[Cite as *Norris v. Philander Chase Co.*, 2010-Ohio-5297.]

Also see entry on reconsideration at 2010-Ohio-6653.

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JOHN NORRIS

Plaintiff-Appellee

-vs-

PHILANDER CHASE COMPANY
AND KENYON COLLEGE

Defendants-Appellants

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Sheila G. Farmer, J.

Case No. 10-CA-04

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Knox County Court of Common Pleas, Case No. 04 OT 020042
JUDGMENT:	Reversed and remanded
DATE OF JUDGMENT ENTRY:	October 28, 2010

APPEARANCES:

For Plaintiff-Appellee

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Hoffman, J.

{¶1} Defendants-appellants Philander Chase Company and Kenyon College appeal the January 4, 2010 Judgment Entry, entered by the Knox County Court of Common Pleas, which denied their request for attorney fees, after a jury found in favor of Appellants and against plaintiff-appellee John Norris.

STATEMENT OF THE CASE AND FACTS

{¶2} Clyde Norris, now deceased, and his wife, Bonnie Norris, created a revocable living trust ("the Trust") on January 8, 1991. The Trust corpus included approximately 220 acres of real property ("the family farm") located in Gambier, Ohio, near the campus of Kenyon College. Attorney Richard Murray prepared the Trust for the elder Norrises. The Trust designated Appellee and Tim Norris, Appellee's brother and Clyde Norris' other son, as co-trustees. On June 7, 1994, Clyde Norris amended the Trust, removing his sons as co-trustees, and designating himself as trustee.

{¶3} On March 17, 1998, Clyde Norris, as trustee, granted Appellee an Option to Purchase Real Estate. The Option provides, in pertinent part:

{¶4} "The undersigned, Clyde Norris, as Trustee of the Clyde Norris Revocable Trust dated January 8, 1991 (as amended), * * * irrevocably conveys and grants to [Appellee], his son, the right and option to purchase all that real estate described [as the family farm] * * *, pursuant to the terms and conditions set forth below.

{¶5} "Upon the death of Clyde Norris * * * **if** the real estate described * * * is an asset of the said Trust, or the Executor or Adminstrator of Clyde Norris' Estate, **if** the real estate is owned personally by Clyde Norris at the time of his death, shall provide [Appellee] with the option and right to purchase the real estate * * * at a price equal to

the Knox County Auditor's True Market Valuation of the real estate in effect on the date of Clyde Norris' death * * *." Option to Purchase Real Estate, March 17, 1998 (emphasis added).

{¶6} The same day the Option was executed, Clyde Norris amended the Trust. The amendment of March 17, 1998, provided in pertinent part: "The Trustee [Clyde Norris] shall not have the authority to **sell** the farm described above without the express written consent of [Appellee]" Amendment of Trust, March 17, 1998 (emphasis added). We note such amendment did not prohibit the Trustee from gifting the property or otherwise encumbering the property. Of significance, such amendment did not preclude Clyde Norris from revoking the trust.

{¶7} In November, 2001, Tim Norris became interested in the Ohio Agricultural Easement Purchase Program ("the OAEPP"). Participation in the OAEPP allows for the preservation of farmland in Ohio, while providing payments for an agricultural easement to the land owner. The OAEPP essentially purchases the development rights to the property in order to preserve its agricultural nature. Tim Norris ultimately placed his own farm into the program. He also encouraged his mother, Bonnie Norris, to investigate placing the family farm in the OAEPP.

{¶8} A landowner cannot apply directly for participation in the OAEPP. An application must be made on behalf of a landowner by the County Commissioners, Township Trustees, Municipal Councils, or Land Trusts. Appellant Philander Chase is an Ohio not-for-profit member corporation which operates for the benefit of Appellant Kenyon College. Kenyon College is the only member of Philander Chase. Philander Chase is a land trust; therefore, eligible to submit applications to OAEPP. Tim Norris

approached Douglas Givens, the managing director of Philander Chase, as to the possibility of submitting an application on behalf of the family farm for participation in the OAEPP. The Norris family's interest in the program was prompted by concerns about how nursing home and medical expenses for Clyde Norris would be paid. Acceptance into the OAEPP program would generate funds to help defray those expenses.

