

IN THE SUPREME COURT OF OHIO

|                                 |   |                                    |
|---------------------------------|---|------------------------------------|
| ROBERT F. ALSFELDER, JR.,       | : | Case No. <u>12-1385</u>            |
|                                 | : |                                    |
| 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                       | : |                                    |

|  |
|--|
| <p><b>FILED</b></p> <p>AUG 13 2012</p> <p>CLERK OF COURT<br/>SUPREME COURT OF OHIO</p> |
|--|

MEMORANDUM IN SUPPORT OF JURISDICTION

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

**TABLE OF CONTENTS**

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC AND GREAT  
GENERAL INTEREST..... 1

STATEMENT OF THE CASE AND FACTS..... 1

    I.    Facts of the Case..... 1

    II.   Procedural History..... 2

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW..... 4

**First Proposition of Law: The First District improperly raised the requirement  
for the Appellant to produce the trust document under which he claims  
impairment of his equitable interest in the decedent’s prior estate planning  
documents.....4**

**Second Proposition of Law: A beneficiary of a trust that is a named  
beneficiary under the decedent’s prior estate planning documents does in  
fact have standing to contest a last will and testament under R.C. 2107.71..... 5**

CONCLUSION..... 6

CERTIFICATE OF SERVICE..... 7

APPENDIX **Appx. Page**

    Entry of Hamilton County Court of Common Pleas, Probate Division,  
    Case No. 20010002179 (September 27, 2011)..... 1

    Judgment Entry of the First District Court of Appeals, Hamilton County,  
    Case No. C-110681 (June 29, 2011)..... 6

**EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC AND GREAT GENERAL INTEREST**

This case presents several issues of public and great general interest involving the initial requisite standing necessary to contest a last will and testament, and specifically whether the beneficiary of a trust that is a named beneficiary in the decedent's prior estate planning documents has standing to contest a subsequent purportedly signed last will and testament filed for probate.

The Court of Appeals for the First Appellate District ("First District") affirmed the trial court's decision that the Appellant, a beneficiary of a trust named in the decedent's prior estate planning documents, whose interest is therefore equitable rather than legal, did not have standing in order to prosecute a will contest action.

**STATEMENT OF THE CASE AND FACTS**

**I. Facts of the Case**

The Appellant timely filed a will contest action in the Hamilton County Probate Court following the death of the decedent on January 7, 2010. (T.d. 2). The last will and testament filed in probate court was purportedly signed by the decedent on January 1, 2010. The Appellant is the beneficiary of a trust that is a named beneficiary in the decedent's prior estate planning documents.

The events surrounding the days just prior to and including January 1, 2010, the day that the decedent purportedly signed a last will and testament that is the subject of the underlying contest, are not in dispute. These include: (1) the decedent was a patient in the intensive care unit of a hospital beginning on or about December 26, 2009; (2) sometime thereafter, the decedent was placed on a ventilator and in a medically induced coma; (3) at some point after that, the

decedent was brought out of the medically induced coma; (4) an attorney was called by one of the decedent's heirs to make the necessary arrangements for the attorney and her husband to come to the hospital on the afternoon of January 1, 2010; (5) the attorney brought with her that afternoon a newly drafted last will and testament for the decedent; (6) the attorney presented the newly drafted last will and testament to the decedent; (7) the attorney and her husband witnessed the purported signing of the purported instrument; and (8) the decedent died six (6) days later on January 7, 2010.

## **II. Procedural History**

The Appellant timely filed a will contest action in the Hamilton County Probate Court alleging undue influence and lack of capacity in the purported execution of the purported last will and testament signed by the decedent in the intensive care unit of the hospital on January 1, 2010, just six (6) days prior to her death. (T.d. 2). Certain Appellees first filed a Motion to Dismiss. (T.d. 11). In response, the Appellant filed an affidavit which stated that pursuant to the decedent's prior estate planning documents, his share of the decedent's estate was to be paid directly to the trustee of a trust that is a beneficiary under the decedent's prior estate planning documents. (T.d. 21). The affidavit also established that said distribution would create a greater financial benefit to him than if the purported January 1, 2010 last will and testament is held to be valid. (T.d. 21). The Appellant further stated in his Affidavit that if distribution takes place in accordance with the purported January 1, 2010 last will and testament, he will not realize the financial benefits and advantages that he would if a distribution takes place in accordance with the prior estate planning documents and that he will incur pecuniary damage and loss. (T.d. 21). The Appellees' motion to dismiss was denied. (T.d. 23).

