Filed in District Court
State of Minnesota
1/28/2020 4:19 PM

STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF RAMSEY	SECOND JUDICIAL DISTRICT
Dr. Jane Doe, Mary Moe, First Unitarian Society of Minneapolis, and Our Justice, Plaintiffs, vs. State of Minnesota, Governor of Minnesota, Attorney General of Minnesota, Minnesota Commissioner of Health, Minnesota Board of Medical Practice, and Minnesota Board of Nursing, Defendants.	Court File No.: 62-CV-19-3868 Case Type: Civil – Other/Misc.

ORDER DENYING INTERVENTION

This matter came before the undersigned on January 24, 2020 upon the motions of Pro-Life Action Ministries, Inc. and Association for Government Accountability for limited intervention pursuant to Minn. R. Civ. P. 24.03. Attorneys Jessica Braverman, Dipti Singh and Juanluis Rodriguez appeared on behalf of Plaintiffs. Solicitor General Liz Kramer and Assistant Attorney General Kathryn Iverson Landrum appeared on behalf of Defendants. Attorney Erick Kaardal appeared on behalf of Proposed Intervenors Pro-Life Action Ministries, Inc. and Association for Government Accountability.

Having considered the facts, the arguments of counsel and the parties, and all of the files, records and proceedings herein,

IT IS HEREBY ORDERED:

1. The motion for limited intervention of Proposed Intervenors Pro-Life Action Ministries, Inc. and Association for Government Accountability is **DENIED**.

Filed in District Court
State of Minnesota
1/28/2020 4:19 PM

2. The attached Memorandum shall be incorporated into this Order.

BY THE COURT:

Dated: January 28, 2020

Thomas A. Gilligan
Judge of District Court

Filed in District Court
State of Minnesota
1/28/2020 4:19 PM

MEMORANDUM

Plaintiffs Dr. Jane Doe, Mary Moe, First Unitarian Society of Minneapolis and Our Justice (collectively "Plaintiffs") filed this lawsuit to challenge the constitutionality of certain Minnesota laws concerning abortion and treatment of sexually transmitted infections. The laws challenged by the Plaintiffs include targeted regulations of abortion providers, mandatory disclosure and delay requirements, a law requiring the burial or cremation of fetal tissue resulting from an abortion or miscarriage, a two-parent notification requirement for minors seeking abortion care, a ban on advertising sexually transmitted infection treatments, and related criminal penalties.

In the Complaint as originally filed and as amended, Plaintiffs asserted seven counts, six of which alleged various violations of the Minnesota Constitution. Plaintiffs' seventh count sought a declaration that all of the challenged laws are unconstitutional or otherwise unenforceable. While Plaintiffs sought declaratory and injunctive relief, they did not make a damages claim.

Defendants State of Minnesota, Governor of Minnesota, Attorney General of Minnesota, Minnesota Commissioner of Health, Minnesota Board of Medical Practice and Minnesota Board of Nursing (collectively "Defendants") filed a motion to dismiss all claims against all Defendants. Defendants asserted numerous legal defenses, including lack of standing, naming improper parties, and failure to state a claim upon which relief may be granted. The motion was comprehensively briefed by both sides and the court held a two-hour hearing to hear oral argument on the motion.

Just before the hearing on the motion to dismiss, Pro-Life Action Ministries, Inc. ("PLAM") and Association for Government Accountability ("AGA")(collectively "Proposed Intervenors") filed a Notice of Limited Intervention to Assert the Defense of Lack of Private Cause of Action. Proposed Intervenors contended that the Defendants had not alleged a defense that there is no private cause of action for violations of the Minnesota Constitution, which they claim was a complete defense to all claims alleged against all Defendants. As such, they sought limited intervention to assert this defense.

Filed in District Court
State of Minnesota
1/28/2020 4:19 PM

Both Plaintiffs and Defendants timely objected to the intervention, the motion to intervene was comprehensively briefed by both sides and the court held another two-hour hearing to hear oral argument on the motion.

RULE 24 INTERVENTION STANDARD

Proposed Intervenors moved to intervene as of right under Minn. R. Civ. P. 24.01 and alternatively for permissive intervention under Minn. R. Civ. P. 24.02.

