secured by a mortgage on their property at 178 Church Street in Bidwell, Ohio. On October 5, 2015, Beneficial Financial I Inc., plaintiff below and appellee herein, filed a foreclosure action and sought (1) relief on the note and the mortgage, (2) reformation of the legal description of property included in the mortgage, and (3) a declaratory judgment that appellee is entitled to enforce the note, which had been lost, over against HSBC Finance Corporation.[1]

{¶ 4} Appellee's complaint alleged that they are entitled to enforce the promissory note, with an unpaid balance of $46,226.01 plus interest from April 3, 2011. Appellee further alleged that appellants were in default in payment and declared the debt to be immediately due and payable. Appellee stated that on September 10, 2014, the mortgage was assigned from HSBC Finance Corporation, Successor by Merger to HFTA Corporation, Successor by Merger to HFTA First Financial Corporation f/k/a Transamerica Financial Services to Beneficial Financial I Inc. Appellee further stated that Holzer Hospital Foundation, State of Ohio Department of Taxation and the Treasurer of Gallia County, have or claim to have an interest in the premises.

{¶ 5} As part of the complaint, appellee also asserted that, although the appellants are the owners of the property, through inadvertence or error, the legal description, as contained in the mortgage deed, does not conform to the legal description set forth in the warranty deed book. However, the parties' intention at the time of the execution of the mortgage deed was to transfer to

[1] At the time appellee filed the complaint, HSBC Finance Corporation had not been made a party to the complaint.

the appellee all interest that the appellants had in the property. Thus, through a scrivener's error the legal description was not entirely and properly placed in the mortgage deed and deed of conveyance. Accordingly, appellee stated that it was entitled to a declaratory judgment that it is the party entitled to enforce the promissory note and demanded that the mortgage deed be reformed to provide for the proper legal description. Appellee further demanded judgment against the appellants, jointly and severally, for $46,226.01 plus interest from April 3, 2011, plus late charges, any deferred non interest/interest bearing amounts, advances for taxes and insurance, and all other expenditures recoverable under the note, the mortgage and Ohio law.

{¶ 6} Appellee also attached to the complaint a lost-note affidavit from Lori Washington, Vice President and Assistant Secretary of Administrative Services Division of Beneficial, executed April 22, 2014, that states in part:

> 3. I am making this Lost Note Affidavit in connection with a promissory note and/or loan agreement ("Note"), in which Doyle J. Saunders and Sharon A. Saunders, promised to pay the Lender the sum of $64,513.19 (the "Loan"). The Loan is identified as Account Number ***.
>
> 4. On or about the date on which this Affidavit was executed, a diligent search for the original Note was conducted. The search included looking in the physical files and secure storage facilities where the original Note and other documents related to Account * * * are maintained.
>
> 5. After conducting the search described in paragraph 4 above, Lender was not able to locate either the original or a copy of the Note. Therefore, the Lender cannot reasonably obtain possession of the original Note because the whereabouts of the original Note cannot be determined although the Lender was in possession of the original Note prior to its whereabouts becoming undeterminable.
>
> 6. The records maintained by the Lender, including the mortgage associated with 178 Church St. Bidwell, OH, 45614 as well as a payment history are attached as composite Exhibit 1, and were used to establish the terms of the Note and also established that the Note was not paid, satisfied, pledged, transferred or lawfully seized.

> 7. The terms of the Note were input into the servicing system, and include among other things the principal balance, property address, the names of the obligors and mortgagers, interest rate, payment dates, term, and account number. The information detailed above was then used to service the loan, including the recording of payments, as well as fees and costs relating to the Loan.
>
> 8. The interest rate set forth in the Note, as detailed by the Lender's records attached as composite Exhibit 1, was 14.499%, the date of the first payment was due on March 3, 1997 and the final payment was to be made on or before February 03, 2027.
>
> 9. The amount of the monthly principal and interest payments due under the terms of the Note, as detailed by the Lender's records attached as composite Exhibit 1 are $790.00.
>
> 10. Lender hereby agrees to hold the Borrowers harmless and agrees to indemnify them from any loss they may incur by reason of a claim by another person or entity to enforce the note.

{¶ 7} Appellee also attached to the complaint: (1) a copy of the appellants' mortgage with Transamerica Financial Services in the amount of $64,513.19, dated January 29, 1997, (2) a copy of the mortgage assignment to it from HSBC, successor by merger to HFTA Corporation, successor by merger to HFTA First Financial Corporation f/k/a Transamerica, and (3) a copy of Beneficial's Preliminary Judicial Report according to which the property was encumbered with six Ohio tax liens and one judgment lien.

