STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0272

Jennifer Schroeder, et al.,
Respondents,

vs.

Minnesota Secretary of State Steve Simon,
Respondent,

Minnesota Voters Alliance, applicant for intervention,
Appellant.

Filed September 8, 2020
Affirmed
Jesson, Judge

Ramsey County District Court
File No. 62-CV-19-7440

Michael M. Sawers, Craig S. Coleman, Tom Pryor, Kirsten L. Elfstrand, Faegre Drinker Biddle & Reath LLP, Minneapolis, Minnesota; and

Teresa J. Nelson, David P. McKinney, American Civil Liberties Union of Minnesota, Minneapolis, Minnesota (for respondents Schroeder, et al.)

Keith Ellison, Attorney General, Allen Cook Barr, Assistant Attorney General, St. Paul, Minnesota (for respondent Minnesota Secretary of State)

Erick G. Kaardal, Mohrman, Kaardal & Erickson, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Jesson, Judge; and Florey, Judge.

S Y L L A B U S

A claimed interest in avoiding unnecessary litigation and the spending of public funds on litigation does not constitute the required "interest relating to the property or

transaction which is the subject of the action" that must be established to intervene as a matter of right under rule 24.01 of the Minnesota Rules of Civil Procedure.

O P I N I O N

JESSON, Judge

Appellant Minnesota Voters Alliance (MVA) sought to intervene in a lawsuit challenging the constitutionality of Minnesota's statutory scheme governing the restoration of the right to vote after a felony conviction. According to MVA, respondent Minnesota Secretary of State Steve Simon—through representation provided by the Minnesota Attorney General's Office—failed to assert a defense that would result in dismissal of the action. But the district court denied MVA's motion to intervene. Because MVA lacks the necessary interest in the subject of the action, we affirm the district court's denial of its request to intervene as a matter of right.

FACTS

This appeal requires us to decide whether appellant Minnesota Voters Alliance (MVA) is entitled to intervene in a lawsuit challenging Minnesota's statutory scheme for restoring the right to vote after a felony conviction. In order to resolve this question, we begin by explaining the underlying lawsuit, before turning to MVA's interest in intervening.

In Minnesota, a felony conviction renders an individual ineligible to vote until his or her civil rights are restored. Minn. Const. art. VII, § 1; *see also* Minn. Stat. § 201.014, subd. 2(1) (2018). And before restoration of civil rights can occur, an individual must be "discharge[d]." Minn. Stat. § 609.165, subd. 1 (2018). But "discharge" is not synonymous

with being released from incarceration. *Id.*, subd. 2 (2018). Rather, "discharge" requires a court order or the expiration of an individual's sentence. *Id.* In other words, an individual convicted of a felony must complete his or her entire sentence—including probation, parole, or supervised release—before the right to vote is restored.

Respondents Jennifer Schroeder, Elizer Eugene Darris, Christopher James Jecevicus-Varner, and Tierre Davon Caldwell (collectively, plaintiffs) are each citizens of Minnesota who have been convicted of a felony. Although each individual completed any required incarceration, they remain on parole, probation, or another form of supervised release. As a result, they are ineligible to vote.[1]

This scheme for restoring an individual's right to vote after a felony conviction, plaintiffs allege, is unconstitutional. Through the underlying lawsuit, they sought declaratory and injunctive relief, including restoration of the right to vote. Respondent Minnesota Secretary of State Steve Simon (the secretary), through representation provided by the Minnesota Attorney General's Office, answered the complaint. In doing so, the secretary asserted affirmative defenses and sought dismissal of the complaint.

Six days later, MVA filed a notice expressing its intent to seek limited intervention in the case. MVA characterizes itself as "a nonprofit organization with members who seek

[1] For example, according to the complaint, Schroeder was convicted of drug possession in 2013. Schroeder was sentenced to one year in the county jail and was released over five years ago. But because her sentence also includes 40 years of probation, Schroeder will remain ineligible to vote until 2053. Additionally, plaintiffs alleged in the complaint that, in 2016, one in 41 adults in Minnesota was on parole or probation. The complaint further states that "[b]ased on the most recent data available, 52,336 Minnesotans, who are currently living in the community and bearing the struggles and responsibilities of citizenship, are unable to vote due to a past felony-level criminal conviction."

to ensure . . . public confidence in the integrity of Minnesota's elections . . . and that public officials act in accordance with the law in exercising their obligations to the people of the State of Minnesota." Both the plaintiffs and the secretary objected to MVA's noticed intervention. MVA then moved for limited intervention as a matter of right, or, in the alternative, permissive intervention. According to MVA, it sought to intervene to assert a particular defense: the "lack of private cause of action." This defense, which is based on MVA's assertion that there is no private cause of action under the Minnesota Constitution, would result in dismissal of the case, MVA argued. And, as a taxpayer, MVA maintained that it had an interest in the attorney general's office asserting that defense to avoid unnecessary litigation and wasting taxpayer resources.

