

**IN THE SUPREME COURT
 STATE OF NORTH DAKOTA**

In the Matter of the Estate of)	
Arline H. Hogen, deceased)	
)	Supreme Court No. 20140119
Steven C. Hogen, Petitioner and)	
Appellee and Cross-Appellant)	Cass County District Court
)	No. 09-07-P-00100
vs.)	
)	
Rodney Hogen, Respondent and)	
Appellant and Cross-Appellee)	

**Appeal from Probate Orders
 of the Cass County District Court,
 East Central Judicial District,
 Honorable John C. Irby, Presiding**

APPELLEE AND CROSS-APPELLANT'S REPLY BRIEF

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ARGUMENT

I. Issues raised in Cross-Appeal.

A. Whether the trial court's findings on pre-death cash Rodney purloined out of Arline's trust are clearly erroneous.

[¶1] As noted in Appellee's Brief at ¶ 71, when Arline's husband, Curtiss, died in 1993, his undivided half interest in the family's farmland went into a trust, with the cash rental/crop share income from that farmland to be paid over to Arline (not less frequently than annually) until her death. Instead of paying that cash rent/crop share income the trust received (primarily elevator grain checks and government checks) over to Arline, however, Rodney misappropriated a chunk of that cash rent/crop share income for himself. In other words, when Rodney hauled crop share grain to the elevator and Rodney deposited the grain checks he received into Arline's trust, instead of giving those crop share proceeds to Arline, Rodney purloined them out of the trust and kept them for himself.

[¶2] The PR's right of retainer claim against Rodney in this case was asserted in three (3) probate documents filed in the district court and served upon Rodney on 3/19/10: **(a)** Petition for Approval of Final Account, Determination of Testacy and for Settlement of Estate, Odyssey #12, ¶ 9; **(b)** Final Report and Account, Odyssey #13, p. 5; and **(c)** Inventory and Appraisement, Odyssey #14 at p. 6, ¶ 4. The right of retainer as recited in the third document, the Inventory and Appraisement, is representative, and it stated in part:

Unliquidated claim for cash rent . . . owed to the estate by Rodney Hogen; crop shares . . . owed to the estate by Rodney Hogen; government payments . . . that the decedent and the estate were due, which payments were instead kept by farm tenant Rodney Hogen, and are owed by Rodney Hogen to the estate; and overpayments of farm expenses . . . by the decedent and by the estate, which expenses should have been paid by Rodney Hogen, the amount of which Rodney Hogen now owes the estate.

Id. “First Amended” revisions of these three probate documents (Petition for Approval of Final Account, Final Report and Account, and Inventory and Appraisal) were filed and served 2/15/13, at Odyssey #197, #198, and #199, respectively. “Second Amended” revisions of these three probate documents were filed and served 2/21/14, at Odyssey #499, #500, and #502, at the direction of the trial court, after the court made the decision appealed by the PR in his Cross-Appeal.

[¶3] The fact that Rodney laundered crop share grain checks and government checks through the trust checkbook before he purloined those funds does not change the fact that he owes those crop share proceeds and government payments to Arline/her estate. It was Arline’s money, i.e., cash rent and crop share proceeds, not Rodney’s, when it went into the trust checkbook; it was Arline’s money, i.e., cash rent and crop share proceeds, not Rodney’s, when it came out of the trust checkbook and into Rodney’s pocket. The right of retainer claim made by the PR is broad enough to encompass those claims. Rodney should not be allowed to do indirectly--withhold cash rent/crop shares he, as a tenant, owes to Arline--what he cannot do directly.

B. Whether the trial court's finding Arline waived pre-death rentals Rodney owed to her is clearly erroneous.

[¶4] Rodney's Reply Brief on the PR's Cross-Appeal says not a word about "waiver." Instead, he attempts to mislead this Court by suggesting some sort of "payment/reconciliation" occurred between Rodney and Arline. No such thing happened, and there is not a shred of evidence in the record to suggest it did.

[¶5] Rodney's deposition was received in evidence as Exhibit 70, Odyssey #247. In the course of that deposition Rodney was examined regarding statements/allegations in his Answer (Odyssey #76) to the PR's right of retainer claim.

The following Q and A occurred:

Q. . . . [T]he title of this document is Answer Arising Out of Order on Procedure, which your counsel prepared and provided to the court and to me, and if you would turn to page 3, please. Are you there?

A. Yes.

Q. . . . Right at the bottom, the last two lines, and then it goes to the top of the next page, "Rodney Hogen admits that he was a tenant in farmland cash rent agreement(s) with Arline H. Hogen during 2003-2006, and for years earlier, but all obligations of the tenant to the landlord were timely fulfilled by a process of payment/reconciliation of accounts agreed to between Arline H. Hogen and Rodney Hogen many years ago." Did I read that accurately?

A. Yes.

Q. All right. Tell us how this worked, this what you call process of payment reconciliation of accounts. Did it happen once a year?

A. Yes.

Q. And who was present for this process?

A. Who was present for this process?

Q. You were, of course.

A. Yes, I was.

Q. And who else?

A. Me. I did it all.

Q. And how about Arline?

A. No. I took care of her business on the farm.

Q. Okay. So she was not involved at all in any of the process of payment/re--

A. Dad did not want her to be involved because she didn't understand and dad and I had worked out this agreement many years ago.

* * *

Q. So to answer my question, the number of people involved was one and that one person was you?

A. That's the way my dad wanted it.

Q. And the answer to that question is you were the only person that --

A. Yes.

Q. All right. When this payment/reconciliation process happened --

A. Um-hmm.

Q. --and I -- you were just in your home when it happened or do you have an office on the farm? Where were you physically when you did this?

A. I don't remember.

Id. at 27:16-29:4; 29:10-24.

[¶6] Contrary to ¶ 19 in Rodney's Reply Brief of Appellant and Cross-Appellee, the district court made no findings whatsoever as to Rodney's "payment/reconciliation" notion. The record in this case is devoid of any evidence that Rodney ever communicated--not even once--with Arline about any farm-related matters.

CONCLUSION

[¶7] As to the PR's Cross-Appeal, the trial court's findings on pre-death claims of **(a)** Rodney's purloining of \$23,329.75 in cash(cash rent/crop share income) out of Arline's trust, and **(b)** Rodney's \$59,275.56 shortages in cash rent/crop share rentals owed to Arline, should be reversed as being clearly erroneous, and the matter remanded to the trial court with a direction to include both sums (plus interest), in the right of retainer to be offset against Rodney's share of the estate.

Dated: October 31, 2014.

/s/ Michael D. Nelson

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CERTIFICATE OF COMPLIANCE

The undersigned attorney for the Appellee in the above-entitled matter hereby certifies, in compliance with Rule 32(a)(8)(A), N.D.R.App.P., that the above brief contains 1,132 words (excluding words contained in **(1)** the table of contents, **(2)** the table of authorities, and **(3)** this certificate), which is within the limit of 2,000 words.

/s/ Michael D. Nelson

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STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

I hereby certify that on October 31, 2014, I caused to be electronically filed the **Appellee and Cross-Appellant's Reply Brief** with the Clerk of the North Dakota Supreme Court (at **supclerkofcourt@ndcourts.gov**) and served the same electronically upon **Jonathan T. Garaas** as follows:

Jonathan T. Garaas. **garaaslawfirm@ideaone.net**

Dated: October 31, 2014.

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