STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0273

Dr. Jane Doe, et al.,
Respondents,

vs.

State of Minnesota, et al.,
Respondents,

Pro-Life Action Ministries, Incorporated, et al., intervenors,
Appellants.

Filed October 12, 2020
Affirmed
Slieter, Judge

Ramsey County District Court
File No. 62-CV-19-3868

Christy L. Hall, Jessica Braverman, Gender Justice, St. Paul, Minnesota; and

Dipti Singh (*pro hac vice*), Lawyering Project, Los Angeles, California (for respondents Dr. Jane Doe, et al.,)

Keith Ellison, Attorney General, Liz Kramer, Solicitor General, Leah Tabbert, Jacob Campion, Kathryn Iverson Landrum, Assistant Attorneys General, St. Paul, Minnesota (for respondents State of Minnesota)

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

Considered and decided by Bratvold, Presiding Judge; Cochran, Judge; and Slieter, Judge.

U N P U B L I S H E D O P I N I O N

SLIETER, Judge

Appellants Pro-Life Action Ministries (PLAM) and the Association for Government Accountability (AGA) appeal the district court's denial of their motion for intervention as a matter of right. They argue that the district court's order should be reversed because (1) they satisfied the criteria for intervention as a matter of right in Minn. R. Civ. P. 24.01, (2) "there is a sound reason to allow the intervention," and (3) affirming the order denying their intervention would unlawfully create a private cause of action. Because appellants are unable to demonstrate that the state must defend the lawsuit on the basis that plaintiffs constitutionally lack a private cause of action against the government, they fail to demonstrate an interest in the litigation based upon taxpayer standing. Further, because appellants failed to preserve for review the alternative public interest basis to intervene, that claimed interest has been forfeited. Finally, because appellants do not have an interest in the subject matter of the action, they are not entitled to intervene, and we do not analyze the merits of their purported defense. In sum, appellants failed to demonstrate a basis for intervention of right pursuant to Minn. R. Civ. P. 24.01, and we therefore affirm.

FACTS

The underlying litigation began in May 2019 when plaintiffs Dr. Jane Doe, Mary Moe, Our Justice,[1] and the First Unitarian Society of Minneapolis filed a complaint against the state, governor, attorney general, commissioner of health, Minnesota Board of Medical

[1] Our Justice was added as a plaintiff in an amended complaint filed in July 2019.

Practice, and Minnesota Board of Nursing. The complaint argues that Minnesota's targeted regulation of abortion provider laws, mandatory disclosure and delay laws, fetal tissue disposition requirement, two-parent notification requirement, and ban on advertising sexually-transmitted-infection treatments violate the Minnesota Constitution. Dr. Doe and Ms. Moe challenged the laws on behalf of themselves and their patients, First Unitarian Society on behalf of its congregants, and Our Justice on behalf of its clients. Defendants moved to dismiss, arguing that (1) plaintiffs failed to sufficiently plead their standing, (2) plaintiffs failed to name the proper defendants, and (3) six of plaintiffs' claims fail as a matter of law. Notably, defendants did not raise the argument that plaintiffs lack a private cause of action against the government.

Appellants filed a "Notice of Limited Intervention to Assert the Defense of Lack of Private Cause of Action" two weeks after defendants filed their memorandum in support of their motion to dismiss. This defense is based on the premise that Minnesota has not recognized, absent a legislative grant not here applicable, either in the constitution or common law the right of private citizens to commence a lawsuit against the government. Appellants argued to the district court that they were entitled to intervene as a matter of right pursuant to Minn. R. Civ. P. 24.01, and alternatively that the court should grant permissive intervention under Minn. R. Civ. P. 24.02. The plaintiffs and defendants both opposed appellants' motion to intervene. [2]

[2] In a special-term order, this court limited this appeal to intervention as a matter of right pursuant to rule 24.01. This is because "[o]rders denying permissive intervention under Rule 24.02 are not appealable." *Husfeldt v. Willmsen*, 434 N.W.2d 480, 482 (Minn. App. 1989).

The district court issued a written order denying appellants' motion to intervene. The district court began its analysis by addressing the merits of the defense that appellants wish to raise upon their intervention explaining that "there would be no reason to allow intervention to assert a meritless defense." It decided that appellants' defense is meritless because "[l]itigants who seek declaratory or injunctive relief for violations of the Minnesota Constitution *can* sue the government." The district court concluded, "[s]ince it would be futile to allow limited intervention in order to allege a defense which would undoubtedly fail, the motion to intervene effectively collapses on itself."

The district court separately concluded that appellants' arguments fail pursuant Minn. R. Civ. P. 24.01 and 24.02. This appeal follows.

D E C I S I O N

I. Appellants do not have a right to intervene pursuant to rule 24.01 because they do not have an interest in the subject of the action.