After a hearing, the district court denied MVA's motion to intervene. Although the court determined that MVA's motion was timely, it concluded that MVA did not have a sufficient interest related to the subject of the action. As a result, it was unnecessary for MVA to intervene to protect any interest. Nor, according to the district court, did MVA establish that the secretary did not adequately represent its alleged interest. MVA appeals.[2]

ISSUES

I. Is this appeal moot?

II. Is MVA entitled to intervene as a matter of right under rule 24.01 of the Minnesota Rules of Civil Procedure?

[2] MVA sought to consolidate this appeal with another involving a third party seeking to intervene to assert the no-private-cause-of-action defense. In a special-term order, this court denied that request. The special-term panel also clarified that the scope of this appeal is limited to the issue of intervention as a matter of right because the district court's denial of MVA's request for permissive intervention is not appealable. Additionally, the supreme court denied MVA's request for accelerated review.

ANALYSIS

I. This appeal is not moot.

Before evaluating MVA's arguments, we must decide whether this appeal should be dismissed as moot, as plaintiffs argue. We consider de novo whether an appeal is moot. *Verhein v. Piper*, 917 N.W.2d 96, 100 (Minn. App. 2018).

According to plaintiffs, the procedural posture of the underlying action renders this appeal moot. MVA did not move to stay the case in district court during this appeal. At the time of oral argument before this court, the parties were awaiting a decision from the district court regarding summary-judgment motions from each side. During the pendency of this appeal, the district court granted summary judgment in favor of the secretary and dismissed the complaint with prejudice. Though plaintiffs contended that the appeal was moot before the summary-judgment decision, they assert that the district court's order further cements their argument.

An appeal is "moot when a decision on the merits is no longer necessary or an award of effective relief is no longer possible." *Dean v. City of Winona*, 868 N.W.2d 1, 5 (Minn. 2015). Mootness is "a flexible discretionary doctrine" and "not a mechanical rule" that we invoke automatically. *Id.* at 4 (quotation omitted). Here, MVA seeks to intervene to argue a specific defense: that there is no private cause of action under the Minnesota Constitution. And it desires to do so based on its claimed interest in ensuring that the attorney general's office uniformly asserts the defense to prevent "meritless litigation." No current party has argued this defense. Further, while summary judgement has now been granted, the time to appeal that decision has not lapsed. *See* Minn. R. Civ. App. P. 104.01,

subd. 1 (describing the time frame for an appeal). This context supports the determination that this appeal is not moot. In short, it is possible in the future span of this case, that we could grant the relief MVA desires: intervention to argue its identified defense. *See Dean*, 868 N.W.2d at 5. Accordingly, this appeal is not moot.[3]

II. MVA does not satisfy the requirements under rule 24.01 of the Minnesota Rules of Civil Procedure to intervene as a matter of right.

MVA argues that the district court erroneously denied its motion to intervene as a matter of right. "Orders concerning intervention as a matter of right . . . are subject to de novo review and are independently assessed on appeal." *State Fund Mut. Ins. Co. v. Mead*, 691 N.W.2d 495, 499 (Minn. App. 2005).

[3] Even if an issue may "technically" be moot, we can address its merits if it "is functionally justiciable and of public importance and statewide significance." *In re Schmalz*, 945 N.W.2d 46, 49 n.3 (Minn. 2020). In this appeal, the record is well-developed, and the parties have adequately briefed and argued the case. Further, we review orders regarding intervention as a matter of right de novo. *See id.* (identifying the de novo standard of review in a matter of statutory interpretation as a factor supporting the conclusion that a case was functionally justiciable); *see also State Fund Mut. Ins. Co. v. Mead*, 691 N.W.2d 495, 499 (Minn. App. 2005) (describing the standard of review for orders concerning intervention as a matter of right). Considering these factors, we conclude that this appeal is functionally justiciable.

