[Cite as *Brown v. Ralston,* 2016-Ohio-4916.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

AMANDA S. BROWN, PLAINTIFF-APPELLEE, V. MARTHA A. RALSTON, ET AL., DEFENDANTS-APPELLANTS.	)))))))))	CASE NO. 14 BE 0051 OPINION

CHARACTER OF PROCEEDINGS:	Civil Appeal from Court of Common Pleas of Belmont County, Ohio Case No. 13 CV 435
JUDGMENT:	Affirmed
APPEARANCES: For Plaintiff-Appellee	Attorney David K. Liberati Attorney Jacob A. Manning 2100 Market St., Bennett Square Wheeling, WV 26003 Attorney Michael D. Bonasera 191 W. Nationwide Blvd., Ste. 300 Columbus, Ohio 43215
For Defendants-Appellants	Attorney John R. Estadt Attorney Erik A. Schramm, Jr. Attorney Kyle W. Bickford 46457 National Rd. West St. Clairsville, Ohio 43950
JUDGES: Hon. Gene Donofrio Hon. Cheryl L. Waite Hon. Mary DeGenaro	
	Dated: June 13, 2016

[Cite as *Brown v. Ralston*, 2016-Ohio-4916.]
DONOFRIO, P.J.

{¶1} Defendants-appellants, Martha and David Ralston, appeal from a Belmont County Common Pleas Court judgment granting summary judgment in favor of plaintiff-appellee, Amanda Brown, on Brown's claims for intentional interference with an expectancy of inheritance and specific performance.

{¶2} Appellant Martha Ralston is appellee Amanda Brown's mother. Appellant David Ralston is Brown's stepfather. Russell Ball was Martha's father and Brown's grandfather. Russell owned certain farm property in Barnesville consisting of approximately 70 acres. Brown owns the adjoining property.

{¶3} On July 26, 2006, Russell created the Russell A. Ball Trust. (Def. Dep. Ex. 1). Russell named himself as trustee. (Def. Dep. Ex. 1). At that time, Russell placed his farm property into the trust. (Def. Dep. Ex. 2). Martha is the sole beneficiary of the trust. (Martha Dep. 43).

{¶4} On May 8, 2008, Russell transferred the farm property out of the trust and to himself personally. (Def. Dep. Ex. 3). That same day, Russell executed a general warranty deed naming Brown as the transfer-on-death beneficiary for the farm property. (Def. Dep. Ex. 4).

{¶5} In March 2009, Russell signed an oil and gas lease for his farm with Oxford Oil, now Eclipse Resources. Brown also signed an oil and gas lease for her property.

{¶6} On August 7, 2009, Russell executed a power of attorney naming Martha as his attorney-in-fact. (Def. Dep. Ex. 5). Russell also executed his last will and testament that day. (Def. Dep. Ex. 9). The will devised all of Russell's "farm machinery and tangible personal property necessary to maintain the farm" to Brown. (Def. Dep. Ex. 9). The will devised the residue of Russell's property to Martha. (Def. Dep. Ex. 9).

{¶7} Martha recorded the power of attorney on March 8, 2012. (Def. Dep. Ex. 5). Also on March 8, Martha, acting as Russell's attorney-in-fact, revoked the transfer-on-death designation made to Brown and named herself, personally, as the transfer-on-death beneficiary of the farm. (Def. Dep. Ex. 6). And also on March 8,

Martha, acting as Russell's attorney-in-fact, transferred the farm to the Russell A. Ball Trust. (Def. Dep. Ex. 7).

{¶8} On September 17, 2012, Martha, acting as trustee of the Russell A. Ball Trust, executed a quitclaim deed conveying the farm to herself and her husband David. (Def. Dep. Ex. 8).

{¶9} Russell passed away on March 8, 2013.

{¶10} On December 2, 2013, Brown filed a complaint against the Ralstons raising claims for intentional interference with an expectancy of inheritance and conversion and requesting injunctive relief, specific performance, and an accounting of assets.

{¶11} Brown filed a motion for summary judgment on August 21, 2014, asserting there were no genuine issues of material fact that Martha, using her position as attorney-in-fact, seized assets for herself that Russell had intended to pass on to Brown. The Ralstons filed a competing summary judgment motion.