Appellants argue that they are entitled to intervene as a matter of right pursuant to Minn. R. Civ. P. 24.01, which 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 (emphasis added).[3] Our supreme court has interpreted this rule to require four elements to allow intervention: "(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." *League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636, 641 (Minn. 2012). We review orders addressing rule 24.01 *de novo*. *State Fund Mut. Ins. Co. v. Mead*, 691 N.W.2d 495, 499 (Minn. App. 2005).

Because resolution of the second element is determinative of our analysis, that is where we begin our consideration. *League of Women Voters Minn.*, 819 N.W.2d at 641. Appellants claim that they meet the second element in two ways: (1) private interests as taxpayers in having the "meritless case" end, and (2) public interests. Because appellants solely argued taxpayer interest to the district court, the public-interests argument is forfeited and we decline to analyze it. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *see also Leppink v. Water Gremlin, Co.*, 944 N.W.2d 493, 501-02 (Minn. App. 2020).[4]

[3] Alternatively, appellants argue that they should be allowed to intervene as a matter of right because a "sound reason exists." *See* 35A C.J.S. Federal Civil Procedure § 167 (2020) ("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."). While the interpretation of federal rules may be helpful in interpreting similar state rules, *Buck Blacktop, Inc. v. Gary Contracting and Trucking Co., LLC.*, 929 N.W.2d 12, 18 (Minn. App. 2019), "[n]o 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," *Schroeder v. Minn. Sec'y of State*, ___ N.W.2d ___, ___, 2020 WL 5359413, at *6 (Minn. App. Sept. 8, 2020).

[4] The court of appeals also addressed the public-interests argument in *Schroeder*, determining that "general public interest is insufficient to support intervention as a matter of right." 2020 WL 5359413, at *6 n.6.

Appellants argue that their "interest relating to the property or transaction which is the subject of the action" is as taxpayers who have an interest in conserving the state's resources. Appellants claim that allowing them to intervene and interpose the proffered defense will, if successful, bring a quick and final end to the litigation and save public resources. In support of their claimed taxpayer interest, appellants cite to the well-recognized taxpayer standing cases of *McKee v. Likins*, 261 N.W.2d 566 (Minn. 1977), *State v. Werder*, 273 N.W. 714 (Minn. 1937), and *Citizens for Rule of Law v. Senate Comm. on Rules & Admin.*, 770 N.W.2d 169 (Minn. App. 2009), *review denied* (Minn. Oct. 20, 2009). We are not convinced.

These cited cases are distinguishable from this case because they all recognized standing to challenge unlawful disbursements of public money or to contest an illegal action of a public official. *See generally McKee*, 261 N.W.2d at 571 ("It is well settled that a taxpayer may, when the situation warrants, maintain an action to restrain unlawful disbursements of public moneys . . . as well as to restrain illegal action on the part of public officials." (quotation omitted)) The subject of this action is abortion-related laws, not the unlawful expenditure of public money. *See Schroeder*, 2020 WL 5359413, at *4 (determining that "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.") Moreover, though appellants have made a reasonable argument as to why the state could have defended this action based on a lack of constitutional private cause of action against

the government, they have not demonstrated that the state's failure to do so is illegal.[5] For these reasons, appellants lack a taxpayer interest to intervene.[6]

Appellants, as a final basis for reversal, claim the district court erred by considering the merits of the defense without first granting intervention. If we affirm the district court, appellants argue, our affirmance "discover[s] a new cause of action." We disagree.

We do agree the district court erred in considering the merits of the defense prior to granting intervention. *Westfield Ins. Co. v. Wensmann, Inc.*, 840 N.W.2d 438, 445 (Minn. App. 2013) ("We consider [the intervention issue] first, as we reach the merits of [the] appeal only if [appellant] was properly permitted to intervene."), *review denied* (Minn. Feb. 26, 2014). But because we conclude that appellants do not have an interest in the subject matter of the action and thus cannot intervene as a matter of right, we decline to determine the merits of the defense had appellants been allowed to intervene.

Affirmed.

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[5] Appellants have pointed to numerous cases in which either the attorney general or a county attorney acting on behalf of the state has interposed this constitutional defense. *See e.g.*, *Hummel v. Minn. Dep't of Agriculture*, 430 F. Supp. 3d 581, 594 (D. Minn. 2020) ("There is, however, no private cause of action for violations of the Minnesota Constitution." (quotation omitted)); *Davis v. Hennepin Cty*, No. A11-1083, 2012 WL 896409 at *2 (Minn. App. Mar. 19, 2012) ("Minnesota does not allow private actions based on alleged violations of the Minnesota Constitution.").

[6] The parties presented no legal authority indicating that standing to commence an action equates to "interest relating to the property or transaction which is the subject of the action" for purposes of rule 24.01. Moreover, "taxpayer standing is not synonymous with demonstrating an interest sufficient to warrant intervention as a matter of right." *Schroeder*, 2020 WL 5359413, at *5. However, because that is the theory argued by the parties, that is the basis by which we analyze the desired intervention.