In addition to being functionally justiciable, this appeal presents a question "of public importance and statewide significance." *Schmalz*, 945 N.W.2d at 49 n.3. MVA asks us to decide whether its claimed interest—avoiding the spending of public funds defending allegedly unnecessary litigation and ensuring that the attorney general's office uniformly asserts available defenses—warrants intervention as a matter of right. Resolution of this question implicates the ability of third parties to seek intervention in the significant number of cases involving the attorney general's office and the use of public funds for litigation costs. As a result, resolution addresses an issue of statewide significance.

Rule 24.01 of the Minnesota Rules of Civil Procedure governs intervention as a matter of right. It states:

> Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Minn. R. Civ. P. 24.01. Under this rule, a proposed intervenor must satisfy four requirements to intervene as a matter of right. *League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636, 641 (Minn. 2012). Those requirements are "(1) a timely application; (2) an interest in the subject of the action; (3) an inability to protect that interest unless the applicant is a party to the action; and (4) the applicant's interest is not adequately represented by existing parties." *Id.* Each requirement must be met. *See id.*

Here, the parties agree—as do we—that the first requirement is met. MVA filed its notice of intervention less than a week after the secretary filed his answer and filed its motion to intervene about a month later. Nothing suggests that MVA's request to intervene was untimely.

We turn then to the second requirement: establishment of "an interest in the subject of the action." *Id.* To evaluate whether this requirement has been satisfied, we examine "the pleadings and, absent sham or frivolity," we "accept the allegations in the pleadings as true." *Snyder's Drug Stores, Inc. v. Minn. State Bd. of Pharmacy*, 221 N.W.2d 162, 164 (Minn. 1974). But when deciding a motion to intervene as a matter of right, "the merits of the proposed complaint are not to be determined." *Id.*

Not every alleged interest in a lawsuit supports intervention as a matter of right. For instance, in general, personal or familial interests are insufficient to warrant intervention as a matter of right. *See Valentine v. Lutz*, 512 N.W.2d 868, 870 (Minn. 1994). And if a judgment will not affect a proposed intervenor's legal rights, the proposed intervenor is generally not entitled to intervene as a matter of right. *See Koski v. Chicago & Nw. Transp. Co.*, 386 N.W.2d 282, 284-85 (Minn. App. 1986).

At the district court, MVA described its interest as twofold: (1) an interest in the attorney general's office uniformly asserting the no-private-cause-of-action defense and (2) an "interest in ending the meritless litigation as state taxpayers." But the district court concluded that MVA's alleged interest was not related to "the *subject* of the action." Minn. R. Civ. P. 24.01 (emphasis added). Characterizing MVA's interest as requiring the secretary to assert a particular defense—rather than in the constitutionality of Minnesota's statutory scheme for restoring the right to vote after a felony conviction—the district court concluded MVA did not establish the necessary interest to intervene as a matter of right.

We agree. MVA does not profess an interest in the subject of the lawsuit. Nor does it allege any harm that it has suffered or will suffer—other than the expenditure of public funds defending the suit—as a result of the action. When considering what constitutes sufficient injury, our decision in *Heller v. Schwan's Sales Enters., Inc.*, is instructive. 548 N.W.2d 287 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996). In *Heller*, an individual sought to intervene in a lawsuit involving claims arising from salmonella discovered in ice cream. *Id.* at 289. The individual did not allege that he suffered any injury from eating contaminated ice cream. *Id.* at 291. Rather, he argued that he purchased

that particular brand of products and maintained that the retail price of the products would increase due to the settlement reached and excessive attorney fees. *Id.* We concluded that the individual did not demonstrate an interest in the action because he did not claim that he suffered any injury and "merely criticized the class [attorney] fees and speculated that the settlement may increase the price of" the products. *Id.* at 292.

Similarly here, MVA does not argue that it has suffered any injury. Nor does it describe a future harm that will occur as a result of the lawsuit. Instead, MVA criticizes the defenses chosen by the secretary and the costs incurred to defend the lawsuit. But, without more, a claimed interest in avoiding unnecessary litigation and the spending of public funds on litigation does not constitute the required "interest relating to the property or transaction which is the subject of the action" that must be established to intervene as a matter of right under rule 24.01 of the Minnesota Rules of Civil Procedure.

MVA asserts three main arguments to persuade us otherwise. Two of those arguments are grounded in the requirements of rule 24.01, and one argument urges us to expand precedent to permit intervention as a matter of right for a "sound reason." We review each argument in turn.