Rule 24.01 provides:

> 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.

Therefore, in order to intervene as of right under Rule 24.01, Proposed Intervenors must show: (1) a timely application for intervention; (2) an interest relating to the property or transaction which is the subject of the action; (3) circumstances demonstrating that the disposition of the action may as a practical matter impair or impede the party's ability to protect that interest; and (4) that the intervening party is not adequately represented by existing parties. *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 207 (Minn. 1986). Parties seeking intervention of right must satisfy all of these factors. *Luthen v. Luthen*, 596 N.W.2d 278, 280-81 (Minn. Ct. App. 1999).

Rule 24.02 provides for permissive intervention. This rule states in pertinent part:

> Upon timely application anyone may be permitted to intervene in an action when an applicant's claim or defense and the main action have a common question of law or fact. *** In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Minn. R. Civ. P. 24.02. Accordingly, in order to obtain permissive intervention, a proposed intervenor must show: (1) a timely application for intervention; (2) an interest in litigating common questions of law or fact with the main action; and (3) that the intervention will not delay or prejudice the adjudication of the rights of the parties. *Id.*

Filed in District Court
State of Minnesota
1/28/2020 4:19 PM

THE MERITS OF THE LACK OF PRIVATE CAUSE OF ACTION DEFENSE

Proposed Intervenors' intervention motion is premised on their contention that the Minnesota Constitution does not provide a private cause of action to sue the government. Proposed Intervenors contend that the Minnesota Attorney General's Office (the "Attorney General"), which represents Defendants, is "ignoring black letter law that there is no cause of action for claims based on violations of Minnesota's constitution" in failing to raise the defense in this case. They cite *Eggenberger v. West Albany Twp.*, 820 F.3d 938 (8th Cir. 2016) and *Guite v. Wright*, 976 F. Supp. 866 (D. Minn. 1997), as well as several unpublished decisions from the Minnesota Court of Appeals as support for this contention. The gist of all of the decisions cited by Proposed Intervenors, is that a private cause of action for a violation of the Minnesota Constitution does not exist. *See, e.g., Eggenberger*, 820 F.3d at 941-42; *Guite*, 976 F.Supp. at 871. They also point to examples in other matters litigated by the Attorney General where it has successfully alleged the private cause of action defense and contend that the failure to allege the defense violates a norm of asserting this defense in every claim brought under the Minnesota Constitution. According to Proposed Intervenors, the failure to allege the lack of private cause of action defense is a "waste of taxpayers' funds by unnecessary litigation."

In their reply memorandum and at oral argument, however, Proposed Intervenors conceded that the Minnesota Supreme Court "has not yet adjudicated the legal issue of the Minnesota Constitution implying a private cause of action." *See Dean v. City of Winona*, 868 N.W.2d 1, 8 n. 4 (Minn. 2015). Thus, they have undercut their contention that this preferred defense is "black letter law." It seems clear that Proposed Intervenors seek to assert the defense of a private cause of action to claims for violation of the Minnesota Constitution in this case so that it can be "properly present[ed] for adjudication" because this "legal issue is an important one for the Minnesota Supreme Court to resolve."

Filed in District Court
State of Minnesota
1/28/2020 4:19 PM

Defendants do not squarely address the merits of the defense which the Proposed Intervenors seek to assert. Instead, Defendants maintain that they should not be forced to disclose their privileged work product in opposing this motion or be forced to "describe *why* they have chosen particular defenses over others, or *why* they consider certain defenses to be inapplicable." (emphasis in original). Defendants also argue that disagreements over legal strategy simply do not create an opportunity for intervention, particularly when a governmental body such as the Attorney General is representing a litigant. *See Planned Parenthood of Wis., Inc. v. Kaul*, 942 F.3d 793, 798 (7th Cir. 2019); *North Dakota ex rel. Stenehjem v. United States*, 787 F.3d 918, 921 (8th Cir. 2015).

