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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1224**

Kristin M. Schumacher,
Respondent,

Marian V. Swanson, intervenor,
Respondent,

vs.

Terrence K. Swanson,
Appellant,

and Terrence K. Swanson, counterclaimant,
Appellant,

vs.

Kristin M. Schumacher, et al.,
Respondents.

**Filed April 24, 2017
Affirmed
Bratvold, Judge**

St. Louis County District Court
File No. 38-CV-15-152 and 69VI-CV-15-206

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Considered and decided by Schellhas, Presiding Judge; Kirk, Judge; and Bratvold, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Respondent-sister brought partition actions relating to two properties that she and appellant-brother owned as tenants in common subject to respondent-mother's life estate. The partition actions were consolidated and appellant filed counterclaims alleging malicious prosecution, abuse of process, and injury to inheritance and requested a jury trial. The district court denied appellant's jury-trial request based on its determination that appellant waived his right to a jury trial by bringing his counterclaims in an equitable action. After a court trial on the partition actions and the counterclaims, the district court ordered partition by sale and denied appellant's counterclaims. Appellant argues that his counterclaims were legal in nature and he was entitled to a jury trial, partition should not have been granted because respondents requested equitable relief with unclean hands, and his counterclaims should not have been denied. We affirm.

FACTS

Respondent Marian Swanson and her late husband (collectively, the Swansons) owned two properties in fee simple as joint tenants: a family home in Babbitt (the house) and a cabin near Ely (the cabin). The house is a "well-maintained one-story, three-bedroom, two-bath home on a single lot" and was valued at \$68,900 in 2016. The cabin is a "two-bedroom seasonal log cabin built in the 1930s, situated on about an acre of land with

electricity and minimal heating,” but with no septic system, toilets, or drinking water. It was valued at \$276,600 in 2016.

The Swansons raised four children to adulthood, including appellant Terrence Swanson (Terry) and respondent Kristin Schumacher (Kristin). In January 1996, the Swansons retained a real estate attorney and executed quitclaim deeds, which conveyed the house and cabin to Terry and Kristin, as tenants in common, reserving a life-estate interest for the Swansons. The Swansons lived in the house and used the cabin until 2007, when Marian’s husband died. Marian continued to live in the house after her husband’s death and was living there at the time this case was tried. Marian also used and maintained the cabin, with the help of Terry and Kristin.

At some point after her husband’s death, Marian contacted the same attorney who had prepared the quitclaim deeds and asked him to prepare a new will. Marian explained that she was concerned about her finances and wanted to sell the house and the cabin. The attorney advised Marian that in order to convey full title to a buyer, she would need Terry and Kristin to convey their interests to her. In November 2011 and January 2012, Kristin and her then-husband signed deeds conveying their interest in the properties to Marian. Terry refused to convey his interest to Marian. In August 2012, Kristin’s marriage was dissolved by decree, a fact that Terry relies on for some of his claims.

In January 2013, Marian initiated partition actions relating to each property (*Swanson I*). The cases were consolidated and the district court issued a partition order, which Terry appealed. This court reversed, holding that Marian could not maintain the partition actions because her interest was not concurrent with Terry’s interest. *See Swanson*

v. Swanson, 856 N.W.2d 705 (Minn. App. 2014). While the appeal was pending, Marian executed transfer-on-death deeds conveying her interest in both properties to Kristin. After this court's decision, Marian revoked the transfer-on-death deeds and re-conveyed her one-half interest in each property to Kristin, again reserving a life estate for herself.

In March 2015, Kristin brought the present partition actions, which the district court consolidated. Terry asserted several affirmative defenses, including that the partition actions were barred by the doctrine of unclean hands. He also asserted three counterclaims against Kristin and Marian as a third-party defendant: (1) a malicious-prosecution claim against Marian, (2) an abuse-of-process claim against Kristin and Marian, and (3) a claim of interference with an inheritance against Kristin and Marian. Marian intervened under Minn. R. Civ. P. 24.01.

Approximately one month before the scheduled trial, Terry filed a jury-trial demand under Minn. R. Civ. P. 38.01 and Kristin and Marian moved to strike the demand. The district court granted the motion to strike, concluding that Terry had waived his right to a jury trial on the counterclaims by raising them in an equitable action.