After the ruling on the Motion to Dismiss, and without any further evidence or testimony, the same certain Appellees next filed a motion for summary judgment. (T.d. 33). The trial court granted said motion, and held that the Appellant did not have the requisite standing under R.C. 2107.71 to prosecute the will contest action. (T.d. 59). The trial court's stated rationale was that the Appellant did not have standing because he had been omitted as a direct beneficiary under the decedent's prior estate planning documents. (T.d. 59). Instead, he took from the decedent's prior estate plan by virtue of being the beneficiary of a trust that was a named beneficiary. The trial court cited to *Campbell v. Strasburger* (1st Dist. 1968), 17 Ohio App.2d 56, 57, 244 N.E.2d 530, in its ruling that in order for the Appellant to establish standing to bring a will contest action, he must establish that he is an interested person having a direct pecuniary interest in the estate of the decedent that, under the contested will, would be destroyed, reduced or impaired. The court went on to cite to *Roll v. Edwards* (4th Dist.), 2006 Ohio 830, and stated that a movant who stands to take nothing if successful, has no standing.

The Appellant appealed to the First District which upheld the trial court's decision. In citing to *Steinberg v. Central Trust Co.*, 18 Ohio St.2d 33, 247 N.E.2d 303 (1969), the First District held that the movant in a will contest action must demonstrate that he had a direct, pecuniary interest in the decedent's estate that would be impaired or defeated if the instrument admitted to probate is a valid will. The First District further held that, although the movant claimed in his Affidavit that his pecuniary interest in the decedent's estate would be impaired if the January 1, 2010 last will and testament was held to be valid because he stood to gain more financially from an earlier executed last will and testament that gave his share to a trust, he did not introduce a copy of the trust document into evidence. However, the trial court never raised the issue of producing the trust document in its ruling.

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**First Proposition of Law:** The First District improperly raised the requirement for the Appellant to produce the trust document under which he claims impairment of his equitable interest in the decedent's prior estate planning documents.

In its decision, the First District stated that, absent a copy of the trust document being attached to his affidavit, the Appellant failed to establish that he has standing to proceed in the will contest action. However, this was never an issue that was raised at the trial court level. Nor was it mentioned in the trial court's decision as being a necessary part of Appellant's affidavit. If the First District determined that the trust document was necessary in order to establish standing under the case it cited, *Steinberg v. Central Trust Co.* (Id.), then the proper course would have been for the case to have been sent back to the trial court for further proceedings. However, the alleged need for the trust document was not an issue that was raised in the summary judgment hearing, nor was it raised in the entry issued by the trial court. The First District improperly affirmed the trial court's decision by making its decision based on a document that was never at issue.

Applying that same rationale, the First District would presumably require that the decedent's prior estate planning documents be attached to the Appellant's affidavit as well. But that is never mentioned or questioned. Therefore, the First District is requiring that a trust document be made part of the Appellant's affidavit to establish his standing to proceed in the will contest action but never raises the issue of whether or not the trust itself is in fact a beneficiary under the decedent's prior estate plan. The First District does not cite to a single case that gives support to its holding that the Appellant lacks standing because he failed to attach the trust document to his affidavit. Again, this was never the holding of the trial court, and by requiring the attachment of the trust document, the First District is in effect sanctioning an

impermissible default summary judgment, where neither party produced evidence. *Maust v. Palmer* (1994), 94 Ohio App.3d 764, 641 N.E.2d 818, 821. The moving party produced no evidence. The only evidence in the record is the affidavit of the Appellant. (T.d. 21). If that is insufficient, then the moving party has failed to meet its burden and the First District is upholding the granting of summary judgment by the trial court by improperly shifting the burden to the nonmoving party.

**Second Proposition of Law:** A beneficiary of a trust that is a named beneficiary under the decedent's prior estate planning documents does in fact have standing to contest a last will and testament under R.C. 2107.71.

It is clearly established law that the beneficiary of a trust that is a beneficiary of a last will and testament has a direct, pecuniary interest in an estate, even though the interest of the beneficiary is an equitable one rather than a legal one. Through the only evidence submitted in this proceeding, which was unrebutted and uncontroverted, the Appellant stated that his interest in the decedent's prior estate plan is to be paid to a trust and that he will incur pecuniary damage and loss if the purported January 1, 2010 last will and testament is held to be valid. (T.d. 21). Therefore, the Appellant established that he is an interested person, albeit by virtue of an equitable interest and not a legal interest, and that his interest is being impaired by virtue of the purported January 1, 2010 last will and testament. Therefore, there is nothing more for the Appellant to establish in order to have standing to prosecute the allegations in the underlying will contest action. A beneficiary of a trust that is the beneficiary of the probated last will and testament does have standing to contest a decedent's final account in probate court. *In re Estate of Boll* (1998), 126 Ohio App.3d 507, 710 N.E.2d 1139. The *Boll* (Id.) case holds that a beneficiary of a trust which is a beneficiary of a decedent's estate is an interested person, and therefore, combining the holdings in *Boll* and *Steinberg*, it is clear that a beneficiary of a trust