{¶9} Attorney Murray worked with the Norris family and Philander Chase to apply to the OAEPP in order to generate funds for the Trust. Attorney Murray had represented Appellants on various occasions. Philander Chase submitted the OAEPP application on behalf of the family farm to the State on April 29, 2002. Bonnie Norris signed the application as holder of Clyde Norris' power of attorney. If the application was accepted, the State of Ohio would pay 74% of the amount of the value of the agricultural easement, Philander Chase would subsidize 25%, and the Norris family would be responsible for the remaining 1%. Philander Chase received no financial benefit from the arrangement. In fact, such would cost the organization $153,000.

{¶10} Appellants first became aware of Appellee's Option in late August, 2002, more than three months after the OAEPP application. Attorney Murray sent a correspondence to Appellee and Tim Norris, suggesting several possibilities for generating income for the Trust. Appellants were copied on the letter as one of the suggestions involved the sale of the development rights to Kenyon College in the event the family farm was not immediately accepted into the OAEPP.

{¶11} Clyde Norris resigned as trustee of the Trust on December 27, 2002, and named Appellee and Dean Owen as co-trustees. Dean Owen is the husband of Pamela Owen, Clyde Norris' daughter and Appellee's sister. On January 3, 2003, Clyde Norris

once again amended the Trust. The amendment added the following language: "The powers of the Trustee(s) to deal with real estate shall include, but not be limited to, the leasing or granting of easements, including, but not limited to, agricultural easements under the Ohio Department of Agricultural Easement Pilot Project and all other similar permanent or semi-permanent or short term easements sponsored and/or funded by State and/or Federal Agencies." January 3, 2003 Amendment of Trust Agreement.

{¶12} Because of Appellee's apparent conflict of interest regarding OAEPP issues and his desire to purchase the family farm at a discounted price from the Trust of which he was co-trustee, Attorney Murray advised Appellee to obtain his own personal counsel. Appellee subsequently retained Attorney Richard Heath. On January 6, 2003, Attorney Heath sent a letter to the Ohio Department of Agriculture, in an attempt to thwart participation of the family farm in the OAEPP. By doing so, the Trust lost the $550,000 it would have received had the family farm participated in the OAEPP. Appellee advised his family he would not object to the participation of the family farm in the OAEPP, if his family would consent to his purchasing the farm from the Trust at a price significantly lower than the appraised fair market value. On January 26, 2003, Attorney Heath notified the Ohio Department of Agriculture Appellee was no longer obstructing the participation of the family farm in the OAEPP. Appellee subsequently changed his position and again objected to the participation of the family farm in the OAEPP.

{¶13} On March 31, 2003, at the direction of Dean Owens as co-trustee of the Trust, Attorney Murray sent a letter to Attorney Heath advising Appellee was forbidden from planting any crops on the family farm without a resolution of the issues relative

thereto. Attorney Murray indicated the Norris family wanted Appellee to pay land rent and resolve the purchase price of the family farm. The Norris family and Appellee finally reached a settlement of their disputes, and a Settlement Agreement was executed on May 14-15, 2003. As part of the settlement, Appellee released his Option, but was able to purchase the family farm for $600,000. The $600,000 purchase price was less than the appraised value, however, the price was approximately $200,000 more than the anticipated cost under the Option. The family farm never participated in the OAEPP.[1]

{¶14} On February 3, 2004, Appellee filed a Complaint against Appellants and Attorney Murray. As against Appellants, the Complaint asserted claims of tortious interference with contract and business relations. As to Attorney Murray, the Complaint raised a claim of legal malpractice relative to legal work performed by Murray on behalf of Clyde Norris. All claims against Murray were resolved prior to trial.

{¶15} Appellee's claims against Appellants were tried to a jury on November 12-14, 2008. The jury, after deliberating for less than one hour, returned a unanimous verdict in favor of Appellants, and against Appellee. The jury answered interrogatories, specifically finding Appellants did not wrongfully interefere with Appellee's Option; Appellee knowingly and willingly, without duress from Appellants, released his Option; Appellants' conduct was justified; and Appellee did not suffer any damages as a result of Appellants' actions. The trial court filed a judgment entry memorializing the jury's verdict on November 17, 2008. Appellee did not appeal the verdict. Appellants filed a timely motion for expenses on December 17, 2008.

[1] We note had the family farm participated in the OAEPP after Appellee's purchase, the net cost of the family farm to Appellee would have been $50,000, approximately $350,000 less than the anticipated cost under the Option.

{¶16} The trial court conducted a hearing on Appellants' motion for expenses on July 23, 2009. Via Judgment Entry filed January 4, 2010, the trial court overruled Appellants' motion, finding the imposition of economic sanctions was not warranted due to Attorney Murray's entanglement with Appellants regarding the subject matter of the litigation. The trial court found Appellee was entitled to advance the argument the peculiar facts of the case either warranted a change in existing law, or a less restrictive interpretation of existing law.