Plaintiffs contend that Proposed Intervenors' "complete defense" is meritless. They argue that there is more than a century of decisions from the Minnesota Supreme Court where it has considered challenges to laws based on violations of the Minnesota Constitution and which involved claims for declaratory or injunctive relief. *See, e.g., Alexander v. City of Duluth*, 58 N.W. 866, 867 (Minn. 1894)(striking down an act regarding the construction of tunnels by cities as a violation of the special legislation provision of the Minnesota Constitution); *Doe v. Gomez*, 542 N.W.2d 17, 19-20, 32 (Minn. 1995)(finding challenged law impinged plaintiffs' fundamental right to privacy under the Minnesota Constitution, and affirming grant of declaratory and injunctive relief); *Cruz-Guzman v. State*, 916 N.W.2d 1, 12 (Minn. 2018)(reversing appellate court's dismissal of constitutional challenge as nonjusticiable and acknowledging court's "duty to adjudicate claims of constitutional violations). Plaintiffs argue further that the Minnesota Supreme Court has addressed the merits of lawsuits for declaratory or injunctive relief for violations of all of the constitutional rights alleged by them in this case. *See Gomez*, 542 N.W.2d at 32 (right to privacy); *Cruz-Guzman*, 916 N.W.2d at 12 (equal protection); *Alexander*, 58 N.W. at 867 (special legislation); *Knudtson v. City of Coates*, 519 N.W.2d 166, 169 (Minn. 1994)(freedom of speech); *Contos v. Herbst*, 278 N.W.2d 732, 746 (Minn. 1979)(due

Filed in District Court
State of Minnesota
1/28/2020 4:19 PM

process); and *Hill-Murray Federation of Teachers, St. Paul, Minn. v. Hill-Murray High School, Maplewood, Minn.*, 487 N.W.2d 857, 864-67(Minn. 1992)(freedom of religion).

Finally, Plaintiffs distinguish the federal and unpublished Minnesota Court of Appeals cases cited as examples of the recognition that there is no private right of action under the Minnesota Constitution by Proposed Intervenors, because they all involve claims for monetary damages. *See, e.g., Hatton v. Piper*, 2019 WL 969787 at *1 (D. Minn. 2019); *Mlnarik v. City of Minnetrista*, 2010 WL 346402, at *1 (Minn. Ct. App. Feb. 2, 2010). The sole exception, according to Plaintiffs, is the Eighth Circuit's *Eggenberger* decision which dismissed claims for equitable relief for alleged state constitutional violations. 820 F.3d at 941. The *Eggenberger* court, however, as Plaintiffs point out, based its decision on cases which all involved the dismissal of asserted claims for damages based on state constitutional violations. *Id.*

The court has chosen to address the merits of the defense preferred by Proposed Intervenors before addressing their claim for intervention of right or permissive intervention. The reason for this threshold consideration is simple; there would be no reason to allow intervention to assert a meritless defense.

What Proposed Intervenors contend is a "complete defense" is actually no defense at all to the claims made here. Litigants who seek declaratory or injunctive relief for violations of the Minnesota Constitution *can* sue the government. Two cases demonstrate this concept quite clearly.

In *Cruz-Guzman*, appellants asserted that the State violated its constitutional duty under the Education Clause of the Minnesota Constitution, and that the State violated the Equal Protection and Due Process Clauses of the Minnesota Constitution by enabling school segregation and depriving students of their fundamental right to an adequate education. 916 N.W.2d at 6. The complaint in *Cruz-Guzman* requested both declaratory and injunctive relief; namely, that the court should "permanently enjoin the State from 'continuing to engage in the violations of law," to order the State

Filed in District Court
State of Minnesota
1/28/2020 4:19 PM

to 'remedy the violations of law,' and to order the State 'to provide the [students] forthwith with an adequate and desegregated education.'" *Id.* Recognizing its "duty to adjudicate claims of constitutional violations," the Minnesota Supreme Court declared that it would: "not shy away from [its] proper role to provide remedies for violations of fundamental rights merely because education is a complex area. The judiciary is well equipped to assess whether constitutional requirements have been met and whether appellants' fundamental right to an adequate education has been violated." *Id.* at 12. Accordingly, the Minnesota Supreme Court concluded that the claims alleging violations of the Education, Equal Protection and Due Process Clauses of the Minnesota Constitution were justiciable and implicitly recognized the use of the Uniform Declaratory Judgments Act to bring such constitutional violations before it. *Id.* at 12-13.