{¶ 8} On March 17, 2016, appellee filed an amended complaint for foreclosure, declaratory judgment and other equitable relief. Also, appellee added a new party defendant, HSBC Finance Corporation. On April 22, 2016, appellee filed a motion for default judgment. Appellants filed a motion to strike Exhibit A (lost-note affidavit of Lori Washington) of the appellee's amended complaint for foreclosure and alleged that the lost-note affidavit failed to satisfy the R.C. 1303.38(A)(1) requirements.

{¶ 9} On October 4, 2016, appellee filed an amended Exhibit A to its October 5, 2015

complaint. The amended Exhibit A is a Lost Note Affidavit from Jeffrey W. Kordecki, Vice President and Assistant Secretary of the Administrative Services Division of Beneficial. This affidavit averred: "The Lender acquired ownership of the Note from a person who was entitled to enforce the Note when its whereabouts became undeterminable." On October 12, 2016, the appellants filed a renewed motion to strike Exhibit A.

{¶ 10} On February 1, 2017, appellee filed a Civ.R. 55 motion for default judgment and a Civ.R. 56 motion for summary judgment, accompanied by an affidavit in support from Heather R. Tibbetts, Vice President and Assistant Secretary of the Administrative Services Division of Beneficial, dated January 30, 2017. Tibbetts attested to the assignment of mortgage, the payment history, the terms of the mortgage, and the amount due. In addition, Tibbetts' affidavit stated in part:

> 5. I attest that the original note has been lost, destroyed, or cannot otherwise be located despite reasonable diligence; that Plaintiff was in possession and entitled to enforce said note when the loss of possession occurred or acquired ownership of the instrument from a person entitled to enforce the instrument when the loss of possession occurred; that the loss of possession was not a result of a transfer by the Plaintiff or a lawful seizure.

{¶ 11} On February 13, 2018, the trial court issued its decision and determined that:

> Plaintiff has set forth sufficient evidence to show it is the proper party to enforce the note and mortgage herein, that the mortgage was assigned, and that the note, although lost, was transferred to plaintiff and that the mortgage refers to the note. As held in *Bank of New York v. Dobbs*, 2004-Ohio-4742, citing the Restatement III, Property, Section 5.4(b) 'Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise.' The Court then stated 'Thus, the obligation follows the mortgage if the record indicates the parties so intended.'
>
> Plaintiff has presented evidence by way of affidavits that the note was transferred with the mortgage. Defendants have failed to set forth any evidence that

> would indicate otherwise. * * *
>
> The Court hereby rules that plaintiff is entitled to foreclose upon the note and mortgage and that plaintiff is entitled to reformation of the legal description contained in the mortgage.

{¶ 12} Thus, on March 19, 2018 the trial court granted summary judgment and concluded that (1) Beneficial is entitled to a declaratory judgment that it is the party entitled to enforce the promissory note, and (2) defendants HSBC Finance Corporation, Successor by Merger to HFTA Corporation, Successor by Merger to HFTA First Financial Corporation f/k/a Transamerica Financial Services are barred from claiming any interest in the note. The court also reformed the mortgage deed. This appeal followed.

I.

{¶ 13} In their sole assignment of error, appellants contend that the trial court erred in granting summary judgment because Beneficial should be barred as a matter of law from enforcing a lost note that it acquired from an unidentified assignor, and when it failed to present admissible evidence to demonstrate the terms of the promissory note, default in payments, or the amount owed.

{¶ 14} Generally, summary judgment proceedings present an appellate court with the unique opportunity to review the evidence in the same manner as the trial court. *Smiddy v. Wedding Party, Inc.*, 30 Ohio St.3d 35, 36, 506 N.E.2d 212 (1987). Civ.R. 56 provides that summary judgment may be granted only after the trial court determines:

> 1) no genuine issues as to any material fact remain 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 party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). It is also well

established that a party seeking summary judgment bears the burden to demonstrate that no issues of material fact exist for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Dresher v. Burt,* 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). A dispute of fact is "material" if it affects the outcome of the litigation, and is "genuine" if demonstrated by substantial evidence going beyond the allegations of the complaint. *Burkes v. Stidham,* 107 Ohio App.3d 363, 371, 668 N.E.2d 982 (8th Dist.1995), *Myers v. Jamar Enterprises,* 12th Dist. Clermont No. CA2001-06-056, 2001 WL 1567352, *2 (Dec. 10, 2001). The record on summary judgment must be viewed in the light most favorable to the opposing party. *Williams v. First United Church of Christ,* 37 Ohio St.2d 150, 151-152, 309 N.E.2d 924 (1974).