A court trial was held in April 2016. Kristin, Terry, Marian, the referee from *Swanson I*, Marian's real estate attorney, and Kristin's divorce attorney testified at the trial. In its written findings and order, the district court concluded that Terry and Kristin each had an undivided one-half remainder interest in each property as tenants in common subject to Marian's life estate, that Kristin and Terry's interests were concurrent, and that a partition of the properties was appropriate under Minn. Stat. §§ 558.01 and 558.04 (2016). The

district court determined that the properties could not be physically divided and ordered partition by sale supervised by a referee.

The district court also denied Terry's counterclaims. It determined that Terry failed to prove malicious intent by Marian, defeating Terry's malicious-prosecution claim, finding that Marian "attempted for 18 months to negotiate with [Terry] for a 'friendly' partition and that [she] followed the advice of her attorney" when she brought *Swanson I*. Likewise, it determined Marian and Kristin's conveyances in 2011 and 2014 were "done in good faith" and there was no improper purpose supporting the abuse-of-process claim. Finally, the district court denied Terry's counterclaim for injury to inheritance, concluding that Terry failed to prove that either Kristin or Marian committed waste. This appeal follows.

D E C I S I O N

I. The district court did not err in denying Terry's demand for a jury trial.

Whether a party has a right to a jury trial is a question of law, which we review de novo. *Abraham v. County of Hennepin*, 639 N.W.2d 342, 348 (Minn. 2002). Denial of the right to a jury trial is reversible error. *Olson v. Aretz*, 346 N.W.2d 178, 181 (Minn. App. 1984).

The Minnesota Constitution states that "[t]he right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy." Minn. Const. Art. I, § 4. The Minnesota Constitution "neither takes from [n]or adds to the [jury-trial] right as it previously existed" in the Territory of Minnesota at the time of the constitution's adoption. *Olson v. Synergistic Techs. Bus. Sys., Inc.*, 628 N.W.2d 142, 148 (Minn. 2001) (quoting *Whallon v. Bancroft*, 4 Minn. 109, 111, 4 Gil. 70, 74 (1860)). In

determining whether a litigant has a right to a jury trial, “[w]e focus not on whether the exact cause of action existed, but on the *type* of action—whether the claim is an action at law, for which the Constitution guarantees a right to a jury trial, or an action in equity, for which there is no constitutional guarantee of a jury trial.” *Schmitz v. U.S. Steel Corp.*, 852 N.W.2d 669, 673 (Minn. 2014). When determining whether an action is equitable or legal, our inquiry is two-fold: we first look at the substance of the claim, including the elements of the claim and the pleading in the instant case; we then look at the “nature of the relief sought.” *Abraham*, 639 N.W.2d at 349–53.

The parties do not dispute that the partition action is equitable and also agree that at least two of Terry’s counterclaims are legal in nature, meaning that Terry had a right to a jury trial for the legal claims.¹ We must therefore determine whether the district court correctly concluded that “when a defendant interposes a counterclaim alleging claims arising in law into an action that sounds in equity the defendant loses any right he had to a jury trial on that counterclaim.” The district court relied on *Johnson Serv. Co. v. Kruse*, which arose from a mechanic’s lien foreclosure against defendant’s property. 121 Minn. 28, 29, 140 N.W. 118, 118 (1913).² The *Kruse* defendant admitted plaintiff had completed the

¹ Terry argues that the injury-to-inheritance claim is also legal in nature because the elements of the claim are similar to negligence or property damage claims, both of which are legal claims. Kristin and Marian respond that an injury-to-inheritance claim is similar to a real estate claim, which is equitable in nature. Because we conclude that Terry would not be entitled to a jury trial even if his claim is legal in nature, we need not decide this issue.

² It appears that this opinion was one of several supreme court opinions that flowed from disputes regarding the same construction project and therefore have the same or similar names. Although the district court cited directly to 121 Minn. 90, 140 N.W. 339 (1913), it

work but asserted a counterclaim that she had been “induced to execute the contract through false and fraudulent representations” that the newly installed temperature regulation system would run automatically. *Id.* at 29–30, 140 N.W. at 118. The district court denied the defendant’s jury-trial demand. *Id.* at 30, 140 N.W. at 118. On appeal, the Minnesota Supreme Court affirmed the district court’s decision due to the “settled rule that in an equitable action a defendant, interposing a counterclaim alleging a legal cause of action, is not thereby entitled as a matter of right to a jury trial thereof.” *Id.* at 33, 140 N.W. at 120; *see also Gunhus, Grinnell v. Engelstad*, 413 N.W.2d 148, 152 (Minn. App. 1987) (applying *Kruse*), *review denied* (Minn. Nov. 24, 1987).