{¶12} The trial court held a hearing on the summary judgment motions. Brown conceded that her claims for conversion and an accounting should be properly brought in probate court. Therefore, the court was left to consider Brown's claim for intentional interference with an expectancy of inheritance.

{¶13} The court granted Brown's summary judgment motion and overruled the Ralstons' summary judgment motion. The court declared as null and void the transfer-on-death designation and the quitclaim deed executed by Martha as Russell's attorney-in-fact. It issued a writ of possession to put Brown in possession of the farm property.

{¶14} The Ralstons filed a timely notice of appeal on November 4, 2014. They now raise five assignments of error.

{¶15} The Ralstons' first assignment of error states:

> THE TRIAL COURT ERRED IN FAILING TO APPLY O.R.C. 5302.23(B)(3) TO THE TRANSFER ON DEATH DEED IN DISPUTE.

{¶16} The Ralstons argue that pursuant to the version of R.C. 5302.23(B)(3), which was in effect at the relevant time, Brown could not have an expectancy of inheriting the farm. They assert the trial court erred in failing to apply this statute to preclude Brown's claim.

{¶17} The prior version of R.C. 5302.23(B)(3), in effect from August 29, 2000 until December 28, 2009, provided that an interest in real property that is subject to a transfer-on-death beneficiary designation has certain characteristics and ramifications, including that

> [t]he designation of a transfer on death beneficiary has no effect on the present ownership of real property, and a person designated as a transfer on death beneficiary has no interest in the real property until the death of the owner of the interest.

{¶18} According to the Ralstons, Martha could not interfere with Brown's expectancy of inheritance because, by statute, Brown had no present interest in the farm.

{¶19} The Ohio Supreme Court has held that any person who can prove the elements of intentional interference with expectancy of inheritance has the right to maintain that cause of action. *Firestone v. Galbreath*, 67 Ohio St.3d 87, 88, 616 N.E.2d 202 (1993). The elements of intentional interference with an expectancy of inheritance are: (1) the plaintiff's expectancy of an inheritance; (2) the defendant's intentional interference with that expectancy of inheritance; (3) conduct by the defendant involving the interference that is tortious in nature, such as fraud, duress or undue influence; (4) a reasonable certainty that the expectancy of inheritance would have been realized, but for the defendant's interference; and (5) damage resulting from the interference. *Id*. In an action in federal court involving the same case, the Sixth Circuit pointed out

> that certain probate-related causes of action may only be brought by

> parties with a vested claim to the estate. A cause of action for tortious interference with expectancy of inheritance, however, protects a more attenuated claim to the decedent's property-a claim which need not rise to the level of a vested interest in order to be protected as a legitimate expectancy.

Firestone v. Galbreath, 25 F.3d 323, 325-326 (6th Cir.1994).

{¶20} Brown's claim here is for intentional interference with the *expectancy* of inheritance. Clear from the name of the claim itself, is that the inheritance is not a present interest in the property but only an expectancy. And an inheritance means that the property passes after the owner's death. Thus, a claim for intentional interference with the expectancy of inheritance does not require a present interest in the property. That is not one of the elements set out by the Ohio Supreme Court that is needed to prove a claim for intentional interference with the expectancy of inheritance.

{¶21} Thus, the trial court did not err in failing to apply former R.C. 5302.23(B)(3) to preclude Brown's claim. Accordingly, the Ralstons' first assignment of error is without merit.

{¶22} The Ralstons' second assignment of error states:

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO CONSIDER ALL ADMISSIBLE EVIDENCE, INCLUDING THE FILED AFFIDAVITS OF ATTORNEY BRUCE A. CLAUGUS AND ATTORNEY THOMAS A. HAMPTON.

{¶23} Here the Ralstons assert the trial court failed to consider the affidavits of Attorney Thomas Hampton and Bruce Claugus. They assert they properly filed these affidavits before the trial court ruled on the summary judgment motions. They assert these affidavits created genuine issues of material fact that would have precluded summary judgment.