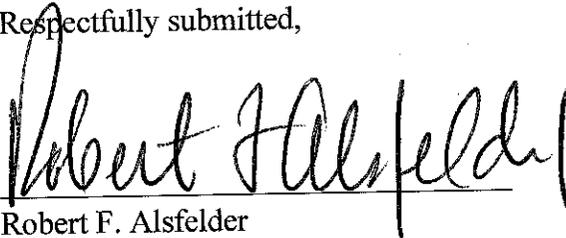
that is a beneficiary under a decedent's prior estate planning documents does in fact have standing to contest the validity of a later will.

CONCLUSION

If allowed to stand, the decision will have a profound detrimental impact on the ability of trust beneficiaries to prosecute will contest cases.

As outlined above, this case involves a matter of public and great general interest, and Appellant respectfully requests this Court to accept jurisdiction in this action in order that the issues presented can be reviewed on their merits.

Respectfully submitted,



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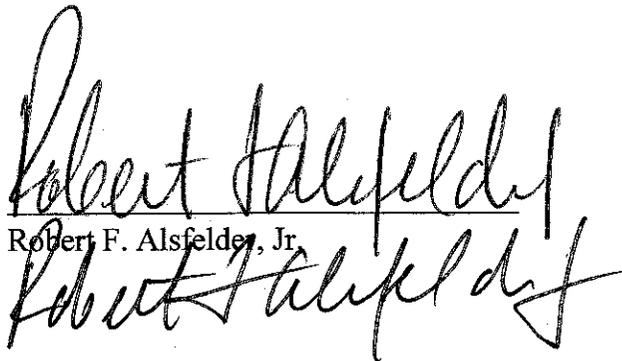
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served upon the following by ordinary U.S. Mail on this 13th day of August, 2012:

Katrina R. Atkins  
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Susan Maher  
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Bradford C. Weber  
Benjamin, Yocum & Heather  
300 Pike Street, Suite 500  
Cincinnati, Ohio 45202

  
Robert F. Alsfelder, Jr.

७

**ENTERED**

COURT OF COMMON PLEAS  
PROBATE COURT DIVISION  
HAMILTON COUNTY, OHIO

SEP 27 2011

IMAGE NO. 3

**ROBERT F. ALSFELDER, JR.,**

: CASE NO. 2010002176

**Plaintiff,**

: Judge Cissell  
: Magistrate Rogena Stargel

v.

**SALLY ALSFELDER, Individually and as  
Co-Executors, et al.,**

: ENTRY RULING ON OBJECTIONS TO  
: MAGISTRATE'S DECISION

**Defendants.**

This matter came before the Court on August 29, 2011, for hearing on Plaintiff Robert F. Alsfelder, Jr.'s Objections to the June 9, 2011 Decision of Magistrate, which granted the Motion of Defendant Sally Alsfelder and Cathy Alsfelder, individually and in their capacity as executors of the Estate of Katherine Alsfelder, for Summary Judgment. Present were Robert F. Alsfelder, Jr., Esq., pro se; Bradford C. Weber, on behalf of the Taylor-Asfelder Family Trust, and Katrina Atkins and J. Michael Cooney on behalf of Sally Alsfelder, Cathy Alsfelder and the Estate.

**PROCEDURAL POSTURE**

In May of 2010, Defendants filed a Motion to Dismiss Plaintiff Robert F. Alsfelder, Jr.'s claims based on lack of standing. Mr. Alsfelder responded to the Motion by attaching an affidavit stating that he was to receive a direct share pursuant to the will admitted to probate, that he was "intentionally omitted as a beneficiary" under the prior estate planning documents, and that he would receive a greater financial benefit under the prior estate planning documents.

On March 25, 2011, the Magistrate denied Defendants' Motion on the grounds that the complaint met the pleading requirements of Civil Rule 8. Specifically, Mr. Alsfelder's allegation that the prior will resulted in a different disposition of the decedent's assets was sufficient to

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Civil Rule 53

*Jane Cissell*

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Appx. 1

withstand a Rule 12(B)(6) motion to dismiss. The Magistrate's decision did not mention Plaintiff's affidavit. Defendants did not file objections to that decision.