Terry argues that in *Onvoy, Inc. v. ALLETE, Inc.*, the Minnesota Supreme Court implicitly overruled *Kruse* when it followed federal precedent regarding the application of jury findings to equitable claims. 736 N.W.2d 611, 617 (Minn. 2007). In *Onvoy*, the plaintiff alleged both equitable and legal claims, and all of the claims were tried together. *Id.* at 614. The supreme court held that a jury’s findings of fact on legal claims are binding on the court in its resolution of equitable claims. *Id.* at 617. In its analysis, the supreme court stated that the federal and state jury-trial rights are “essentially the same” and cited *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S. Ct. 948 (1959), which states that, in federal court, a defendant has a right to a jury trial on compulsory counterclaims brought in an equitable

appears that the reasoning it relied on lies in 121 Minn. 28, 140 N.W. 118 (1913), which directly addresses the jury-trial issue. Additionally, although some sources state the title as *Behrens v. Kruse*, we use the title listed in the Minnesota Reports, *Johnson Serv. Co. v. Kruse*.

action. *Id.* at 508–10, 79 S. Ct. at 955-56; *see also Onvoy*, 736 N.W.2d at 616-17 (discussing *Beacon Theatres*).

We conclude that *Onvoy*’s favorable citation to *Beacon Theatres* did not overrule *Kruse*. *Onvoy* did not analyze or consider whether a defendant waives jury-trial rights by bringing a legal counterclaim in an equitable action because the *Onvoy* defendant did not bring any counterclaims; nor does *Onvoy* cite to, discuss, or criticize *Kruse*. We conclude that *Kruse* remains good law. *See Minn. State Patrol Troopers Ass’n v. State, Dep’t of Pub. Safety*, 437 N.W.2d 670, 676 (Minn. App. 1989) (noting that this court will not make “a dramatic change in the interpretation of the Minnesota Constitution” in the absence of an explicit ruling from the supreme court) (quotation omitted), *review denied* (Minn. Mar. 28, 1989).³ Accordingly, we affirm the district court’s decision to strike Terry’s jury-trial demand because he waived his jury-trial rights by filing legal counterclaims in an equitable action.

II. The district court did not abuse its discretion in ordering partition.

An order for partition is equitable relief, which we review for abuse of discretion. *Nadeau v. County of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979); *see also Swogger v.*

³ We note that *Kruse* was decided before the promulgation of the Minnesota Rules of Civil Procedure, which requires litigants to bring some compulsory counterclaims. *See* Minn. R. Civ. P. 13.01 (requiring a party to bring as a counterclaim any claim against “any opposing party, if it arises out of the transaction that is the subject matter of the opposing party’s claim and does not require . . . the presence of third parties over whom the court cannot acquire jurisdiction”). While we recognize that our courts may someday need to clarify how *Kruse* applies to compulsory counterclaims, we need not reach that issue here because the parties did not brief or argue it to this court. *See McKenzie v. State*, 583 N.W.2d 744, 746 n.1 (Minn. 1998) (indicating that when an appellant “alludes to” an issue but “fails to address [it] in the argument portion of his brief” we need not address it).

Taylor, 243 Minn. 458, 461, 68 N.W.2d 376, 380 (1955). Questions of law that arise in an equitable action are reviewed de novo. *Drewitz v. Motorwerks, Inc.*, 867 N.W.2d 197, 204 n.2 (Minn. App. 2015), *review denied* (Minn. Sept. 15, 2015).

In Minnesota, a partition of real property may be sought where “two or more persons are interested, as joint tenants or as tenants in common, in real property in which one or more of them have an estate of inheritance or for life or for years.” Minn. Stat. § 558.01. Terry argues that Kristin is not a tenant in common because she and her then-husband did not disclose or include their interest in the properties in their marital dissolution in August 2012 and this omission rendered invalid their November 2011 conveyance to Marian. Terry cites a statute governing transfer of property during dissolution. *See* Minn. Stat. § 518.58, subd. 1a (2016) (forbidding a spouse from transferring property without the other spouse’s consent while the dissolution is contemplated or pending).⁴

Terry’s argument is unavailing. Although spouses involved in marital dissolution proceedings have an affirmative duty to make a full and fair disclosure of their assets, the order dissolving Kristin’s marriage was entered in August 2012, several months after she and her then-husband jointly conveyed the properties to Marian in November 2011 and January 2012. Moreover, there is no record evidence that Kristin’s then-husband did not consent to the transfer and Terry cites no authority suggesting that Kristin’s failure to inform the family court of a consensual joint transfer invalidates the transfer. Kristin and

⁴ Terry also cites case law. *See, e.g., Searles v. Searles*, 420 N.W.2d 581, 582 (Minn. 1988) (holding that divorce did not terminate a wife’s interest in property and she had standing to bring a partition action). None of the cases analyze a consensual joint transfer of property during marriage dissolution or hold that such a consensual joint transfer is invalid.

her then-husband's conveyances to Marian in November 2011 and January 2012 extinguished any inchoate interest Kristin's then-husband may have had in the properties.