{¶24} The Hampton affidavit provided that on September 6, 2012, Atty. Hampton prepared a quitclaim deed for Martha in her capacity as trustee of the Russell A. Ball Trust for the conveyance of certain property from the trust to Martha and her husband. (Hampton Aff. ¶ 4). Atty. Hampton averred that he learned from Martha that Russell was unable to care for himself, that he would require a nursing home or assisted living care, and that Martha anticipated it would become necessary to use his real or personal property in order to continue paying for his care. (Hampton Aff. ¶ 6). Atty. Hampton did not recall if Martha intended to sell or mortgage the property. (Hampton Aff. ¶ 6). Atty. Hampton stated that he believed he advised Martha that one option for her would be to transfer the property to herself and then she could sell or mortgage it. (Hampton Aff. ¶ 7). But Atty. Hampton also stated it was his understanding that Martha was Russell's sole heir and he was unaware that any expectancy could be claimed by anyone other Martha. (Hampton Aff. ¶ 7, 8).

{¶25} The Claugus affidavit does not provide any indication that Claugus is an attorney as the Ralstons suggest. Claugus simply indicates that he is Martha's long-time acquaintance. (Claugus Aff. ¶ 3). In the affidavit, Claugus stated that Martha explained her father's condition to him and the costs associated with caring for him. (Claugus Aff. ¶ 4). Claugus stated that Martha told him Brown had "interfered" with Russell's estate plan so that she could not borrow against his liquid assets. (Claugus Aff. ¶ 4). Claugus then stated: "Considering my previous experience with Martha and answers she gave to careful questions I put to her, I became sure that Martha had been truthful with me and that the assistance was needed and justified." (Claugus Aff. ¶ 5). Claugus then stated that "in consequence of my assistance," Martha executed the deeds in question. (Claugus Aff. ¶ 6).

{¶26} The Ralstons cite to two paragraphs of the trial court's judgment in support of their argument here:

> 19. Despite that Martha Ralston has claimed that Attorney Bruce Claugus advised her that the transfers were necessary for that purpose,

> no affidavit from Mr. Claugus has been presented for this Court's consideration. Similarly, despite that Martha Ralston has claimed that Attorney Thomas Hampton advised that the transfers were necessary, no affidavit from Mr. Hampton has been presented for the Court's consideration. Finally, despite that Martha Ralston has claimed that a bank, Wesbanco, informed her that the farm would have to be in her name for it to be mortgaged and to provide money for Russell Ball's care, no affidavit from a representative of Wesbanco has been presented for this Court's consideration. Instead, Defendants have presented only the Affidavit of Martha Ralston, in which Ms. Ralston describes, among other things, what she was told by Mr. Claugus, Mr. Hampton, and an unnamed representative of Wesbanco.
>
> 54. The Court notes initially that the instructions of the attorneys and the bank are not before this Court. There is no affidavit from either of the attorneys stating that the attorneys instructed Martha Ralston that the transfers were necessary. There is also no affidavit from the bank stating that in order for Martha Ralston to mortgage the property, it had to be held in her name. Instead, Defendants have only provided the affidavit of Martha Ralston, and the testimony of Martha Ralston that she was given those instructions. * * *

{¶27} The Ralstons assert that had the trial court considered the Hampton and Claugus affidavits, it would have created a genuine issue of material fact. They claim the trial court was required to provide them with a date on which the matter would be deemed submitted for decision. Without this date, the Ralstons claim, they had no idea of the deadline for submission of affidavits.

{¶28} In a June 27, 2014 entry, the trial court extended the previous discovery deadline of July 14, 2014, to August 15, 2014, with a dispositive motion deadline of August 29, 2014. Thus, the court did inform the parties of the deadlines in this case.

{¶29} The trial court then held the summary judgment hearing on September

22, 2014. The court requested supplemental memoranda from the parties that were due on October 2, 2014. Both parties timely complied with the court's request.

{¶30} Then on October 6, 2014, the Ralstons filed the Hampton affidavit and on October 7, 2014, they filed the Claugus affidavit. The trial court entered its judgment granting Brown's motion for summary judgment on October 8, 2014. There is no indication whether the trial court was aware of the late-filed affidavits at the time it rendered its decision.

{¶31} At the time the trial court ruled on the summary judgment motions, Civ.R. 56(C) provided:

> The motion shall be served at least fourteen days before the time fixed for hearing. *The adverse party, prior to the day of hearing, may serve and file opposing affidavits.* Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, *timely filed* in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *No evidence or stipulation may be considered except as stated in this rule*.[1]

(Emphasis added.)

{¶32} Although Civ.R. 56(C) is clear that affidavits must be timely filed, courts have held that whether to consider an untimely filed affidavit is within the trial court's discretion. *Bush v. Dictaphone Corp*., 10th Dist. No. 00AP-1117, 2003-Ohio-883, ¶ 76; *Widlar v. Young*, 6th Dist. No. L-05-1184, 2006-Ohio-868, ¶ 37.