On April 18, 2011, Defendants Sally and Cathy Alsfielder filed a Rule 56(c) Motion for Summary Judgment based on Robert's lack of standing. After hearing on the Motion, the Magistrate granted summary judgment in favor of Defendants Sally and Cathy Alsfielder, finding (1) that Defendants met their burden of showing that there was no genuine issue of material fact as to Mr. Alsfielder's standing; and (2) Mr. Alsfielder did not "produce admissible evidence showing specific facts that create a genuine issue of material fact as to whether he has a direct pecuniary interest in his mother's estate that will be reduced, impaired, or destroyed if the probated will is valid." Plaintiff Robert Alsfielder timely filed objections to that decision.

#### FINDINGS OF FACT

1. Plaintiff Robert F. Alsfielder seeks to invalidate the will admitted to probate in Case No. 2010000140 ("Probated Will").
2. Pursuant to the Probated Will, Plaintiff Robert F. Alsfielder, Jr. was to receive a direct share of the Estate of Katherine F. Alsfielder.
3. Based upon the Affidavit testimony of Robert F. Alsfielder, Jr., Plaintiff Robert F. Alsfielder, Jr. was intentionally omitted as a beneficiary in the prior estate planning documents ("The Prior Estate Planning Documents").
4. Based upon the Affidavit testimony of Robert F. Alsfielder, Jr., Plaintiff Robert F. Alsfielder, Jr. takes nothing, directly, from the decedent's estate if the Probated Will is invalidated.

ENTERED  
Civil Rule 53

*Jane Cinell*

Appx. 2

CONCLUSION OF LAW

1. A motion for summary judgment shall be granted if the moving party demonstrates that there is no genuine issue as to any material fact that they are entitled to judgment as a matter of law. Ohio R. Civ. P. 56; Hannah v. Dayton Power & Light Co. (1998). A party moving for summary judgment bears an initial burden of pointing to "some evidence of the type listed in Civ. R. 56(C) which affirmatively shows that the nonmoving party has no evidence to support that party's claims." Dresher v. Burt (1996), 75 Ohio St.3d 280, 292, 662 N.E.2d 264, 273.

2. When a movant for summary judgment has met their initial burden, the opposing party "may not rest on the mere allegations of [his] pleading, but [his] response . . . must set forth specific facts showing the existence of a genuine triable issue." Civil Rule 56(E); State ex rel. Burnes v. Athens County Clerk of Courts (1998), 83 Ohio St.3d 523, 524, 700 N.E.2d 1260, 1261 (per curium).

3. Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue. Ohio Contrs. Assn. v. Bicking, 71 Ohio St. 3d 318, 320, 1994 Ohio 183, 643 N.E.2d 1088.

4. R.C. § 2107.71 is the exclusive method by which a will contest action may be brought. Corron v. Corron (1998), 40 Ohio St.3d 75, 78, 531 N.E.2d 708, 712.

5. To establish standing to bring a will contest action under 2107.71, the party must establish that he is an "interested person," having a direct pecuniary interest in the estate of the decedent that, under the contested will, would be destroyed, reduced or impaired. Campbell v. Strasburger (1st Dist. 1968), 17 Ohio App.2d 56, 57, 244N.E.2d 530.

ENTERED  
Civil Rule 53

*James C. Currell*  
BT

6. A contestant who stands to take nothing if he is successful, has no standing. See Roll v. Edwards (4th Dist.), 2006 Ohio 830.

CONCLUSION

Defendants Sally and Cathy Alsfelder met their burden under Civil Rule 56(C), by submitting admissible evidence of specific facts showing that there is no genuine issue of material fact that Mr. Alsfelder lacks standing in this action. Pursuant to Mr. Alsfelder's Affidavit, he was intentionally omitted as a beneficiary of The Prior Estate Planning Documents, but takes a direct share if the Probated Will controls. He takes no direct share if The Prior Estate Planning Documents control. Although Mr. Alsfelder's Affidavit testimony states that he receives a "greater financial benefit" under The Prior Estate Planning Documents, Mr. Alsfelder failed to meet his burden under Civil Rule 56(E) to submit admissible evidence showing specific facts that raise a genuine issue of material fact as to whether he has a direct pecuniary interest in the Estate of Katherine Alsfelder, which would be destroyed, reduced or impaired by the Probated Will. Based on the evidence before the Court, there is no genuine issue of material fact that Mr. Alsfelder lacks standing to maintain the instant action.