First, MVA argues that the supreme court's decision in *State by Peterson v. Werder* supports its position that concern about the wasteful spending of public funds constitutes an interest to support intervention as a matter of right. 273 N.W. 714 (Minn. 1937). But that case is distinguishable. *Werder* involved the expenditure of government funds to compensate a property owner for land damages as a result of a highway. *Id.* at 715. The parties did not seek formal intervention but were permitted to object to the legality of that

expenditure. *Id.* at 716. The primary difference between this case and *Werder* is that the latter specifically involved government expenditures. Accordingly, in *Werder*, concerns about the propriety of those expenditures related directly to the subject of the action. Here, the underlying action has nothing to do with government expenditures. As a result, MVA's concerns about the costs of defending an allegedly "meritless" lawsuit are not directly related to the eligibility of convicted felons to vote. *Werder* does not compel the conclusion that MVA possesses the requisite interest supporting intervention as a matter of right.

Second, MVA contends that it has an interest in the action as a taxpayer[4] and that it meets the requirement for taxpayer standing.[5] We begin by observing that taxpayer standing is not synonymous with demonstrating an interest sufficient to warrant intervention as a matter of right. Generally, taxpayers "lack standing to challenge government action absent damage or injury which is special or peculiar and different from damage or injury sustained by the general public." *Citizens for Rule of Law v. Senate Comm. on Rules & Admin.*, 770 N.W.2d 169, 174 (Minn. App. 2009), *review denied* (Minn. Oct. 20, 2009). But taxpayers have standing to challenge purportedly illegal expenditures of state funds. *See McKee v. Likins*, 261 N.W.2d 566, 571 (Minn. 1977) (stating that "the right of a taxpayer to maintain an action in the courts to restrain the unlawful use of public

[4] According to MVA, it is "a state taxpayer" and "[i]ts membership includes individual registered voters and taxpayers."

[5] The district court rejected this argument, concluding that "[t]he subject matter of the litigation . . . has nothing to do with money, let alone taxpayer funds." And it noted that, as a practical matter, finding that MVA had an interest as a taxpayer because public funds were used to retain counsel would result in MVA—or any taxpayer—being permitted to intervene in any lawsuit where public funds were used to hire counsel, including criminal matters or civil suits against the state.

funds cannot be denied"). Minnesota courts have limited *McKee* closely to its facts, and a challenge to "a specific disbursement" is generally required to invoke taxpayer standing. *Citizens*, 770 N.W.2d at 175.

But the subject of the underlying action is not the expenditure of state funds. Rather, the *subject* of the underlying action is the reinstatement of voting rights after a felony criminal conviction. And each of MVA's cited cases involved a challenge to a particular government expenditure. *See McKee*, 261 N.W.2d at 570-71 (holding that taxpayer had standing to challenge expenditure of tax revenue under rule allegedly adopted without following the proper rule-making procedure); *Werder*, 273 N.W. at 715 (challenging the legality of the expenditure of state funds); *Citizens*, 770 N.W.2d at 171 (challenging increases in legislative per diem allowances). That is not the case here. The broad concept of taxpayer standing does not authorize intervention of right every time government funds are used to defend litigation.

In sum, we conclude that MVA failed to demonstrate an interest in the subject of the underlying action as required by rule 24.01.[6]

Seemingly recognizing that its unusual claimed interest does not fit within the precise requirements of rule 24.01, MVA asks us to grant its intervention motion because "there is a sound reason to allow the intervention." At oral argument, MVA explained its

[6] In its brief, MVA maintains that it has a public interest in Minnesota's voting statutes. According to MVA, it "has a long history of promoting election integrity." We observe that MVA did not argue its interest in this way at oral argument or to the district court. Nonetheless, we conclude that MVA's general public interest is insufficient to support intervention as a matter of right. *See Heller*, 548 N.W.2d at 292; *Koski*, 386 N.W.2d at 284.

"sound reason" as, in essence, ensuring fairness and a uniform result in cases asserting a private cause of action under the Minnesota Constitution.[7] According to MVA, there is an interest in courts getting public law cases "right" and in the attorney general's office consistently asserting—and courts applying—MVA's asserted no-private-cause-of-action defense to avoid bias or the appearance of bias.[8]

No Minnesota caselaw provides that a party may intervene as a matter of right for a "sound reason" without meeting the requirements of rule 24.01. Recognizing this lack of precedent, MVA directs our attention to the analogous federal rule to support application of its proposed "sound reason" standard. Specifically, MVA cites *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502, 506, 61 S. Ct. 666, 668 (1941). But that case interpreted a previous version of rule 24(a) of the Federal Rules of Civil Procedure. And the Supreme Court stated that it was not "dealing with a conventional form of intervention." *Missouri-Kansas Pipe Line Co.*, 312 U.S. at 506, 61 S. Ct. at 668. Rather, that case involved a consent decree giving a pipeline company the ability to become a party to a suit in order to enforce its rights under the decree. *Id.* at 508, 61 S. Ct. at 668. Because the case involved a particular decree, the general intervention principles under the analogous

