FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

BARBARA TUNINK, As Administratrix of the Estate of Alan Tunink,

Plaintiff-Appellee,

vs.

FRANCIS TUNINK,

Defendant-Appellant.

Filed October 27, 1981

1-261
2-66040

Appeal from Sac District Court - James C. Smith, Judge.

Defendant appeals from trial court's judgment against him in this action brought by the administratrix of the estate for an accounting asserting trial court's judgment is not supported by the record and is contrary to the evidence presented. Plaintiff cross-appeals trial court's ruling that refused to find that a third party had a first lien on certain estate assets. AFFIRMED.

Gary L. McMinimee and Russell S. Wunschel of the Wunschel Law Firm, Carroll, Iowa, for defendant-appellant.

Thomas L. McCullough of the McCullough Law Firm, Sac City, Iowa, for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant, Francis Tunink, appeals from trial court's judgment against him in this action brought by plaintiff, Barbara Tunink, administratrix of the estate of Allen Tunink, for an accounting of crops defendant received from the farm of decedent and of certain crop insurance proceeds which defendant received from coverage he carried on decedent's crops. Defendant asserts that trial court's findings are not supported by the record and are contrary to the evidence presented. Plaintiff cross-appeals claiming trial court erred in refusing to establish that the Farmers Home Administration (FHA) had a first lien on the crops in question and in allowing defendant to use the crop proceeds as a setoff against his claims against the estate. We affirm.

Decedent died on October 29, 1977, as a result of a tractor accident. Plaintiff, the decedent's wife, was appointed administratrix of his estate and subsequently filed the present action. At trial the evidence showed that decedent engaged in a farming operation on leased premises beginning in 1976 for the 1977 harvest year. Defendant, decedent's father, made considerable financial contribution to his son's farming operation. He leased the farm for his son, extended his son credit from his own business, and loaned money to his son for various farm operations. It is undisputed that defendant received from decedent approximately 881 bushels of beans prior to decedent's death. It also is undisputed that the defendant never paid decedent or decedent's estate for these beans. Defendant alleged that he returned other beans in his possession to replace those he had received and, in fact, returned approximately seventeen bushels more than he had originally received. Plaintiff denied this allegation.

Trial court rendered judgment in favor of the decedent's estate and these appeals followed. Other relevant facts will be discussed below.

I. Scope of Review. Since this is an action in equity, our review is **de novo.** Iowa R. App. P. 4.

II. Failure to Comply with Appellate Rules. Appellant, in his brief, has failed to cite authority for any legal proposition as required by R. App. P. 14(3) and has failed to make reference to pertinent parts of the record in his argument as required by rule 14(5). An appeal may be dismissed, with or without notice, upon this court's own motion, for failure to comply with an appellate rule. Iowa R. App. P. 19. However, in accordance with our policy of deciding cases on their merits, we nonetheless will address the merits of this case.

III. Accounting for Beans. Appellant argues trial court's finding that he failed to account for 898.66 bushels of beans, at a fair and reasonable value of $7.00 per bushel, is unsupported by the record and is contrary to the evidence presented. Although he admits that he removed approximately 881 bushel of beans from the decedent's bins, and did not pay for those beans, he argues that the evidence clearly establishes that he replaced those beans with 898.66 bushels of other beans in his possession.

We note first that the burden of proof on an issue ordinarily is upon the party who would suffer the loss if the issue were not established. Iowa R. App. P. 14(f)(5). The burden of proof is measured by the test of preponderance of the evidence. Iowa R. App. P. 14(f)(6). Plaintiff alleged that defendant received approximately 1,000 bushel of beans belonging to the decedent, which had a value of approximately $7.00 per bushel. There was testimony to the effect defendant had admitted prior to his son's death to having approximately 1,000 bushels of his son's beans. Defendant admitted at trial that he removed approximately 881 bushels of beans from the decedent's bins, and does not dispute that he did not pay the decedent or his estate for those beans. He defends this action by alleging that he placed other beans in his possession in the decedent's bins as replacement. We believe, on this evidence, that the plaintiff met her initial burden of proof, and that it consequently was encumbent upon defendant to present sufficient, competent evidence that he replaced the decedent's beans at a later date. Having reviewed the entire record and briefs, we conclude that defendant has wholly failed in establishing this allegation by the requisite proof. On behalf of defendant's allegation, the record contains only defendant's self-serving testimony, one self-serving document, and one illegible document that defendant claims indicates he replaced beans taken from decedent's bins. As to the credibility of defendant's self-serving evidence, we give weight to trial court's findings, which in this case were against defendant. Iowa R. App. P. 14(f)(7). As to defendant's exhibit which he claims proves he replaced the beans in question, we give it no weight whatsoever, due to its illegibility. We thus conclude that trial court's judgment against defendant for 898.66 bushels of beans at $7.00 per bushel ($6,290.62) should be affirmed.

IV. Crop Insurance. Defendant next argues that since he contracted for crop insurance on decedent's crops and paid the premium on this insurance, he should be awarded the proceeds. We disagree. We note first that the evidence indicates the crop insurance premium was paid from proceeds of that insurance after the damage to

decedent's crops had been determined and not by any outright expenditure by defendant. Further, we believe it is clear from the record that defendant had no interest in the subject matter being insured. See Farmers Butter & Dairy Coop. v. Farm Bureau Mutual Ins. Co., 196 N.W.2d 533, 536 (Iowa 1972). We thus conclude that defendant procured the insurance for the benefit of those persons who held an insurable interest in the property and that he holds the proceeds in trust for the estate. See Newell v. Tweed, 241 Iowa 90, 40 N.W.2d 20 (1949).[1]

V. Priority of Lien. Appellee cross-appeals arguing that trial court erred in refusing her request that the court find FHA had a first lien on the crops in question and thereby find defendant indebted to the estate in the amount of $14,855.57. We believe the principle of jus tertii applies to this assertion. Appellee seeks to raise the rights of a third party; ordinarily a party lacks standing to raise the rights of others. Iowa Civil Liberties Union v. Critelli, 244 N.W.2d 564,567 (Iowa 1976). Although this principle is subject to exception, none applies here. See Iowa Movers and Warehouse Mens Ass'n. v. Briggs, 237 N.W.2d 759, 772-773 (Iowa 1976). FHA is not a party to the instant action, and plaintiff is not its agent or acting on its behalf. As a result, we see no legal or equitable reason to modify trial court's ruling. If FHA does have a first lien on the crops, it is free to pursue its own legal recourse.

Having found no error, we affirm trial court's judgment.

AFFIRMED.

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[1] "[A] resulting trust arises from the nature or circumstances of consideration involved in a transaction whereby one person thereby becomes invested with a legal title but is obligated in equity to hold his legal title for the benefit of another, the intention of the former to hold in trust for the latter being implied or presumed as a matter of law, although no intention to create or hold in trust has been manifested, expressly or by inference, and although there is an absence of fraud or constructive fraud." 241 Iowa at 97, 40 N.W.2d at 24 (quoting 54 Am. Jur. Trusts § 193).