The Court finds that:

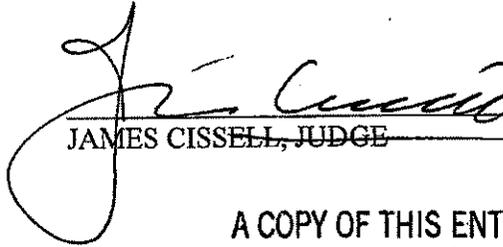
- Plaintiff Robert F. Alsfelder, Jr. has no standing to maintain the instant action and the Magistrate properly dismissed his claims pursuant to Civil Rule 56(C).
- The Court enters judgment in favor of Defendants Sally Alsfelder and Cathy Alsfelder, individually and as co-executors of the Estate of Katherine F. Alsfelder, dismissing the claims of Robert F. Alsfelder, Jr. with prejudice.

ENTERED  
Civil Rule 55

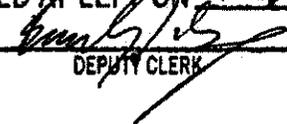
*James C. Cinnell*  
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Appx. 4

IT IS SO ORDERED.

  
JAMES CISSELL, JUDGE

cc Robert F. Alsfelder, Jr., Esq.  
Katrina R. Atkins, Esq.  
Brad. C. Weber, Esq.

A COPY OF THIS ENTRY  
WAS MAILED TO THE PARTIES  
LISTED AT LEFT ON 9-27-11  
BY   
DEPUTY CLERK

COURT OF COMMON PLEAS  
ENTER  
  
HON. JAMES CISSELL  
THE CLERK SHALL SERVE NOTICE  
TO PARTIES PURSUANT TO CIVIL  
RULE 58 WHICH SHALL BE TAXED  
AS COSTS HEREIN.

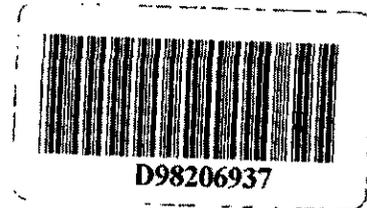
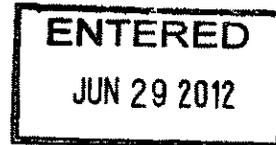
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APPX. 5

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

ROBERT F. ALSFELDER, JR., :  
Plaintiff-Appellant, :  
vs. :  
SALLY ALSFELDER, Individually and :  
as Co-executor 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, :  
Defendants-Appellees. :

APPEAL NO. C-110681  
TRIAL NO. 2010002170  
*JUDGMENT ENTRY.*



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. 3(A); App.R. 11.1(E); Loc.R. 11.1.1.

Robert Alsfelder, Jr., appeals the trial court's grant of summary judgment in favor of Sally Alsfelder, Cathy Alsfelder, Elizabeth Ditto, Susan Maher, and Deborah Alsfelder in his complaint contesting the will of Katherine Alsfelder. We affirm the judgment of the trial court.

Sally and Cathy Alsfelder are the executors of the purported last will of Katherine Alsfelder. Robert, Katherine's son, filed a complaint contesting the will dated January 1, 2010, claiming that the will was invalid due to undue influence and

*Appx. 6*

OHIO FIRST DISTRICT COURT OF APPEALS

lack of capacity and that an earlier will constituted the valid will of Katherine. Sally and Cathy Alsfelder filed a motion for summary judgment, arguing that Robert, who was named in the January 1, 2010 will, did not have standing to contest it. The trial court granted the motion for summary judgment.

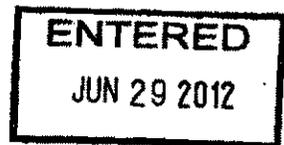
In his sole assignment of error, Robert asserts that the trial court erred in granting summary judgment due to his lack of standing. To have standing to contest the January 1, 2010 will, Robert had to demonstrate that he had "a direct, pecuniary interest in [his mother's estate] that would be impaired or defeated if the instrument admitted to probate is a valid will." *Steinberg v. Central Trust Co.*, 18 Ohio St.2d 33, 247 N.E.2d 303 (1969), paragraph one of the syllabus; R.C. 2107.71. Robert claimed that his pecuniary interest in his mother's estate would be impaired by the January 1, 2010 will because he stood to gain more financially from an earlier will that gave his share to the Taylor-Alsfelder Trust. But Robert did not attach a copy of the trust document in support of his affidavit as required by Civ.R. 56(E). Absent such evidence, we conclude that the trial court properly granted summary judgment. Civ.R. 56(C). The sole assignment of error is overruled.

Therefore, we affirm the trial court's judgment.

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

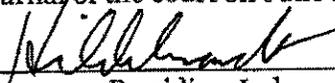
SUNDERMANN, P.J., CUNNINGHAM and DINKELACKER, JJ.

To the clerk:



Enter upon the journal of the court on June 29, 2012

per order of the court

  
Presiding Judge

Appx. 7