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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1552**

Elizabeth Lubinski, et al.,
Respondents,

vs.

Paula Bourne,
Appellant,

Douglas Bourne,
Appellant.

**Filed June 16, 2009
Affirmed
Lansing, Judge**

Winona County District Court
File No. 85-CV-07-236

Lee Ann Riehle, Streater & Murphy, P.A., 64 East Fourth Street, P.O. Box 310, Winona,
MN 55987-0310 (for respondents)

Paula Bourne, Douglas Bourne, 17050 Georgetown Court, Rosemount, MN 55068 (pro
se appellants)

Considered and decided by Schellhas, Presiding Judge; Lansing, Judge; and
Kalitowski, Judge.

UNPUBLISHED OPINION

LANSING, Judge

Paula and Douglas Bourne appeal from judgment in a partition action ordering the sale of a family home in which Paula Bourne owns a one-third remainder interest. The Bournes raise nine issues on appeal: the life-estate holder's status as a party to the action, improper venue, denial of a jury trial, exclusion of an article and two videos on lead poisoning, acceptance of perjured testimony, judicial misconduct, violation of the Minnesota Constitution, fraudulent transfer of property, and an order for attorneys' fees. Because the record and the substantive law do not support the Bournes' arguments of procedural, evidentiary, or constitutional error, we affirm.

FACTS

Elizabeth Lubinski (Lubinski), a widow, conveyed a remainder interest in her Winona home in 1996 to her three adult children, Rick Lubinski, Susan Gallas, and Paula Bourne. She retained a life estate. Lubinski continued to live in the home until health and mobility issues required her to move to an assisted-living residence. Both before and after her move to assisted living, Rick Lubinski and Gallas provided their mother with personal and financial assistance in maintaining the home. When they were unable to continue the assistance, and Lubinski could not afford to maintain the home, Lubinski, Rick Lubinski, and Gallas attempted to persuade Paula Bourne to agree to sell the home. They believed that Lubinski needed the proceeds from the life estate to remain in her assisted-living residence and they also believed that the unoccupied house would

deteriorate and the lack of assets to maintain the home would result in tax forfeiture. Bourne would not agree to the sale.

Rick Lubinski and Gallas joined Lubinski in a partition action that also named Paula Bourne as a party. Bourne's husband, Douglas, joined the litigation as a party in interest, and the Bournes defended the action pro se in the district court and in the prosecution of the appeal. The Lubinskis and Gallas alleged that it was in the interests of all parties that the property be sold to avoid waste, deterioration, and possible tax forfeiture.

The litigation has been contentious. The Bournes have alleged unfair procedures and personal harassment. They have been sanctioned for repetitive and meritless claims and submissions, and the district court judge that was originally assigned to the case recused from the case in response to the Bournes' accusations of bias.

The case was tried to the court and the Bournes opposed the partition and sale of the property. The Bournes claimed that the home was hazardous because asbestos and lead paint had been used in its construction and that selling the house in this condition would violate the Bournes' freedom of conscience under the Minnesota Constitution because young and unborn children would be endangered if they resided in the home. The Bournes unsuccessfully sought to introduce an article and two videos on lead hazards.

At the conclusion of the trial, the district court found that the sale of the house would benefit all parties, particularly Lubinski, and that not selling the house would cause waste and risk tax forfeiture. The district court also found that the Bournes' claim

of potential harm to future purchasers and the purchasers' children was speculative and the claim was undermined by the co-tenants' assurances that the listing agreement would disclose the possibility of asbestos and lead paint in the home. The district court ordered that the house be sold and appointed a referee to supervise the sale. In the memorandum accompanying the order, the district court emphasized that the referee would assure that all necessary disclosures would be made in the sale of the property.

The district court's order also provided that, after accounting for costs of the sale, the proceeds would first be used to compensate Lubinski for her life estate. The remaining proceeds would be divided equally among Lubinski's three children. Finally, the order provided that Paula Bourne's obligation for costs, disbursements, and attorneys' fees would be deducted from her one-third interest before it was distributed to her. The Bournes appeal from judgment.