{¶ 15} "'To properly support a motion for summary judgment in a foreclosure action, a plaintiff must present evidentiary-quality materials showing: (1) the movant is the holder of the note and mortgage, or is a party entitled to enforce the instrument; (2) if the movant is not the original mortgagee, the chain of assignments and transfers; (3) the mortgagor is in default; (4) all conditions precedent have been met; and (5) the amount of principal and interest due.'" *HSBC Mtge. Servs., Inc. v. Watson,* 3d Dist. Paulding No. 11-14-03, 2015-Ohio-221, ¶ 24, quoting *Wright-Patt Credit Union, Inc. v. Byington,* 6th Dist. Erie No. E-12-002, 2013-Ohio-3963, ¶ 10; *Deutsche Bank Natnl. Trust Co. v. Najar,* 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 17; *Bank of Am., N.A. v. Sweeney,* 8th Dist. Cuyahoga No. 100154, 2014-Ohio-1241, ¶ 8.

{¶ 16} Appellants first assert that Beneficial failed to adequately demonstrate that it is a party entitled to enforce the note. R.C. 1303.31(A) identifies three entities entitled to enforce an instrument: (1) the holder of the instrument; (2) a nonholder in possession of the instrument who has the rights of a holder; and (3) a person not in possession of the instrument who is entitled to enforce

the instrument pursuant to R.C. 1303.38 or 1303.58(D).

{¶ 17} At the time Beneficial filed this action, R.C. 1303.38, Ohio's version of Section 3-309 of the Uniform Commercial Code (U.C.C.), provided for the enforcement of lost, destroyed, or stolen instruments and stated:

> (A) A person not in possession of an instrument is entitled to enforce the instrument if all of the following apply:
>
> (1) The person was in possession of the instrument and entitled to enforce it when loss of possession occurred.
>
> (2) The loss of possession was not the result of a transfer by the person or a lawful seizure.
>
> (3) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

Further, under R.C. 1303.38(B), a party who seeks to enforce a lost note must prove the terms of the instrument.

{¶ 18} Before Beneficial filed its February 1, 2017 summary judgment motion, the General Assembly amended R.C. 1303.38(A)(1) to be less restrictive (effective September 28, 2016). Appellants argue that although the legislature amended the statute, to permit an assignee to enforce a lost instrument acquired from a party who was in possession and entitled to enforce the instrument at the time the loss occurred, statutory amendments are presumed to be prospective in operation unless expressly made retroactive. See R.C. 1.48; *Hyle v. Porter*, 117 Ohio St.3d 165, 167, 882 N.E.2d 899 (2008). Thus, appellants argue that the prior version of the statute must apply in this case because it was in effect when the note was lost and the action commenced.

{¶ 19} Appellees, however, contend that the prior version of an amendment should apply only if the amendment is substantive. "The test for unconstitutional retroactivity requires the court first to determine whether the General Assembly expressly intended the statute to apply retroactively." *Bielat v. Bielat*, 87 Ohio St.3d 350, 353, 721 N.E.2d 28 (2000), citing R.C. 1.48; *State v. Cook*, 83 Ohio St.3d 404, 410, 700 N.E.2d 570 (1998), citing *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 522 N.E.2d 489 (1988), paragraph one of the syllabus. "*If so*, the court moves on to the question of whether the statute is substantive, rendering it *unconstitutionally* retroactive, as opposed to merely remedial." (Emphasis added.) *Bielat, supra*.

{¶ 20} Consequently, our first step must be to determine whether the General Assembly expressly made the statute retrospective. We point out that the statutes in *Van Fossen* and *Bielat* included language such as "notwithstanding any provision of any prior statute or rule of law" (*Van Fossen*) or "prior to, on, or after the effective date of the Act" (*Bielat*), which indicates that the General Assembly "expressly made [the respective statutes] retrospective" as per R.C. 1.48. However, the statute in question in this case, R.C. 1303.38, contains no such language to indicate retroactivity. Thus, we need not reach the issue of substantive versus remedial and conclude that the former version of R.C. 1303.38 applies to the case at bar.

{¶ 21} Turning to the application of the former version of R.C. 1303.38, we must consider whether "the person was in possession of the instrument and entitled to enforce it when loss of possession occurred." To determine whether these statutory requirements are satisfied, we apply a preponderance of the evidence standard. *Bank of New York Mellon Corp. v. Erickson*, 5th Dist. Stark No. 2016CA00155, 2017-Ohio-599, ¶ 27, citing *Fifth Third Mtge. Co. v. Fillmore*, 5th Dist. Delaware No. 12CAE 040030, 2013-Ohio-311, ¶ 36-42.