In *Gomez,* appellants sought declaratory and injunctive relief against various governmental bodies for constitutional violations arising out of statutory provisions which restricted the use of public medical assistance and general assistance funds for therapeutic abortion services. 542 N.W.2d at 20. Specifically, they "sought an injunction against the enforcement of the challenged provisions and a declaration that the provisions violated the Minnesota Constitution." *Id.* The trial court "struck Minnesota Statutes section 256B.0625, subdivision 16 as unconstitutional under the equal protection and privacy guarantees of Article I, Sections 2, 7, and 10 of the Minnesota Constitution and permanently enjoined the defendants from enforcing the challenged statutes and regulations." *Id.* The Minnesota Supreme Court framed the issues presented in the following way:

> we are asked to resolve the issues of whether the challenged provisions violate the equal protection guarantees or impermissibly infringe on a woman's fundamental right of privacy under the Minnesota Constitution.

Id. at 21. The supreme court ultimately affirmed the trial court insofar as the subject statutory provision impermissibly infringed on a woman's fundamental right of privacy under the Minnesota Constitution. *Id.* at 32.

Filed in District Court
State of Minnesota
1/28/2020 4:19 PM

In both *Cruz-Guzman* and *Gomez*, the appellants brought private causes of action against governmental bodies for declaratory and injunctive relief for violations of various provisions of the Minnesota Constitution. Like the appellants in those cases, Plaintiffs here allege that they "challenge the validity of [the statutes at issue] under the Minnesota Constitution; Minnesota's Uniform Declaratory Judgments Act, Minn. Stat. §§ 555.01-555.16; and Minnesota Rules of Civil Procedure 57 and 65." Each of the first six counts in the Amended Complaint allege that certain statutes: (1) "violate the right to privacy;" (2) "violate the guarantee of equal protection of the laws;" (3) "violate the prohibition on special legislation;" (4) "violate the right to free speech;" (5) "violate the prohibition on vague laws;" and (6) violate "the right to religious freedom and prohibition on religious preference" each found in the Minnesota Constitution. The Amended Complaint asks this court to declare the statutes at issue unconstitutional and to permanently enjoin Defendants from enforcing them. Accordingly, the Plaintiffs have chosen to frame their claims and requested relief in the same manner as in cases in which the Minnesota Supreme Court accepted subject matter jurisdiction. Without a doubt, the Minnesota Supreme Court did not ignore "black letter law" when it considered and adjudicated the constitutional challenges made in *Cruz-Guzman* and *Gomez*. This court, therefore, finds that the defense sought to be alleged by Proposed Intervenors, on these facts, lacks merit.[1]

Since 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 court will, nonetheless, address the motions for intervention of right and permissive intervention.

[1] Since this court has determined that the purported defense of lack of a private cause of action for violations of the Minnesota Constitution where, as here, the claimed relief is for a declaration that the statutes at issue are unconstitutional and for an injunction to prevent their enforcement, it is not necessary for this court to determine whether that defense may have merit when a party seeks damages for a violation of the Minnesota Constitution.

Filed in District Court
State of Minnesota
1/28/2020 4:19 PM

RULE 24.01 – INTERVENTION AS OF RIGHT

I. PROPOSED INTERVENORS' ATTEMPTED INTERVENTION WAS TIMELY

Under Rule 24.01, the first factor for this court to consider is whether the motion to intervene is timely. "The timeliness of a motion to intervene must be determined on a case-by-case basis." *Omegon, Inc. v. City of Minnetonka*, 346 N.W.2d 684, 687 (Minn. Ct. App. 1984). "While Rule 24 should be construed liberally, intervention is untimely if the rights of the original parties will be substantially prejudiced." *Id.* Proposed Intervenors contend that they acted with diligence in filing their motion. The Defendants filed their motion to dismiss with supporting memorandum on September 25, 2019 and the Proposed Intervenors filed its notice on October 14, 2019. They contend that since this litigation is in its nascent stages, there is no prejudice to the current parties.