After Marian's December 2014 transfer to Kristin, Kristin had a one-half remainder interest in the house and the cabin, and Terry had a one-half remainder interest in the house and the cabin. They were tenants in common with equal interests subject to Marian's life estate. The district court did not err in determining that Terry and Kristin were tenants in common.

Terry next argues that the district court erred in denying his defense of unclean hands. The equitable doctrine of unclean hands states that "he who seeks equity must do equity, and he who comes into equity must come with clean hands." *Hruska v. Chandler Assocs., Inc.*, 372 N.W.2d 709, 715 (Minn. 1985) (quotation omitted). We review for abuse of discretion a district court's decision to grant equitable relief and reject an unclean-hands defense. *See Brown v. Lee*, 859 N.W.2d 836, 844 (Minn. App. 2015), *review denied* (Minn. May 19, 2015).

Terry offers two instances to support his unclean-hands defense. First, he claims that Kristin committed fraud when she conveyed the properties to Marian in November 2011 because, according to Terry, Kristin transferred the properties to block action by her then-husband's creditors. The district court heard the evidence and rejected Terry's claim, finding that both Kristin and Marian made their transfers in good faith. The record supports the district court's finding. Kristin and Marian sought legal advice about transferring the properties. Kristin and Marian also followed their attorney's advice throughout the relevant property transfers and their attorneys testified to that effect at the court trial.

Second, Terry claims that the doctrine of unclean hands applies because the “financial hardship and the need for Marian to relocate to Virginia from Babbitt [is] belied by the evidence,” alleging that Kristin recently purchased a home. It is unclear how Kristin’s purchase affected Marian’s testimony that she seeks to sell the properties to gain financial stability. Moreover, the record contains no evidence establishing Kristin’s purchase.⁵ Accordingly, we conclude that the district court did not abuse its discretion when it rejected Terry’s unclean-hands defense and granted equitable relief in the form of an order for partition.

III. The district court did not err in denying Terry’s counterclaims.

Terry argues that the district court erred in dismissing each of his three counterclaims. We review a district court’s factual findings for clear error and its legal conclusions de novo. *In re Distrib. of Attorney’s Fees between Stowman Law Firm, P.A., & Lori Peterson Law Firm*, 870 N.W.2d 755, 759 (Minn. 2015). Although the district court purported to “dismiss” each counterclaim, the district court decided each counterclaim on the merits and denied relief. We will consider the denial of each counterclaim in turn.

To prove a malicious prosecution action, a plaintiff must prove:

⁵ Terry claims that he asked the district court to take judicial notice of Kristin’s real estate purchase and the court denied his request. The appellate record does not include any motions or transcripts relating to Terry’s request to take judicial notice, nor any evidence about the house. We are unable to consider matters outside the appellate record. *Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977). Accordingly, we will not consider Terry’s request to take judicial notice of Kristin’s newly purchased home, because it is outside the record and the purchase cannot be established by a source “whose accuracy cannot reasonably be questioned.” *See Matter of Zemple*, 489 N.W.2d 818, 819 (Minn. App. 1992) (quotation omitted) (stating standard for taking judicial notice).

(1) the suit must be brought without probable cause and with no reasonable ground on which to base a belief that the plaintiff would ultimately prevail on the merits; (2) the suit must be instituted and prosecuted with malicious intent; and (3) the suit must ultimately terminate in favor of the defendant.

Jordan v. Lamb, 392 N.W.2d 607, 609 (Minn. App. 1986) (quotation omitted), *review denied* (Minn. Oct. 29, 1986). The district court dismissed Terry’s malicious-prosecution claim with prejudice, after concluding that the legal issue decided in *Swanson I* was an issue of first impression, and after finding that Marian followed her attorney’s advice and reasonably believed that she would prevail on the merits, even though she failed to prevail in *Swanson I*.