{¶33} In this case, the Hampton and Claugus affidavits were untimely. The discovery deadline was August 15, 2014. The summary judgment hearing was September 22, 2014. Therefore, at the very latest, all affidavits should have been

[1] Civ.R. 56(C) was amended on July 1, 2015. It now provides that the adverse party may serve responsive arguments and opposing affidavits within 28 days after service of the motion, and the movant may serve reply arguments within 14 days after service of the adverse party's response.

filed by the day of the hearing, September 22. At the conclusion of the hearing, the court then gave the parties ten days to submit supplemental memoranda. So even taking the deadline for affidavits to the extreme, they would have to be filed by October 2, 2014.

{¶34} It is unreasonable for the Ralstons to assume they could file affidavits after the summary judgment hearing. It is likewise unreasonable for them to assume they could file affidavits after the deadline for supplemental memoranda.

{¶35} The Ralstons state that the court erred by not informing them when the matter was deemed submitted for decision. But this was not a case where the court simply ruled on the summary judgment motions. The court held a hearing on the motions, which both parties' counsel attended. Thus, it was clear that the matter was then deemed submitted for decision.

{¶36} Given these circumstances, we cannot conclude that the trial court abused its discretion in not considering the untimely affidavits. Accordingly, the Ralstons' second assignment of error is without merit.

{¶37} The Ralstons' third assignment of error states:

> THE TRIAL COURT ERRED IN RELYING UPON EVIDENCE NOT PROPERLY ADMITTED OF RECORD.

{¶38} Brown submitted two handwritten letters from Russell as deposition exhibits. One letter was from Russell to Brown and the other was from Russell to Martha. (Pl. Dep. Ex. 1, 2).

{¶39} As to the letters, the trial court found:

> 9. Also on May 9, 2008, consistent with the intent of the Transfer on Death Deed, Russell penned two letters: one addressed to his granddaughter Plaintiff Amanda Brown, and one addressed to his daughter, Defendant Martha Ralston. In the letter to Mandy, Russell explained that "upon my death, I had the deeds to the Durnal Farm in

> its entirety transferred to you." Russell further explained that Mandy would have the Durnal Farm "free and clear" although the house "needs a little repair and fixed up inside." Russell also listed farm equipment that he intended to devise to Mandy "so you'll be in business." Russell wrote that a "load was lifted" because the farm would be maintained. Russell stated that he did not want the farm "sold, split up or any change made at all."
>
> 10. In his letter to Martha, Russell references his letter to Mandy "telling her the whys and where four [sic.] of my decision on the Durnal Farm." Russell included a list of farm equipment that he had "given to Amanda along with the farm."

(Judgment Entry ¶ 9, 10).

{¶40} In this assignment of error, the Ralstons argue that the trial court should not have considered the handwritten letters from Russell to Brown and from Russell to Martha. They assert the letters are inadmissible hearsay introduced by Brown in an effort to prove testamentary intent.

{¶41} Brown relies on the hearsay exception set out in Evid.R. 803(3). It provides that a statement of a "then existing, mental, emotional, or physical condition" is not excluded by the hearsay rule. This includes statements "of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)," but does not include statements "of memory or belief to prove the fact remembered or believed." Evid.R. 803(3).

{¶42} In order to use Evid.R. 803(3) to admit hearsay testimony, the statement must refer to a present condition, not a past condition, i.e. "I am afraid of X." *McGrew v. Popham*, 5th Dist. No. 05 CA 129, 2007-Ohio-428, ¶ 28, citing *State v. Apanovitch*, 33 Ohio St.3d 19, 514 N.E.2d 394 (1987). Additionally, Evid.R. 803(3) does not permit testimony regarding the declarant's statements as to why he or she held a particular state of mind. *State v. Stewart*, 75 Ohio App.3d 141, 152, 598

N.E.2d 1275 (11th Dist.1991), citing *Apanovitch*, 33 Ohio St.3d at 21.

