STATE OF MINNESOTA

IN SUPREME COURT

A21-1115

Court of Appeals — Moore, III, J.

Lisa Marie Winkowski,

Respondent,

vs.

J. Vincent Winkowski,

Appellant.

Filed: April 26, 2023
Office of Appellate Courts

Lisa Marie Winkowski, Rochester, Minnesota, pro se.

Thomas R. Braun, Bruce K. Piotrowski, Restovich Braun & Associates, Rochester, Minnesota, for appellant.

Kyle R. Kroll, Winthrop & Weinstine, P.A., Minneapolis, Minnesota; and

Elizabeth M. Cadem, Burns & Hansen, P.A., Minneapolis, Minnesota, appointed attorneys, Minnesota State Bar Association.

S Y L L A B U S

Dismissal is appropriate when a case is moot and no exception to the mootness doctrine applies.

Dismissed.

Considered and decided by the court without oral argument.

O P I N I O N

MOORE, III, Justice.

This case arises from a harassment restraining order issued against appellant J. Winkowski pursuant to Minn. Stat. § 609.748 (2022). A district court may issue a harassment restraining order (HRO) if it finds that "there are reasonable grounds to believe that the respondent has engaged in harassment." *Id.*, subd. 5(b)(3). The statute defines "harassment" to include "*repeated incidents* of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another."[1] *Id.*, subd. 1(a)(1) (emphasis added).

Here, the district court concluded that J. Winkowski had engaged in repeated incidents of harassing conduct against his ex-spouse, respondent Lisa Winkowski, and issued a 6-month HRO. J. Winkowski appealed, arguing that his actions did not constitute "repeated incidents" of the type of conduct necessary for a finding of harassment. While his appeal was pending at the court of appeals, the underlying HRO expired. After the court of appeals affirmed the district court's decision to grant the HRO, J. Winkowski filed a petition for further review, which we granted. We conclude, however, that J. Winkowski's challenge to the HRO issued against him does not present a justiciable controversy because it is moot. We therefore decline to reach the merits and instead dismiss the appeal.

[1] The statutory definition of "harassment" also includes other types of conduct that are not relevant to this case. *See* Minn. Stat. § 609.748, subd. 1(a)(1)–(3).

FACTS

The facts in this case are undisputed. Lisa and J. Winkowski divorced in 2016, and they have two young children.[2] In June 2021, Lisa and J. were engaged in a legal dispute about their parenting time schedule. The events underlying Lisa's HRO petition occurred during a 2-hour period on June 25, 2021. That afternoon, Lisa picked up the children from her parents' home and drove them to her home. About 45 minutes later, J. arrived at Lisa's parents' home to pick up the children.[3] While parked outside the residence, J. texted Lisa, asking where the children were. Lisa responded that they were with her. J. then drove to Lisa's residence and parked his car outside her home. Over the next 2 hours, J., repeatedly called Lisa, honked his car's horn, knocked on Lisa's door, and rang her doorbell. Lisa eventually called the police, and J. drove away before a police officer was dispatched.

On July 1, 2021, Lisa filed a petition in Olmsted County District Court, seeking an HRO against J. based on his alleged acts of harassment on June 25. Lisa's petition sought protection for herself, but not for the parties' minor children. The following day, a referee of the district court issued a temporary HRO for a period of 1 year on an ex parte basis. J. filed a timely request for an evidentiary hearing, which the district court held in August. At the hearing, the district court heard testimony from Lisa, J., Lisa's parents, and two police officers.

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[2] Because the parties have the same last name, we refer to them by their first names.

[3] Before the HRO was issued, parenting time exchanges often occurred at the home of Lisa's parents.

A week later, the district court filed an order granting Lisa's petition for an HRO. The district court concluded that J.'s conduct satisfied the statutory definition of "harassment" necessary to issue an HRO. *See* Minn. Stat. § 609.748, subd. 1(a)(1). In reaching this conclusion, the district court determined that J.'s conduct during the 2-hour period at Lisa's home—which included parking his car outside her home, knocking on her door, ringing her doorbell, and repeatedly calling her—constituted "repeated incidents" of the type of conduct necessary for a finding of harassment. Specifically, the district court reasoned:

> Had [J.] *only* ominously sat in his car outside [Lisa's] house for two hours; *only* honked his horn repeatedly; *only* come up to the house to repeatedly knock and ring; or *only* called [Lisa's] phone two dozen times in twenty minutes, we would have a single incident case. But he did them all. In my judgment [J.'s] multiple, distinct harassing actions, temporally separated and spread out over a two hour period, constitute "repeated incidents."