D E C I S I O N

On appeal the Bournes have raised four issues relating to trial procedure, two evidentiary issues, and three substantive issues, including a constitutional challenge. We interpret procedural rules de novo. *Madson v. Minn. Mining & Mfg. Co.*, 612 N.W.2d 168, 170 (Minn. 2000). If a procedural rule must be construed, we apply the plain language of the rule consistent with its purpose. *Id.* at 171. In applying procedural rules, appellate courts adhere to a policy that "preserve[s] the right to appeal, simplif[ies] practice, and lessen[s] confusion." *In re Welfare of S.M.E.*, 725 N.W.2d 740, 742 (Minn. 2007). Evidentiary rulings are within the district court's broad discretion and will be reversed only if that discretion is clearly abused. *Warrick v. Giron*, 290 N.W.2d 166, 170

(Minn. 1980). Claimed violations of constitutional rights are reviewed de novo. *Star Tribune Co. v. Univ. of Minn. Bd. of Regents*, 683 N.W.2d 274, 283 (Minn. 2004).

I

The Bournes' first challenge is to Lubinski's status as a plaintiff in the partition action. Lubinski reserved a life estate in her home and transferred the remainder interest to her three children as tenants in common. Tenants in common have a statutory right to bring an action for partition of real estate in which they have an interest. Minn. Stat. § 558.01 (2008).

The same chapter that provides for the partition of real estate, specifically allows for joining a life-estate interest in the partition action if "the person entitled [to the life estate] has been made a party" and if the joinder is in the interest of all parties. Minn. Stat. § 558.25 (2008); *see also Heintz v. Wilhelm*, 151 Minn. 195, 199, 186 N.W. 305, 306 (1922) (stating that partition should be subject to life estate, unless parties' interests are clearly served by including life estate holder in partition action).

As tenants in common with Paula Bourne, Rick Lubinski and Gallas were entitled to bring the partition action. The district court determined that all parties' interests, especially those of Lubinski, were served by including the life estate in the sale. Lubinski did not want to retain the life estate, and the house was clearly worth more if it was sold in fee simple rather than subject to a life estate. *Cf. In re Robbins' Estate*, 94 Minn. 433, 435, 103 N.W. 217, 218 (1905) (noting that bequeathed property "would sell more advantageously when . . . interests were united than when sold separately"). The plaintiffs properly joined Elizabeth Lubinski in the action.

II

The Bournes raise five fair-trial arguments that relate to procedural and evidentiary rulings—improper venue, denial of a jury trial, exclusion of an article and two videos on lead poisoning, acceptance of perjured testimony, and judicial misconduct. We are unable to address the challenge to venue because it is not sufficiently developed factually and no objection to venue appears on the record. The case was tried in Houston County, and the Bournes now assert that it should have been tried in Winona County. The Bournes did not object to venue at the time of trial. Consequently, there is no development of the record that would provide a basis for an analysis. Because no venue objection was preserved for appeal and the record is inadequate, the claim fails. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (declining to address arguments not raised or decided in district court).

The Minnesota Constitution guarantees that “[t]he right of trial by jury . . . shall extend to all cases at law . . .” Minn. Const. art. I, § 4. This constitutional provision ensures the right to trial by jury “as it existed . . . when our constitution was adopted in 1857.” *Abraham v. County of Hennepin*, 639 N.W.2d 342, 348 (Minn. 2002). In Minnesota in 1857, a partition action was an equitable action, which did not entail a right to a jury. *Judd v. Dike*, 30 Minn. 380, 385, 15 N.W. 672, 672 (1883); *see also Swogger v. Taylor*, 243 Minn. 458, 464, 68 N.W.2d 376, 382 (1955) (confirming that partition action is authorized by statute but governed by equity). Because the Minnesota Constitution does not recognize a jury right in equitable actions, the Bournes were entitled to a trial to the court, which they received, but not a trial by jury.

The district court excluded from evidence an article and two videos relating to lead hazards that the Bournes sought to introduce during the trial. The three principal items that the Bournes attempted to introduce were an article from the New England Journal of Medicine, a video entitled “Jimmy’s Getting Better,” and a video presentation by a lead-poisoning expert named Dr. Herbert Needleman.