{¶43} This court recently addressed the Evid.R. 803(3) hearsay exception in *Huntington v. Riversource*, 7th Dist. No. 14 MA 90, 2015-Ohio-5600. In that case, Dyke sought to introduce two statements by the decedent that she made when she deeded her oil and gas interest to Dyke. The first statement was that the decedent wanted to keep her oil and gas interest in the family. *Id*. at ¶ 33. We found that statement to be a statement of the decedent's state of mind at the time she made the statement, which was also at the time she signed the deed. *Id*. Thus, we found the trial court should have admitted this statement under Evid.R. 803(3). *Id*. The second statement was that the decedent wanted to pass the oil and gas interest to her family, specifically to Dyke, so that Dyke would have another interest to go with an interest Dyke's mother had. *Id*. at ¶ 34. We found the first part of the statement, that the decedent wanted to pass the oil and gas interest to her family and specifically to Dyke, was admissible because it was a statement of her present state of mind and reflected her intent for the future. *Id*. We found the second part of the statement, that the decedent wanted Dyke to have another interest to go with what Dyke's mother had, was inadmissible because it was an explanation of why she held the state of mind. *Id*.

{¶44} In the present case, Russell's letter to Brown contains several statements the trial court cited to. Russell wrote that "upon my death, I had the deeds to the Durnal Farm in its entirety transferred to you." Brown would have the Durnal Farm "free and clear" although the house "needs a little repair and fixed up inside." Russell also wrote, "I'm giving a list of the machinery along with this so you'll be in business." And he wrote, "I didn't want it sold, split up or any change made at all."

{¶45} Russell's letter to Martha also contained several statements that the trial court cited to. Russell stated he wrote a letter to Brown "telling her the whys and where four [sic.] of my decision on the Durnal Farm." Russell also included a list of farm equipment that he had "given to Amanda along with the farm."

{¶46} As was the case in *Huntington*, supra, some of Russell's statements expressed his present state of mind and reflected his intent for the future while others explained his state of mind. Thus, as was the case in *Huntington*, the trial court should have considered some, but not all, of Russell's statements.

{¶47} The court properly considered Russell's statements to Brown that upon his death, he had the deeds to the farm transferred entirely to her, that she would have the farm free and clear, and that he was providing a list of farm machinery for her. The court also properly considered Russell's statement to Martha that he gave Brown certain farm equipment. These statements reflected Russell's state of mind at the time and reflected his intent for the future.

{¶48} The court should not have considered Russell's statements to Brown that he was giving her the farm machinery "so [she will] be in business" and that he did not want the farm sold, split up or changed. Likewise, the court should not have considered Russell's statement to Martha that he wrote a letter to Brown expressing his reasons for leaving her the farm. These statements reflect Russell's reasons for leaving Brown the farm property and equipment and explained his state of mind.

{¶49} Nonetheless, Russell's statements of why he wanted Brown to have the farm property and equipment were not necessary to the court's grant of summary judgment. As will be seen in the next assignment of error, even without these statements, there are no genuine issues of material fact that would preclude summary judgment. Thus, while the trial court may have considered part of Russell's statements that it should not have considered, any error was harmless.

{¶50} Accordingly, the Ralstons' third assignment of error is without merit.

{¶51} The Ralstons' fourth assignment of error states:

> THE TRIAL COURT ERRED IN FINDING THERE ARE NO GENUINE ISSUES OF MATERIAL FACT IN GRANTING SUMMARY JUDGMENT.

{¶52} The Ralstons contend here that Martha's affidavit, along with those of

Atty. Hampton and Claugus, which the court did not consider, create genuine issues of material fact concerning her "intent, reasoning, and motivation for executing the transfers at issue."

{¶53} An appellate court reviews the granting of summary judgment de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper.

{¶54} A court may grant summary judgment only when (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence can only produce a finding that is contrary to the non-moving party. *Mercer v. Halmbacher*, 9th Dist. No. 27799, 2015-Ohio-4167, ¶ 8; Civ.R. 56(C). The initial burden is on the party moving for summary judgment to demonstrate the absence of a genuine issue of material fact as to the essential elements of the case with evidence of the type listed in Civ.R. 56(C). *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 662 N.E.2d 264 (1996). If the moving party meets its burden, the burden shifts to the non-moving party to set forth specific facts to show that there is a genuine issue of material fact. Id.; Civ.R. 56(E). "Trial courts should award summary judgment with caution, being careful to resolve doubts and construe evidence in favor of the nonmoving party." *Welco Industries, Inc. v. Applied Cos*., 67 Ohio St.3d 344, 346, 1993-Ohio-191, 617 N.E.2d 1129.