Based on its findings, the district court issued a 6-month HRO that prohibited J. from harassing or having contact with Lisa (except through Our Family Wizard, a court-ordered communication website) and, among other directives, from being at or near her home.[4]

On appeal, J. argued that his conduct during the 2 hours at Lisa's home did not amount to "repeated incidents" and that, therefore, the district court erred by concluding he engaged in harassment. In an order opinion, the court of appeals affirmed the district court's order. *Winkowski v. Winkowski*, No. A21-1115, 2022 WL 1297622, at *4 (Minn.

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[4] In the order granting the HRO, the district court stated that it decided to "reduce" the HRO to a 6-month duration, acknowledging that the events underlying Lisa's petition were an "apparently unique" episode in the parties' relationship. Reasoning that Lisa and J. "must co-parent for years to come," the district court concluded that 6 months would "be enough time for the dust to settle."

App. Apr. 22, 2022). After acknowledging that the relevant statutory language was undefined, the court of appeals reviewed its precedential and nonprecedential opinions concerning the harassment statute's "repeated incidents" clause. *Id.* at *2–3. The court of appeals concluded that its case law "reveals that the question [of] whether a person has engaged in 'repeated incidents of intrusive or unwanted acts, words, or gestures,' as opposed to a single incident of such conduct, is a case-specific determination that depends on the facts and circumstances of the case." *Id.* at *3. The court of appeals identified three factors to guide this determination: "the relative timing of the allegedly repeated incidents, the location or locations in which the offensive conduct occurs or is perceived, and the means by which the alleged harasser engages in offensive conduct." *Id.*

The court of appeals proceeded to apply these factors to the facts of the case. It noted that J.'s conduct "occurred intermittently during a rather prolonged two-hour time period," with some periods of intensive contact with Lisa and some periods during which "he paused his offensive conduct." *Id.* Recognizing that J.'s conduct occurred in "one general place" (*i.e.*, Lisa's residence), the court of appeals also reasoned that J. engaged in offensive conduct in "two specific locations" (*i.e.*, his car and Lisa's front door). *Id.* Finally, the court determined that "J.'s conduct consisted of multiple forms of intrusive or unwanted acts and gestures: placing unanswered telephone calls, honking his car horn, knocking on Lisa's front door, and pushing Lisa's doorbell button." *Id.*

In light of "the unique facts and circumstances of this case," the court of appeals determined that the district court did not err by concluding that J. engaged in harassment, as defined by Minn. Stat. § 609.748, subd. 1(a)(1). *Winkowski*, 2022 WL 1297622, at *3.

The court of appeals therefore affirmed the district court's order granting the HRO petition. *Id.* at *4.

J. petitioned for further review on the issue of what constitutes "repeated incidents" under Minn. Stat. § 609.748, subd. 1(a)(1). After we granted review, Lisa's counsel filed a notice of withdrawal and Lisa stated that she would proceed as a self-represented litigant and would not be filing a brief in this matter. We ordered the Minnesota State Bar Association to appoint counsel to file a brief in response to J.'s brief, and the MSBA did so.[5]

ANALYSIS

Our analysis must begin by addressing whether this appeal presents a justiciable controversy, a question that appointed counsel raised for the first time in their brief filed with this court.[6] "Justiciability is an issue of law, which we review de novo." *Dean v. City of Winona*, 868 N.W.2d 1, 4 (Minn. 2015). A moot case is nonjusticiable.[7] *State ex rel. Ford v. Schnell*, 933 N.W.2d 393, 401 (Minn. 2019). We will dismiss an appeal as moot when "a decision on the merits is no longer necessary or an award of effective relief is no longer possible." *Dean*, 868 N.W.2d at 5. Mootness is not, however, "a mechanical rule

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[5] We are grateful to the lawyers appointed by the MSBA for the care and effort they devoted to the brief filed in this case.

[6] J. responded to the mootness argument in his reply brief to this court.