[7] MVA did not raise this "sound reason" argument to the district court. But because it is fully briefed, relatively straightforward, and our standard of review is de novo, we will nonetheless address the merits of the argument. *See Putz v. Putz*, 645 N.W.2d 343, 350 (Minn. 2002) (stating that the rule precluding consideration of issues not raised to the district court is not ironclad); *see also* Minn. R. Civ. App. P. 103.04.

[8] In its brief, MVA argues that the attorney general's office "shirked its duties to zealously represent the state defendants in the case." Because of the attorney general's office's conduct, according to MVA, it "and the public, are left to wonder if the [a]ttorney [g]eneral's [o]ffice, in this high-profile voting rights case, is representing the narrower interests of the plaintiffs instead of the broader interests of the public."

federal rule did not apply. *Id.* *Missouri-Kansas Pipe Line Co.* does not stand for the proposition that, in any public-law case, intervention as a matter of right can occur for any "sound reason" when a proposed intervenor cannot satisfy the requirements of rule 24.01.[9]

Absent any controlling precedent requiring or allowing us to permit intervention as a matter of right for a "sound reason" independent of the requirements of rule 24.01, we decline to do so here. A decision to the contrary would essentially create an exception to the requirements of rule 24.01. Writing wholesale exceptions to Minnesota rules is outside the purview of this court. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). In short, MVA's "sound reason" argument does not warrant intervention as a matter of right.

Having concluded that MVA has not met the second requirement of rule 24.01 (an interest in the subject of the litigation), we need not examine the remaining requirements of the rule.[10] Both these requirements are premised on the existence of an interest, which was not established.

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[9] MVA also relies on a secondary source which states that "[a] person can be entitled to intervene in an action in a federal court where, even though not within the precise bounds of the provisions governing intervention, there is a sound reason to allow the intervention." 35A C.J.S. *Federal Civil Procedure* § 167 (2020). Although we can look to federal cases interpreting analogous federal rules, MVA's cited reference does not constitute an interpretation of the federal rule. *See Patterson v. Wu Family Corp.*, 608 N.W.2d 863, 867 n.4 (Minn. 2000).

[10] The third requirement—"an inability to protect that interest unless the applicant is a party to the action"—requires us to first conclude that MVA demonstrated an interest, which we do not. *League of Women Voters*, 819 N.W.2d at 641. The final requirement places a "minimal burden" on MVA to show "that the existing parties may not adequately represent [its] interests." *Jerome Faribo Farms, Inc. v. County of Dodge*, 464 N.W.2d 568, 570 (Minn. App. 1990) (quotations omitted), *review denied* (Minn. Mar. 15, 1991). MVA argues that, when analyzing this requirement, the district court imposed a more stringent standard found in federal caselaw. That standard provides that "[a]lthough the burden of showing inadequate representation usually is minimal, when one of the parties is an arm or

D E C I S I O N

Rule 24.01 is clear: to intervene as a matter of right, a proposed intervenor must claim "an interest relating to . . . the subject of the action." MVA failed to do so. MVA professes concern about the wasteful spending of public funds on "meritless litigation," a concern that seemingly stems from its contention that the attorney general's office does not uniformly assert the lack-of-a-private-cause-of-action defense.[11] Perhaps such concerns could support a request for permissive intervention in some cases. But, without more, a claimed interest in avoiding unnecessary litigation and the spending of public funds on litigation does not constitute the required "interest relating to the property or transaction which is the subject of the action" that must be established to intervene as a matter of right under rule 24.01 of the Minnesota Rules of Civil Procedure. Accordingly, the district court properly denied MVA's motion to intervene.

Affirmed.

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agency of the government, and the case concerns a matter of sovereign interest, the bar is raised, because in such cases the government is presumed to represent the interests of all its citizens." *N.D. ex rel. Stenehjem v. United States*, 787 F.3d 918, 921 (8th Cir. 2015) (quotation omitted). Because we conclude that MVA failed to satisfy the interest requirement, we need not decide whether this heightened standard applies or whether the district court erroneously relied on it.

[11] We express no opinion on the question of whether a private cause of action exists under the Minnesota Constitution. Likewise, we do not opine whether asserting the defense would lead to the dismissal of this case, as MVA contends.