Terry argues that this court’s holding in *Swanson I* was predictable and Marian could not have reasonably believed that she would prevail on the merits. To defeat a malicious prosecution claim, a party need only establish a reasonable belief that she had probable cause to file a claim. *Dunham v. Roer*, 708 N.W.2d 552, 569 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006). Moreover, the district court also found that Marian relied on her attorney’s advice. Minnesota courts recognize an advice-of-counsel defense where a litigant “fully disclosed all material facts to the attorney, received advice that his or her conduct was legal, and acted in good-faith reliance on that advice.” *Sysdyne Corp. v. Rousslang*, 860 N.W.2d 347, 354 (Minn. 2015) (citing *Miller v. Am. Nat’l Bank in Little Falls*, 216 Minn. 19, 23, 11 N.W.2d 655, 657 (1943)). The district court did not err when it denied Terry’s malicious-prosecution claim.

We next consider the district court’s denial of Terry’s abuse-of-process claim; the “essential elements” include: “the existence of an ulterior purpose and the act of using the

process to accomplish a result not within the scope of the proceedings in which it was issued.” *Dunham*, 708 N.W.2d at 571. An abuse-of-process claim requires a determination of whether the legal process “was used to accomplish an unlawful end for which it was not designed or intended, or to compel a party to do a collateral act which he is not legally required to do.” *Kittler & Hedelson v. Sheehan Props., Inc.*, 295 Minn. 232, 239, 203 N.W.2d 835, 840 (1973).

The district court denied Terry’s abuse-of-process claim because it concluded that the “evidence shows extensive negotiation to attempt to sell both properties prior to initiating litigation seeking the same.” Terry argues that Marian was untruthful when she claimed that she wanted to partition the properties to increase her financial stability and her ulterior motive was “to inflict financial harm and emotional distress upon Terry.”

The district court’s finding that Kristin and Marian did not have an improper purpose in seeking partition has ample support in the record, which establishes that Marian sought partition because the properties were too much work for her, she wanted to move, and she needed financial stability. The parties sought to negotiate a friendly partition for over a year before filing the first partition action. While Marian testified that she and Terry “don’t have a friendly relationship,” no evidence establishes that either Kristin or Marian filed these partition actions to harm Terry. Accordingly, we conclude that the district court did not err in denying Terry’s abuse-of-process claim.

Finally, Terry challenges the district court’s denial of his injury-to-inheritance claim under Minn. Stat. § 557.05 (2016), which provides:

A person seized of an estate in remainder or reversion may maintain a civil action for any injury done to the inheritance, notwithstanding an intervening estate for life or years.

The district court determined that Terry failed to prove that Marian committed waste or Kristin created a cloud on the property title.

Regarding Terry's theory of waste, the district court recognized that Terry enumerated various concerns about painting the logs on the cabin, failing to install a septic system, failing to update the electrical system, and failing to repave the garage floor or replace the garage walls. The district court also recognized that evidence established "[b]oth properties can be sold subject to currently existing conditions."

Terry argues that Marian committed waste because the cabin property was not kept "up to code with respect to the septic system, electrical and heating, and the like." Terry is correct that Marian, as a life tenant, has a duty not to commit waste on the properties. *Beliveau v. Beliveau*, 217 Minn. 235, 242, 14 N.W.2d 360, 364 (1944) (holding a life tenant is obligated "not to permit waste, to make necessary and reasonable repairs, . . . and not to permit noxious weeds to infest the lands"). However, a life tenant has no duty to *improve* the property. *Rendahl v. Hall*, 160 Minn. 502, 505, 200 N.W. 744, 745 (1924). This means Marian was not obligated to install expensive septic and electrical systems on a "rustic" property that is valued mainly for its lake access.

Terry testified he and his family have maintained the properties; but Marian also testified that she and Kristin have performed maintenance at the properties. Moreover, Terry failed to produce any evidence regarding the value of either property before or after

the alleged waste occurred to prove that his inheritance had been injured. Accordingly, the district court did not err when it denied Terry's injury-to-inheritance claim based on waste.

Terry also contends that there is a "threat of clouded title" that will hinder sale of the properties. The only "threat" identified by Terry is Kristin and her then-husband's transfer to Marian in 2011 and 2012. As discussed above, Kristin's then-husband conveyed his inchoate interest to Marian and this conveyance extinguished any interest he may have had in the property. Further, Terry's argument that the partition actions "have left a paper trail that will deter potential future purchasers" was never raised below. We do not consider matters not argued and considered in the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Accordingly, the district court did not err when it denied Terry's injury-to-inheritance claim.

Affirmed.