[7] Minnesota courts may only hear actual cases and controversies. *In re Application of the Senate*, 10 Minn. 78, 81 (1865). We decline to hear moot cases because courts do "not issue advisory opinions or decide cases merely to make precedents." *Sinn v. City of St. Cloud*, 203 N.W.2d 365, 366 (Minn. 1972).

that is automatically invoked whenever the underlying dispute between the parties is settled or otherwise resolved." *Id.* at 4. It is instead "a flexible discretionary doctrine" that is subject to some limited exceptions. *State v. Rud*, 359 N.W.2d 573, 576 (Minn. 1984).

It is undisputed that the HRO underlying this appeal expired in February 2022, meaning that there is no longer "a live controversy that can be resolved." *In re Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997). However, the parties dispute whether an exception to our mootness doctrine applies. We address each exception in turn.

A.

We begin by considering our exception for "issues that are capable of repetition, yet likely to evade review." *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005). This "exception applies to issues that are likely to reoccur, but also would continue to evade judicial review." *Dean*, 868 N.W.2d at 5. To apply this exception, two prongs must be satisfied: (1) there must be "a reasonable expectation that a complaining party would be subjected to the same action again," and (2) "the duration of the challenged action [must be] too short to be fully litigated before it ceases or expires." *Id.* The party seeking this exception to mootness bears the burden of showing that an injury is capable of repetition, yet likely to evade review. *See Snell v. Walz*, 985 N.W.2d 277, 287 (Minn. 2023).

J., the party seeking an exception to the mootness doctrine in this case, makes no argument in his brief for why his injury is capable of repetition, yet likely to evade review. Accordingly, we conclude that J. has failed to meet his burden, and we therefore decline to apply the capable-of-repetition-yet-evading-review exception to this case.

B.

J. asserts that we should apply our collateral consequences doctrine to reach the merits of his appeal. "Where an appellant produces evidence that collateral consequences actually resulted from a judgment, the appeal is not moot." *In re McCaskill*, 603 N.W.2d 326, 329 (Minn. 1999). Moreover, if a party demonstrates that " 'real and substantial' disabilities attach to a judgment," then we will presume that collateral consequences result from the judgment and will not require "actual evidence of collateral consequences." *Id.* (quoting *Morrissey v. State*, 174 N.W.2d 131, 133 (Minn. 1970)). "A party may rebut this presumption of collateral consequences only by showing 'there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged [judgment].' " *Id.* (alteration in original) (quoting *Sibron v. New York*, 392 U.S. 40, 57 (1968)).

J. has produced no evidence that collateral consequences have actually resulted from the HRO issued in this case. However, we may still consider the merits of J.'s appeal if he demonstrates that "real and substantial disabilities" attach to the HRO. *McCaskill*, 603 N.W.2d at 329 (citation omitted) (internal quotation marks omitted). We have generally applied this prong of the collateral consequences exception in the context of criminal convictions and civil commitments, noting the serious consequences that can stem from such cases. *See, e.g.*, *id.* at 331 ("Due to the seriousness of the potential consequences created by the early intervention provisions, we conclude that collateral consequences attach to appellant's [civil] commitment."); *State v. Jones*, 516 N.W.2d 545, 546 n.1 (Minn. 1994) (concluding that a criminal defendant's appeal was not moot even though he had

been released from prison because his criminal conviction could carry potential consequences, such as negatively impacting his ability to obtain future employment).

In conclusory fashion, J. asserts two ways in which the HRO underlying this appeal carries collateral consequences. First, J. points to the possibility that a future HRO could be issued against him for a period of up to 50 years if more HROs are issued against him for conduct similar to that alleged in this case, which he disputes is "harassment" covered by the statue. *See* Minn. Stat. § 609.748, subd. 5(b)(3) (providing that a district court may issue an HRO for a period of up to 50 years if "the petitioner has had two or more previous restraining orders in effect against the same respondent or the respondent has violated a prior or existing restraining order on two or more occasions"). However, J. makes no argument for why the mere possibility of a future HRO of up to 50 years amounts to a real and substantial disability similar to a criminal conviction or civil commitment.