{¶55} As set out above, the elements of intentional interference with an expectancy of inheritance are: (1) the plaintiff's expectancy of an inheritance; (2) the defendant's intentional interference with that expectancy of inheritance; (3) conduct by the defendant involving the interference that is tortious in nature, such as fraud, duress or undue influence; (4) a reasonable certainty that the expectancy of inheritance would have been realized, but for the defendant's interference; and (5) damage resulting from the interference. *Firestone*, 67 Ohio St.3d at 88.

{¶56} There is no genuine issue of material fact as to the first element, that Brown had an expectancy of an inheritance. Russell designated Brown as the

transfer-on-death beneficiary for the farm. (Def. Dep. Ex. 4). And Martha even admitted that it was Russell's intent that Brown receive the farm upon his death. (Martha Dep. 18, 23, 25).

{¶57} There also is no genuine issue of material fact as to the second element, that Martha intentionally interfered with Brown's expectancy of inheriting the farm. Martha stated in her deposition and in her affidavit that she revoked Brown's transfer-on-death designation and subsequently transferred the farm into the Russell A. Ball Trust and then transferred the farm to herself and her husband. (Martha Dep. 19, 24, 34-35; Martha Aff. ¶ 10, 11, 16). Martha also stated that she understood that by making these transfers she changed what Russell had intended. (Martha Dep. 39). And Martha stated that had she not transferred the farm property, it would have passed to Brown. (Martha Dep. 45).

{¶58} And there is no genuine issue of material fact as to the third element, that Martha's conduct involving the interference was tortious in nature.

{¶59} Martha realized Russell's intent was to leave the farm property to Brown when she opened his safe deposit box in 2012. (Martha Dep. 18, 23). Martha was not able to discuss Russell's intent with him, however, because by that time his dementia was too advanced. (Martha Dep. 23). Martha stated that she and her husband decided they should revoke Brown's transfer-on-death designation and put the farm into the trust so they could borrow money on the property to pay for Russell's care if needed. (Martha Dep. 19, 24, 34; Martha Aff. ¶ 10, 11). Martha stated that she undertook the transfers as power-of-attorney. (Martha Dep. 35). She did not discuss the transfer of the farm with Russell because he was incompetent by that time. (Martha Dep. 35). Martha agreed that when she transferred the farm property, it changed what Russell had intended. (Martha Dep. 39).

{¶60} As to the removal of Brown as the transfer-on-death beneficiary, Martha stated that she removed Brown as the transfer-on-death beneficiary and designated herself as the transfer-on-death beneficiary. (Martha Dep. 36-37). But she was unsure how these changes would affect her ability to mortgage the property. (Martha

Dep. 36-37). Counsel then posed the following questions to Martha:

> Q So neither one of those then you're aware of how that would have affected the mortgage?
>
> A Right.
>
> Q Ultimately, how in your understanding then is transferring this - - You're acting as power of attorney for your father. Is that correct?
>
> A Yes.
>
> Q In your understanding, how did this benefit your father, of taking Mandy [Brown] off of the property and naming yourself as a beneficiary?
>
> A I don't know.
>
> Q So you're not aware of how that would have benefitted him then?
>
> A No.

(Martha Dep. 37).

{¶61} This first change that Martha made, removing Brown as the transfer-on-death beneficiary and naming herself as the transfer-on-death beneficiary, could not have helped Russell in any way. Martha has maintained all along that the only reason she made the changes and transfers of the farm property was so that she would be able to sell or mortgage the property to pay for Russell's nursing home care. (Martha Aff. ¶ 9, 10, 14, 18). But changing the person who would receive the property after Russell died would in no way help Martha to pay for Russell's care. Thus, these actions show that Martha's stated motive was insincere, if not fraudulent.

{¶62} Additionally, Martha contradicted her own testimony. At her deposition she stated that she never discussed the transfers with Brown. (Martha Dep. 20). Yet in her affidavit, she stated that she discussed the transfers with all of her children including Brown. (Martha Aff. ¶ 18).

{¶63} The Ralstons argue a genuine issue of material fact is created by evidence that Martha made the transfers so that she could mortgage the farm

property to pay for Russell's nursing home care. Martha repeatedly stated that as her reason for the transfers. (Martha Dep. 19-20; Martha Aff. ¶ 9, 10, 14, 16). But there is one glaring problem with Martha's explanation. She never mortgaged or sold the farm property. (Marth Dep. 42-43). The property remains in Martha's and her husband's names. Moreover, the only evidence of Martha's alleged reason for the transfers were her own self-serving statements.