Plaintiffs contend that the motion is untimely, because Proposed Intervenors waited several months after the hearing on the motion to dismiss before perfecting the motion to intervene. They also contend that Proposed Intervenors "have moved to intervene only to introduce frivolous arguments on well-settled matters of state constitutional jurisprudence" and "have already caused significant delay and prejudice by requiring parties to the original action to expend time and resources to respond to their frivolous arguments." Defendants do not address this factor.

Because the notice to intervene was brought at a very early stage of this litigation, before the court heard the motion to dismiss, and despite some intervening delay in perfecting the motion to intervene, the court finds that the Proposed Intervenors made a "timely application."

II. PROPOSED INTERVENORS HAVE NOT DEMONSTRATED AN INTEREST SUFFICIENT TO INTERVENE OF RIGHT

The second factor asks this court to evaluate whether Proposed Intervenors have an interest relating to the property or transaction which is the subject of the action. Proposed Intervenors contend that they each are taxpayers who "have an interest in this meritless lawsuit ending because it is causing unnecessary disbursement of taxpayer's funds." They claim both taxpayer standing and

Filed in District Court
State of Minnesota
1/28/2020 4:19 PM

associational standing to assert defenses where the Attorney General has failed to do so. In their reply memorandum, Proposed Intervenors make the hyperbolic and unsupported claim that: "the Attorney General's omission of the lack of private cause of action defense is an *illegal* action and has caused an *unlawful* disbursement of public money on legal services[2] in this case which should have ended with the complete defense of lack of private cause of action." (emphasis added).

Plaintiffs contend that the Proposed Intervenors do not have the requisite interest in the "subject[s] of the action," which are challenged abortion laws. Proposed Intervenors' purported interest in the Attorney General's legal strategy or the disbursement of taxpayer funds are not "the subject of the action." *See Heller v. Schwan's Sales Enterprises, Inc.*, 548 N.W.2d 287, 292 (Minn. Ct. App. 1996)(proposed intervenor did not claim that he suffered any injury as a result of consuming Schwan's ice cream, but rather "merely criticized the class attorney's fees and speculated that the settlement may increase the price of Schwan's products."). Plaintiffs also contend that taxpayer or associational standing is not sufficient to establish entitlement to intervention of right, particularly where the "subject of the action" does not address illegal acts or the unlawful expenditure of funds. *Citizens for Rule of Law v. Senate Comm. On Rules & Admin.*, 770 N.W.2d 169, 174-75 (Minn. Ct. App. 2009).

Defendants maintain that taxpayer standing does not apply in this case, because taxpayer standing is only appropriate where the lawsuit pertains to "unlawful disbursements of public money or illegal action on the part of public officials." *Id.* at 175. Further, Defendants allege that "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." *Id.* at 174. Like Plaintiffs, Defendants argue that neither Plaintiff Intervenor has established an interest in anything other than a

[2] Proposed Intervenors have not provided any facts or legal authority which would support a contention that the Attorney General's failure to allege a defense would be illegal or would result in any unlawful expenditure.

Filed in District Court
State of Minnesota
1/28/2020 4:19 PM

purported unnecessary expenditure of money or dictating the litigation strategy of the Attorney General.

An interest in the assertion of a particular legal defense or an interest in saving the expenditure of funds for public lawyering, is not "an interest relating to the property or transaction which is the subject of the action." Minn. R. Civ. P. 24.01. The "transaction[s] which [are] the subject of the action" here are the challenged abortion laws. Like *Heller*, Proposed Intervenors do not claim to have been affected or damaged by the challenged abortion laws, but rather criticize the attorneys' fees expended without the use of its preferred defense. 548 N.W.2d at 292. The court has significant concerns about accepting disputes about litigation strategy, tactics, and efficiency as an interest sufficient to merit intervention. Proposed Intervenors have not demonstrated an interest sufficient to intervene of right.