{¶ 22} Appellants urge us to follow the Third District's analysis in *U.S. Bank, N.A. v. Jones*, 2016-Ohio-7168, 71 N.E.3d 1233 (3d Dist.). In *Jones*, the court concluded that the lost-note affidavit, executed by Wells Fargo after it allegedly had assigned the note and mortgage to U.S. Bank, stated that Wells Fargo "is the lawful owner of the Note" and that Wells Fargo "has not cancelled, altered, assigned, or hypothecated the Note." The court, however, emphasized that R.C. 1303.38 requires that the person in possession of the instrument and entitled to enforce it when the loss of possession occurred must set forth in the lost-note affidavit when the note was lost or that Wells Fargo was the servicing agent for U.S. Bank when the note was lost. Further, the court noted that the additional affidavit of judgment, executed by Wells Fargo several years after it allegedly had assigned the note and mortgage to U.S. Bank, stated that Wells Fargo is the servicing agent for U.S. Bank, but the affidavit did not state when the note was lost or that Wells Fargo was the servicing agent for U.S. Bank when the note was lost. Instead, the affidavit simply referenced the earlier lost-note affidavit. Thus, after its review, the Third District concluded that "no evidence in the record to establish that U.S. Bank was in possession of the note, *and* entitled to enforce the note *when loss of possession occurred.* At best, the evidence only establishes that U.S. Bank *may* have been entitled to enforce the note when loss of possession occurred, and this is insufficient to establish that U.S. Bank was entitled to enforce the lost note under R.C. 1303.38(A)(1)." *Jones* at ¶ 22-23. We observe, however, that in *Jones,* unlike the facts in the case sub judice, the foreclosure plaintiff did not provide testimony that it was in possession of the note when it was lost. Rather, the plaintiff's servicer, who was also the original lender under the note, testified that it, instead of the plaintiff, was the lawful owner of the note. *Jones* at ¶ 22. In addition, the servicer did not state whether the note was lost before or after the note and mortgage were transferred to the plaintiff,

creating a question as to which party was in possession of the note when it was lost.

{¶ 23} Beneficial contends that we should follow the Fifth District's analysis in *Bank of New York Mellon Corp. v. Erickson,* 5th Dist. Stark No. 2016CA00155, 2017-Ohio-599, *supra,* where the court considered a lost-note affidavit and concluded that a foreclosure plaintiff satisfies the R.C. 1303.38(A) requirements by producing testimony to indicate that (1) the servicer or its predecessor (as servicer or by merger) or the custodian, acquired possession of the note, (2) possession of the note cannot be reasonably determined because the note was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person, and (3) the loss of possession of the note is not the result of a rightful transfer or a lawful seizure of the note. *Erickson* at ¶ 28.

{¶ 24} The Fifth District, in applying the former version of R.C. 1303.38, concluded that the plaintiff sufficiently established that, although the original note could not be located, the summary judgment burden must shift to the defendant to demonstrate a genuine issue of material fact for trial. While the *Erickson* defendant argued that the lost-note affidavit failed to establish, by a preponderance of the evidence, that the bank was in possession of the note and entitled to enforce the note when the loss of possession occurred, the Fifth District concluded that the defendant did not supply any Civ.R. 56 evidence to contradict the information supplied in the lost-note affidavit or to show any issue of material fact in dispute. *Erickson* at ¶ 29. Many other courts have also found lost-note affidavits, similar to the ones in the case at bar, to be sufficient. For example, in *Huntington Natnl. Bank v. Cade*, 8th Dist. Cuyahoga No. 103674, 2016-Ohio-4705, the Eighth District considered a lost-note case in which a bank employee's affidavit averred that the original note was lost and she could not locate it despite a diligent search of the records, but that Huntington was in possession of the note and entitled to enforce it when loss of possession occurred and that the

loss of possession was not the result of a transfer by Huntington or a lawful seizure. The affiant employee also affirmatively stated that she possessed personal knowledge of the facts and matters recited in the affidavit due to her job functions. *Cade* at ¶ 12. The Eighth District noted that Ohio law recognizes that personal knowledge may be inferred from the contents of an affidavit. *See Bush v. Dictaphone Corp.,* 10th Dist. Franklin No. 00AP-1117, 2003-Ohio-883, ¶ 73. Also, no requirement exists that an affiant explain the basis for his or her personal knowledge when personal knowledge can be reasonably inferred based on the affiant's position and other facts contained in the affidavit. *Nationstar Mtge., L.L.C. v. Wagener,* 8th Dist. Cuyahoga No. 101280, 2015-Ohio-1289, ¶ 26. An affiant's specific averment that an affidavit is made on personal knowledge is sufficient to satisfy the requirement of Civ.R. 56(E) unless controverted by other evidence. *Charter One Mtge. Corp. v. Keselica,* 9th Dist. Lorain No. 04CA008426, 2004-Ohio-4333.