The court’s denial of the admission of this evidence was not an abuse of discretion because the article and videos were inadmissible hearsay not shown to fall within a hearsay exception. Hearsay is an out-of-court statement offered for the truth of the matter asserted. Minn. R. Evid. 801(a), (c). Unless the hearsay comes within an exception to the general rule of inadmissibility, it must be excluded from evidence. Minn. R. Evid. 802.

The Bournes sought to introduce “Jimmy’s Getting Better” to prove that disclosures on lead were not enough to keep children safe. They sought to introduce the journal article and the video presentation of Dr. Needleman to show that lead is hazardous, even in small amounts. The article and videos were offered for the truth of their content, but none of the people making statements in the article or videos were witnesses at trial. Consequently, the statements were out-of-court testimony that amounts to hearsay, and the Bournes did not advance any exception that would save these submissions from the hearsay bar. Similarly, the district court properly declined to allow Douglas Bourne to testify as an expert on lead poisoning. Under Minn. R. Evid. 702, a witness may qualify as an expert in a topic based on “knowledge, skill, experience, training, or education.” Douglas Bourne’s employment as a paralegal may establish

experience and training in research skills, but it does not establish expertise on the topic of lead poisoning, and the district court acted within its discretion to rule that Douglas Bourne did not qualify as an expert.

The Bournes contend that the district court accepted and relied on Gallas's and Rick Lubinski's untrue testimony relating to the lead and asbestos hazards in the house. In a posttrial submission, the Bournes compiled statements and written materials in an attempt to refute Gallas's and Rick Lubinski's trial testimony.

This belated attempt at impeachment fails. The trial in this litigation has ended, and the law does not provide for a continuation of factual disputes. Even if the Bournes' claims were taken as valid rather than argumentative, they would not conclusively affect the appeal. The district court relied on a range of testimony and evidence, and we do not overturn findings because some evidence would support a different conclusion; the district court's findings are entitled to deference and we view the record in the light most favorable to those findings. Minn. R. Civ. P. 52.01. The district court's findings have support in the record.

Furthermore, even if we construed the posttrial submission as a motion for a new trial, it would still fail because there is no indication that the extraneous materials were unavailable before trial or that they would not be excluded as inadmissible hearsay. *See* Minn. R. Civ. P. 59.01(d) (allowing court to grant new trial only if evidence could not have been discovered with due diligence).

The Bournes' final fair-trial argument is that the district court judge that presided over the trial committed misconduct by failing to view their case impartially. The record

is devoid of any evidence that would support this claim. We start from the governing presumption that a judge has properly discharged judicial duties. *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998). Based on the record as a whole, the judge’s conduct is consistent with the presumption and shows patience and professionalism in attempting to assist the pro se litigants. *See Kasson State Bank v. Haugen*, 410 N.W.2d 392, 395 (Minn. App. 1987) (noting judge’s duty to make reasonable accommodation for pro se litigants). Although the judge, at times, questioned, challenged, and admonished the litigants, the record demonstrates that this was for the purpose of clarifying the law, guiding the process, curtailing inappropriate behavior, and attempting to understand the competing arguments. The record does not support a claim of judicial misconduct.

III

At trial and on appeal the Bournes have contended that the sale of the house would violate their freedom of conscience under the Minnesota Constitution because their religious beliefs encompass the protection of young and unborn children and the sale of the house would make them responsible for any harm inflicted by lead or asbestos.

The factual basis for the Bournes’ endangerment argument is not well supported in the record. The district court found that the Bournes’ claim of “potential permanent harm to purchasers or their children [was] speculative at best and not supported by any admissible evidence.” This conclusion is not clearly erroneous. Because it was unsupported by medical evidence, the district court explicitly rejected Paula Bourne’s testimony that she had “fairly high” levels of lead in her body as a result of living in the

home. The Bournes offered no other competent proof addressing the condition of the home, and Rick Lubinski and Gallas testified that it was not hazardous.

To the extent the Bournes' stated religious beliefs do *not* depend on proving an actual hazard, we are still not convinced that their right to these beliefs has been unconstitutionally burdened. Under the Minnesota Constitution, which provides stronger protection for freedom of conscience than the United States Constitution, courts apply a four-part test to examine claims that state action violates a right to conscience. *Hill-Murray Fed. of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857, 864-65 (Minn. 1992). The analysis considers whether (1) the purported belief is sincere; (2) state action burdens the belief; (3) the state interest is overriding or compelling; and (4) the state uses the least restrictive means. *Id.* at 865.