{¶64} This evidence all supports a finding that Martha's actions were tortious. Therefore, no genuine issue of material fact exists as to the third element.

{¶65} Likewise, there is no genuine issue of material fact as to the fourth element, that there was reasonable certainty that Brown's expectancy of inheritance would have been realized, but for Martha's interference. Before Martha made the changes and transfers, the farm property was owned by Russell with a transfer-on-death designation to Brown. (Def. Dep. Ex. 4). Had Martha not made any changes, the property would have remained this way until Russell's death in 2013. Additionally, Martha herself admitted that, but for her actions, the farm property would have gone to Brown. (Martha Dep. 45). But because of her actions, the farm property now belonged to her. (Martha Dep. 45).

{¶66} Finally, there is no genuine issue of material fact as to the fifth element, that Brown suffered damages resulting from Martha's interference. There is no question that Brown suffered the loss of the farm property because of Martha's interference. Martha admitted this. (Martha Dep. 45, 53).

{¶67} No genuine issues of material fact exist. Martha used her position as attorney-in-fact to circumvent Russell's intentions and to benefit herself and her husband. The trial court properly granted summary judgment in favor of Brown. Accordingly, the Ralstons' fourth assignment of error is without merit.

{¶68} The Ralstons' fifth assignment of error states:

> THE TRIAL COURT ERRED IN DETERMINING PLAINTIFF-APPELLEE PROVED TORTIOUS CONDUCT ON THE PART OF DEFENDANT-APPELLANT MARTHA A. RALSTON.

{¶69} In their final assignment of error, the Ralstons argue that Brown did not meet the elements for intentional interference with the expectancy of inheritance.

{¶70} As to the first and fourth elements, the Ralstons argue, Brown cannot establish an expectancy of inheritance with reasonable certainty due to the operation of R.C. 5302.23(B)(3).

{¶71} As discussed in the Ralstons' first assignment of error, R.C. 5302.23(B)(3) does not have any bearing on Brown's claim. Her claim was for intentional interference with the *expectancy* of an inheritance, not for interference with a vested property interest.

{¶72} As to the second and third elements, the Ralstons assert Brown failed to establish Martha's intent to interfere with Brown's expected inheritance or the requisite tortious conduct. They claim Brown knew of the transfers and understood the transfers were to provide care for Russell.

{¶73} As discussed above, the evidence establishes that Martha intended to interfere with Brown's expected inheritance and acted fraudulently. Martha clearly stated in her deposition that she never discussed the transfers with Brown. (Martha Dep. 20-21). In her affidavit, she stated that she discussed the transfers with all of her children including Brown. (Martha Aff. ¶ 18). But "[a]n affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to defeat the motion for summary judgment." *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, paragraph three of the syllabus.

{¶74} Finally, the Ralstons assert that Martha's second affidavit created a genuine issue of material fact as to Russell's testamentary intent because Martha averred that Russell wanted all of his grandchildren to share the oil and gas underlying the farm.

{¶75} Martha filed a second affidavit after the summary judgment hearing. In this affidavit, Martha stated that Russell did not intend for Brown to retain the oil and gas and mineral rights underlying the farm but that he wanted all of his grandchildren

to share the oil and gas rights. (Martha Second Aff. ¶ 12, 13).

{¶76} This second affidavit does not create a genuine issue of material fact. Firstly, as was the case with the Hampton and Claugus affidavits, it was not filed until after the summary judgment hearing. Thus, the trial court had no obligation to, and may not have, considered the second affidavit. Secondly, the second affidavit contradicts Martha's deposition statements that she knew Russell intended for Brown to inherit the farm. (Martha Dep. 18, 23). She never qualified those statements by saying Russell intended Brown to inherit the farm but not to inherit the underlying oil and gas rights. And as stated above, a party opposing summary judgment may not create a genuine issue of material fact by submitting their own affidavit that contradicts their prior deposition testimony. *Byrd*, 110 Ohio St.3d at paragraph three of the syllabus.

{¶77} Accordingly, the Ralstons' fifth assignment of error is without merit.

{¶78} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.