Second, J. points to the possibility he could be denied the "ability to conceal a weapon lawfully," citing Minn. Stat. § 624.714 (2022). That statute prohibits a person from carrying or possessing a pistol in certain places without first having obtained a permit to carry the pistol issued by the county sheriff where the permit applicant resides. *Id.*, subds. 1a, 2–6. J. cites this statute but does not explain why he believes the HRO issued against him would necessarily result in the denial of a permit to carry a handgun in public under the statute. In short, J.'s conclusory arguments regarding the possibility of a 50-year HRO or the denial of a permit to carry fail to demonstrate that real and substantial

difficulties attached to the HRO issued against him. We therefore conclude that the collateral consequences exception to mootness does not apply to this case.[8]

C.

Under our third exception to the mootness doctrine, "[w]e have the discretion to consider a case that is technically moot when the case is 'functionally justiciable' and presents an important question of 'statewide significance that should be decided immediately.' " *Dean*, 868 N.W.2d at 6 (quoting *Rud*, 359 N.W.2d at 576).

"A case is functionally justiciable if the record contains the raw material (including effective presentation of both sides of the issues raised) traditionally associated with effective judicial decisionmaking." *Rud*, 359 N.W.2d at 576. We conclude that this case is functionally justiciable given that the record was fully developed at the district court (and there are no real disputes of fact), one of the principal issues is a matter of statutory interpretation, and each party's arguments have been adequately briefed and/or argued at the district court, the court of appeals, and here. *See, e.g.*, *Pfoser v. Harpstead*, 953 N.W.2d 507, 514 n.4 (Minn. 2021) ("The issue here is functionally justiciable because the record is fully developed, the issue involves a matter of statutory interpretation, and the issue has been adequately briefed."); *In re Schmalz*, 945 N.W.2d 46, 49 n.3 (Minn. 2020) ("This case is functionally justiciable because it is a matter of statutory interpretation, which we review

[8] Our conclusion that the collateral consequences exception does not apply to this case should not be read as a statement that an HRO carries no collateral consequences in every HRO case. We merely conclude that J. has not met his burden of showing that collateral consequences, whether actual or presumed, have attached to the HRO issued against him.

de novo, and because it has been adequately briefed and argued by the parties through the appeal process.").

But for this exception to apply, the issue on appeal must also "present[] an important question of statewide significance that should be decided immediately." *Dean*, 868 N.W.2d at 6 (citation omitted) (internal quotation marks omitted). Because neither party addresses this mootness exception in their briefs, the record before us is devoid of any indication of the statewide importance of the issue raised in this appeal.[9] Accordingly, we decline to exercise our discretion to consider the merits of this appeal as a functionally justiciable issue of statewide importance.

In sum, we conclude that this case is moot and that no exception to our mootness doctrine applies.[10] Accordingly, dismissal of the appeal is proper.[11]

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[9] We recognize that the court of appeals has considered several appeals from HRO orders in recent years that address the issue of what constitutes "repeated incidents" of harassing conduct necessary to issue an HRO. *See Rickmyer v. Woodall*, No. A20-0312, 2021 WL 317701 (Minn. App. Feb. 1, 2021); *Bjerke v. Flomo*, No. A19-0094, 2019 WL 4927070 (Minn. App. Oct. 7, 2019); *Peterson v. Meyer*, No. A18-1185, 2019 WL 2168770 (Minn. App. May 20, 2019), *rev. denied* (Minn. Aug. 6, 2019). However, without further analysis and support from the parties themselves on the applicability of this mootness exception, we decline to view these cases as sufficient evidence that interpretation of the HRO statute is an important question of statewide significance that we should decide immediately. *See Dean*, 868 N.W.2d at 6.

[10] We recently adopted a fourth mootness exception for instances when a party moots a case by voluntarily ceasing the allegedly wrongful action. *Snell*, 985 N.W.2d at 288. The voluntary cessation doctrine does not apply here, however, because there is no challenged activity that was voluntarily ceased.

[11] Because this matter became moot while it was pending at the court of appeals, it appears that it may have been nonjusticiable when the court of appeals reached its decision. Under similar circumstances in past cases, we have ordered the court of appeals' decision be vacated, in addition to dismissing the appeal. *See Case v. Wood*, 377 N.W.2d 924, 924

CONCLUSION

For the foregoing reasons, we dismiss this appeal as moot.

Appeal dismissed.

(Minn. 1985). Here, the parties and appointed counsel do not suggest that vacation of the court of appeals' decision is proper, and indeed they do not discuss the issue at all. Under the circumstances of this case, and absent any argument by a party or appointed counsel that we should do so, we decline to vacate the court of appeals' decision.