III. PROPOSED INTERVENORS HAVE FAILED TO DEMONSTRATE AN INTEREST THAT WOULD BE IMPAIRED OR IMPEDED BY THE DISPOSITION OF THIS LAWSUIT

The third factor asks this court to consider the circumstances demonstrating that the disposition of the action may as a practical matter impair or impede the party's ability to protect that interest. Proposed Intervenors contend that, absent intervention, they have no "avenue to assert the defense of lack of private cause of action to end the litigation." Since the Attorney General has failed to allege this defense, which Proposed Intervenors maintain has resulted in waiver, they contend that no other party will assert and preserve it.

Plaintiffs contend that, since Proposed Intervenors lack an interest in this lawsuit, there is no need to consider this factor. They also contend that Proposed Intervenors have not demonstrated that the disposition of the lawsuit will impede their rights or interests because "they are neither regulated by the challenged laws nor do they claim to have members whose rights or interests may be directly impeded if the Court were to strike down the challenged laws." Defendants do not address this factor.

Filed in District Court
State of Minnesota
1/28/2020 4:19 PM

The interest analysis in the second factor is inextricably intertwined with the protection of the interest analysis in the third factor. Because Proposed Intervenors lack an interest in the subject of the action, they also lack an interest which is subject to protection. Even if this court were to consider this factor unresolved by its resolution of the second factor, it appears that Proposed Intervenors' argument regarding the impediment or impairment of their interest centers around is contention that the Defendants have waived the assertion of their preferred defense. Proposed Intervenors have suggested, in a rather circular manner, that their defense relates to the subject matter of the court to adjudicate the constitutionality of the abortion statutes: "In other words, PLAM's and AGA's interest in the subject matter of the litigation is whether the court has subject matter jurisdiction to litigate the subject matter of the litigation: the alleged unconstitutionality of the abortion restrictions." If the assertion of the preferred defense is truly a matter of subject matter jurisdiction, the Attorney General's failure to assert in its motion to dismiss has not resulted in waiver. *See Dead Lake Ass'n, Inc. v. Otter Tail County*, 695 N.W.2d 129, 134 (Minn. 2005)("lack of subject matter jurisdiction may be raised at any time by the parties or sua sponte by the court, and cannot be waived by the parties"). If the court denies the motion to dismiss in its current form, there would be nothing to prevent the Attorney General from raising any meritorious defense regarding the subject matter jurisdiction of the court in a subsequent dispositive motion. Similarly, there is nothing preventing this court from addressing subject matter jurisdiction *sua sponte*. In the end, if the preferred defense of Proposed Intervenors has not been waived and could be addressed if the Defendant's motion to dismiss is unsuccessful, there is no impairment or impediment to it being addressed in the future. Proposed Intervenors have not demonstrated an interest that would be impeded or impaired by the disposition of this lawsuit.

Filed in District Court
State of Minnesota
1/28/2020 4:19 PM

IV. PROPOSED INTERVENORS HAVE FAILED TO DEMONSTRATE THAT DEFENDANTS' REPRESENTATION IS INADEQUATE

The final factor for consideration by this court relates to the adequacy of the representation of Proposed Intervenors' interest by existing parties. Proposed Intervenors insist that the executive branch must, through the representation of the Attorney General "act as an advocate to ensure the lack of private cause of action defense is brought to dismiss every claim brought under the Minnesota Constitution." Proposed Intervenors maintain that by "omitting the defense of lack of private cause of action, the Attorney General's Office has demonstrated that it does not adequately represent the interests of state taxpayers who want all unnecessary litigation against the government to end." Proposed Intervenors contend that they have a minimal burden of showing that the existing parties may not adequately represent their interests. *Jerome Faribo Farms, Inc. v. Cty. of Dodge*, 464 N.W.2d 568, 570 (Minn. Ct. App. 1990)

Plaintiffs contend that this factor need not be considered if the court has already decided Proposed Intervenors lack an interest under the second factor. Nonetheless, Plaintiffs maintain that a proposed intervenor must establish "specific facts or reasons" why they are not adequately represented by the existing parties. *See Husfeldt v.* Willmsen, 434 N.W.2d 480, 483 (Minn. Ct. App. 1989). Both Plaintiffs and Defendants cite federal authority which raises the bar for demonstrating inadequacy when one of the parties is an arm or agency of the government and the case concerns a matter of sovereign interest. *See, e.g., Stenehjem*, 787 F.3d at 921 ("Although the burden of showing inadequate representation usually is minimal, 'when one of the parties is an arm or 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."). This presumption may be rebutted when the proposed intervenor makes "a strong showing of inadequate representation." *Id.* at 921 (citation omitted). In the end, "[a]bsent…dereliction of duty…the proposed intervenor cannot rebut the presumption of representation by merely disagreeing with the