{¶ 25} The *Cade* court also concluded that Huntington produced sufficient evidence of its right to enforce the note under R.C. 1303.38, which shifted the burden to Cade to set forth sufficient facts to demonstrate that a genuine issue of material fact exists for trial. Cade, however, supplied no rebuttal evidence to contradict the information in the lost-note affidavit or to show any disputed issue of material fact. Thus, because Huntington's evidence was not rebutted, the magistrate found that the note was lost prior to the foreclosure filing, that Huntington had possession of the note and was entitled to enforce the note when it lost possession, and the loss was neither a result of a transfer of the note by Huntington nor a lawful seizure of the note by another entity. *Cade, supra,* at ¶ 14,

{¶ 26} Similarly, in the case at bar the lost-note affidavits state that they are based upon personal knowledge obtained through the review of, and in reliance upon, business records concerning the loan. Moreover, Tibbetts' affidavit satisfied the elements of appellee's prima facie

case for foreclosure. In her affidavit, Tibbetts (1) authenticated the mortgage and the mortgage assignment from HSBC to Beneficial, (2) testified that the appellants are in default with the loan currently due for the May 3, 2011 monthly installment, (3) testified that the appellants were both sent notice of their default and given an opportunity to cure it, (4) further authenticated the letter that provided such notice, and satisfied all conditions precedent, (5) testified to the amount of principal and interest due, and (6) authenticated a payoff statement reflecting the same.

{¶ 27} In addition to challenging the lost note, appellants argue that the trial court erred in admitting the business records that Beneficial produced from a prior servicer over their hearsay objection. Specifically, appellants claim that Tibbetts did not testify as to her familiarity with the prior servicer's record keeping system and did not lay a foundation for the admissibility of Beneficial's business records. However, Tibbetts expressly stated that she was "comprehensively trained on how {appellee] monitors and tracks loan transactions, and specifically, the way that [appellee] receives, inputs, and maintains critical loan information." As Beneficial asserts, under the adoptive business records exception to the rule against admitting hearsay evidence, "[r]ecords need not be actually prepared by the business offering them if they are received, maintained, and relied upon in the ordinary course of business and incorporated into the business records of the testifying entity." *Green Tree Servicing, LLC v. Roberts,* 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 30. Tibbetts' affidavit states: "To the extent such records related to the loan that is the subject of this proceeding ("Loan"), come from another entity, those records were received by [appellee] in the ordinary course of its business, have been incorporated into and maintained as part of [appellee]'s business records and have been relied on by [appellee]." Thus, we find appellants' arguments in this vein to be without merit.

{¶ 28} Finally, appellants assert that appellee "should" have produced "records of merger" regarding the predecessors in interest of HSBC, the party that assigned the appellants' mortgage to Beneficial. However, as appellee notes, Ohio courts have held that borrowers lack standing to challenge the validity of mortgage assignments when they are not a party to such assignments. *See Bank of New York Mellon v. Froimson*, 8th Dist. Cuyahoga No. 99443, 2013-Ohio-5574, ¶ 17 ("It is settled in this appellate district that a mortgagor lacks standing to challenge the assignment of his mortgage directly if the mortgagor is neither a party to, nor a third-party beneficiary of, the assignment contract.") *See also, Chase Home Fin. v. Heft*, 3d Dist. Logan Nos. 8–10–14, 8–11–16, 2012–Ohio–876; *Bridge v. Aames Capital Corp*., N.D.Ohio No. 1:09 CV 2947, 2010 WL 3834059 (Sept. 29, 2010).

{¶ 29} Accordingly, based upon the foregoing reasons, we agree with the trial court's conclusion that Beneficial produced sufficient evidentiary materials to establish its right to enforce the note under R.C. 1303.38. Thus, Beneficial satisfied its initial burden for summary judgment. Consequently, the appellants had a reciprocal burden to produce evidentiary materials to establish a triable issue of fact. We also agree with the trial court's conclusion that appellants failed to produce such evidence. Thus, because Beneficial's evidence was not rebutted, the trial court properly granted summary judgment in favor of Beneficial and appellants' assignment of error is without merit.

{¶ 30} Accordingly, based upon the foregoing reasons, we affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellants the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Gallia County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, J. & Hess, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.