{¶17} It is from this judgment entry Appellants appeal, raising as error:

{¶18} "I. THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN DENYING APPELLANTS KENYON COLLEGE AND PHILANDER CHASE'S MOTION FOR EXPENSES."

I

{¶19} In their sole assignment of error, Appellants contend the trial court erred in denying their motion for expenses. We agree.

{¶20} R.C. 2323.51 grants a trial court the authority to award court costs, reasonable attorney fees, and other reasonable expenses incurred in connection with the civil action or appeal to any party to the civil action or appeal, who was adversely affected by frivolous conduct. "Frivolous conduct", as defined in R.C. 2323.51(A)(2), includes conduct which "serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including, but not limited to, causing unnecessary delay or a needless increase in the cost of litigation", R.C. 2323.51(A)(2)(a)(i), or conduct " * * * not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of

existing law, or cannot be supported by a good faith argument for the establishment of new law". R.C. 2323.51(A)(2)(a)(ii).

{¶21} The question of what constitutes frivolous conduct may be either a factual determination, or a legal determination. *Wiltberger v. Davis* (1996), 110 Ohio App.3d 46. A determination conduct is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law requires a legal analysis. *Lable & Co. v. Flowers* (1995), 104 Ohio App.3d 227, 233. With respect to purely legal issues, we follow a de novo standard of review and need not defer to the judgment of the trial court. *Wiltberger,* supra, at 51-52. However, we do find some degree of deference appropriate in reviewing a trial court's factual determinations and will not disturb such factual determinations where the record contains competent, credible evidence to support such findings. Id.

{¶22} We note, while a trial court is statutorily required to conduct a hearing on a motion for attorney fees, the court is not required to re-litigate the entire underlying action. *The Brewery, Inc. v. Board of Commissioners of Delaware County, OH, et al.* (July 23, 1997), Delaware App. No. 96CAE11059, unreported.

{¶23} In his Complaint, Appellee asserted a claim of tortious interference with contract against Appellants. In order to establish such a claim, Appellee was required to prove the following elements: "(1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) lack of justification, and (5) resulting damages." *Fred Siegel Co., L.P.A. v. Arter & Hadden* (1999), 85 Ohio St.3d 171, paragraph one of the syllabus.

{¶24} We find Appellee lacked evidence to prove all the elements of the tort at the time of the filing of his Complaint, and the trial court should have deemed his action in filing it to be frivolous.

{¶25} Appellee's Option, although "irrevocable", was only able to be exercised upon Clyde Norris' death. It did not grant Appellee a vested right to the family farm. Rather, the Option provided Appellee with a contingent, conditional interest. The Trust always remained revocable by the elder Norrises and the Option was dependent upon the family farm being part of the Trust corpus at the time of Clyde Norris' death. The Option did not prohibit gifting of the property nor encumbering the property. Appellee chose to release his right to the Option on May 16, 2003, prior to Clyde Norris' death, as part of the settlement with his family members contesting his rent free use of the farm during Clyde's life.

{¶26} There is no evidence to establish Appellants were aware of Appellee's Option at the time the application was submitted to OAEPP in late April, 2002. Appellee claims Appellants possessed constructive knowledge of the Option as such had been recorded at the time of the execution in March, 1998. However, constructive knowledge is not sufficient to sustain a cause of action for tortious interference with contract. *Crown Equipment Corp. v. Toyota Material Handling, U.S.A., Inc.* (C.A. 6), 202 Fed. Appx. 108, 2006 Fed.App. 0798N. As such we fail to see how Appellants' OAEPP application "tortuously interfered" with Appellee's Option contract as a result of recording the Option

{¶27} Additionally, Appellee failed to prove a breach of the contract. In his deposition, Appellee acknowledged he and his father, Clyde Norris, were the only

parties to the Option. Appellee also stated neither he nor Clyde Norris breached the Option. As stated supra, the Option was only viable upon Clyde Norris' death; therefore, could only be exercised at that time. Appellee elected to release his right in the Option before the scheduled time for its exercise. The terms of the Option did not preclude Clyde Norris from granting an easement or otherwise encumbering the family farm. Although enrollment in OAEPP and the resulting easement could have affected the value of the family farm, such did not preclude Appellee from choosing to or not choosing to exercise his Option. The OAEP application did not violate the terms of the Option and/or the Trust, either as originally executed or subsequently amended.