Filed in District Court
State of Minnesota
1/28/2020 4:19 PM

litigation strategy or objectives of the party representing him." *Id.* at 922. *See also Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 658-59 (7th Cir. 2013)(proposed intervenors "identify no conflict rendering the state's representation inadequate. Instead [proposed intervenors] rely largely on post-hoc quibbles with the state's litigation strategy."). Plaintiffs and Defendants argue that is precisely what Proposed Intervenors are doing here.

Although the *Stenehjem* decision is not binding on this court, its articulated presumption of adequate governmental representation and rebuttal burden is persuasive and makes sense. But even if this court did not find *Stenehjem* persuasive, Proposed Intervenors have not even met the "minimal" burden of *Jerome Faribo Farms*. On this record, it can't be said that the Defendants have been anything but zealous in their defense in this case. They brought a motion to dismiss all claims against all Defendants. While this court has not yet made a decision on the motion to dismiss, the legal theories advanced by the Defendants are at least plausible and adequate. If Defendants are correct, their motion to dismiss will end the case. The fact that they have not added yet another legal theory, which this court has already found lacks merit, does not make Defendants' representation inadequate. The fact that Defendants have used the defense in cases alleging entitlement to damages for constitutional violations in other matters, does not make their representation inadequate. The fact that Defendants have not alleged a defense which Proposed Intervenors would like the Minnesota Supreme Court to squarely address, does not make their representation inadequate. Whether this factor is considered under the "minimal" burden of *Jerome Faribo Farms*, or the more demanding *Stenehjem* burden, Proposed Intervenors have not demonstrated that Defendants' representation is inadequate.

For all of these reasons, Proposed Intervenors have not demonstrated entitlement to intervention of right under Rule 24.01.

Filed in District Court
State of Minnesota
1/28/2020 4:19 PM

RULE 24.02 – PERMISSIVE INTERVENTION

The court reaches the same conclusion with regard to Proposed Intervenors' alternative motion for permissive intervention under Minn. R. Civ. P. 24.02.

The first factor to be considered for permissive intervention is whether there was a timely application for intervention. This is the identical factor which this court considered in Proposed Intervenor's motion for intervention of right. This court has already determined that the Proposed Intervenors made a "timely application."

The second factor asks this court to evaluate Proposed Intervenors' interest in litigating common questions of law or fact with the main action. Proposed Intervenors contend that this factor is satisfied "because PLAM and AGA want to assert the defense of lack of private cause of act [sic] which the Attorney General's Office omitted." Plaintiffs and Defendants reiterate many of the arguments they made with regard to the lack of standing or interest of Proposed Intervenors in addressing this factor. For the reasons stated already in detail above, the assertion of Proposed Intervenors preferred defense would be futile and they lack sufficient interest in this litigation, even under the less demanding standard of Rule 24.02. Accordingly Proposed Intervenors have not met their burden under this factor.

The final factor requires this court to assess whether the intervention will delay or prejudice the adjudication of the rights of the parties. Proposed Intervenors argue that limited intervention to merely assert its preferred defense will not prejudice the rights of the parties. Plaintiffs contend that rather than taking action which will result in the conservation of public resources, Proposed Intervenors' actions will counterproductively cause delay and waste public resources. Defendants contend that allowing Proposed Intervenors to become involved in this case would "unduly complicate an already complicated case of state-wide importance." Again, in light of this court's

Filed in District Court
State of Minnesota
1/28/2020 4:19 PM

conclusion that the preferred defense of Proposed Intervenors lacks merit, allowing them to intervene to assert the defense, knowing that it would not be successful, would be a waste of public resources.

Proposed Intervenors motion for permissive intervention under Rule 24.02 is therefore denied.

TAG