We accept that the Bournes have satisfied the first consideration because their stated belief is sufficiently tied to their religion and its established tenets to trigger the presumption in favor of sincerity. *State v. Pedersen*, 679 N.W.2d 368, 373-74 (Minn. App. 2004), *review denied* (Minn. Aug. 17, 2004).

In evaluating the second consideration, we observe at the outset that, in the absence of state action causing the alleged infringement, a claim of constitutional violation fails. *See Chenoweth v. City of New Brighton*, 655 N.W.2d 821, 827 (Minn. App. 2003) (concluding that city's incentives for development were not state action capable of supporting takings claim), *review denied* (Minn. Apr. 29, 2003); *Smith v. Condux Int'l, Inc.*, 466 N.W.2d 22, 26 (Minn. App. 1991) (holding that absence of state action defeated speech-related First Amendment claim).

The Bournes have asserted no state action that results in burdening their religious beliefs. They assert that they want to make the property completely safe before it is sold. The Bournes have not alleged any state action that would prevent them from achieving that purpose. The state has not forced them to accept an ownership interest in the property, barred them from abating hazards once they obtained an ownership interest, or prevented them from buying the house in the partition sale and abating any dangers that they believe exist. *See* Minn. Stat. § 558.19 (2008) (providing for purchase at partition sale by part-owner).

The fact that the Bournes' beliefs may result in an additional personal expense does not establish that their freedom of conscience has been violated. *See Shagalow v. State, Dep't of Human Servs.*, 725 N.W.2d 380, 390-92 (Minn. App. 2006) (upholding state's withdrawal of aid when religious belief influenced person to move to Jerusalem to receive services), *review denied* (Minn. Feb. 28, 2007).

The absence of state action is dispositive, and therefore, we do not address the remaining considerations of whether the state interest is overriding or compelling or whether the state has used the least restrictive means. The resolution of the partition action did not violate the Bournes' constitutional right to freedom of conscience.

IV

The Bournes argue that the sale of the house violates lead-abatement law and, thus, a sale without disclosure amounts to a fraudulent transfer under Minn. Stat. § 513.57 (2008). The Bournes have presented no evidence that the sale of the house has yet occurred. Consequently, their claim of fraudulent transfer is premature. *See State ex*

rel. Friends of Riverfront v. City of Minneapolis, 751 N.W.2d 586, 593 (Minn. App. 2008) (holding contract claim not ripe when action said to breach contract had not yet occurred), *review denied* (Minn. Sept. 23, 2008).

We also note that the co-tenants have consistently indicated that any sale would include disclosure to potential buyers of the possibility of asbestos and lead paint in the home. Furthermore, the district court included in its memorandum a statement that the referee would insure that “all necessary disclosures [would] be made” in the sale of the property.

V

Review of the order for costs, disbursements, and attorneys’ fees is also premature. Under Minn. Stat. § 558.215 (2008), an appeal is permitted from a partition order “entered pursuant to section[s] 558.04, 558.07, 558.14, or 558.21.” Allocation of sale proceeds is governed by Minn. Stat. § 558.16 (2008), but the allocation is not final until the sale has occurred and an order for disbursement is issued under Minn. Stat. § 558.21 (2008). The order for costs, disbursements, and attorneys’ fees may not be appealed under section 558.16; the Bournes must wait and appeal from an order issued under Minn. Stat. § 558.21. *See* Minn. Stat. § 558.215 (allowing appeals under section 558.21). Thus, the Bournes may appeal costs, disbursements, and attorneys’ fees after the house is sold and final judgment for disbursement is entered.

We note, however, that district courts have discretion in partition actions to charge costs and disbursements to the parties. *Kuller v. Kuller*, 260 Minn. 256, 260, 109 N.W.2d 561, 563-64 (1961). And the district court has authority in partition actions, in prescribed

circumstances, to order attorneys' fees. *Hanson v. Ingwaldson*, 84 Minn. 346, 346-47, 87 N.W. 915, 915 (1901) (per curiam); *see also Kuller*, 260 Minn. at 260, 109 N.W.2d at 563 (interpreting *Hanson*).

Affirmed.