{¶28} Further, as did the jury specifically in response to an interrogatory, we find Appellants' actions were justified. Appellants responded to a request for volunteers from the State of Ohio to assist in the preservation of the State's agricultural heritage. Appellants were to have paid the Trust $153,000 for the family farm's participation in the OAEPP. Though Kenyon College would have received the benefit of knowing the area surrounding its campus would remain agricultural, it received no direct pecuniary benefit.

{¶29} Finally, we find Appellee did not suffer definite, non speculative damages as a result of Appellants' actions. We note Appellee was able to purchase the family farm at a price significantly lower than the current market value of the property. Appellee elected to exercise his Option at a negotiated price as part of a settlement of

his dispute with other members of the Norris family; not as a result of Appellants' actions regarding the OAEPP application.[2]

{¶30} The trial court found economic sanctions were not warranted "due to the entanglement of Attorney Murray with [Appellants] regarding the subject matter of this litigation." January 4, 2010 Judgment Entry at p.9. We reiterate, our review is de novo on legal issues. Unlike the trial court, we do not find Attorney Murray's actions imputable to Appellants regarding Appellants' OAEPP application.

{¶31} Based upon the foregoing, we find the trial court should have found Appellee's filing of the Complaint to be frivolous.

{¶32} Appellants' sole assignment of error is sustained.

{¶33} The judgment of the Knox County Court of Common Pleas is reversed, and the matter remanded for further proceedings consistent with this Opinion and the law.

By: Hoffman, J.
Farmer, J. concurs,
Gwin, P.J., dissents

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

HON. W. SCOTT GWIN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

[2] Although the $600,000 paid is more than the estimated auditor's market valuation at the time the Option was executed, the settlement agreement avoided Appellee being obligated to pay rent for the use of the land during Clyde's lifetime. As noted earlier, after releasing the Option and purchasing the property, nothing prevented Appellee from pursing participating in the OAEPP in his own right.

Gwin, J., dissenting

{¶34} I dissent from the result reached by the majority.

{¶35} The majority states the option contract would not have prevented the trustee from disposing of the property in another manner, for example, by gift. I believe this is a misstatement of Ohio law. "The owner of property who grants a purchase option may not dispose of the property before the option expires or is otherwise terminated, while the party who owns the option to purchase is free to consider other property 'during the period of the option without prejudice to, or waiver of, his or her right to exercise the option.'" *The Four Howards Ltd. v. J & F Wenz Road Investment, L.L.C.,* 179 Ohio App. 3d 399, 902 N.E. 2d 63, 2008-Ohio-6174, citing *Bahner's Auto Parts v. Bahner (*July 23, 1998), 4th Dist. No. 97-CA-2538. The contract does not have to specifically preclude gifting; the owner may not "dispose" of the property. I find this means the trustee cannot do anything with the subject property that would infringe on the option to purchase.

{¶36} Likewise, the amendment to the trust, dated January 3, 2003, provided the trustee could enter into agreements to grant permanent easements. However, I would find this amendment is unenforceable because it unilaterally alters and substantially affects the appellee's option rights granted in the contract of March 1998.

{¶37} The majority finds the appellant had no knowledge of the option contract at the time appellant first entered into negotiations for the easement, but the record shows the matter dragged on for months after appellant received notice. Whether appellant acted reasonably and whether the delay ultimately damaged appellee were jury questions.

{¶38} Finally, the majority states appellee suffered no damages, and I agree we are bound by the jury's verdict in that regard. However, the record demonstrates the parties eventually settled the matter with appellee paying a "negotiated price" far higher than the price for which the option contract provided. The fact the jury did not find appellee was entitled to damages does not render the lawsuit frivolous.

{¶39} I would find the trial court, having presided over the matter and thereby being in the best position to evaluate the matter, was correct in determining the action did not involve frivolous conduct. I would affirm the judgment.

s/ W. Scott Gwin
HON. W. SCOTT GWIN

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

JOHN NORRIS	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
PHILANDER CHASE COMPANY AND KENYON COLLEGE	:	
	:	
Defendants-Appellants	:	Case No. 10-CA-04

For the reasons stated in our accompanying Opinion, the judgment of the Knox County Court of Common Pleas is reversed, and the matter remanded for further proceedings consistent with our Opinion and the law. Costs to Appellee.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

HON. W. SCOTT GWIN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER