STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1265

Dr. Jane Doe, et al.,
Respondents,

vs.

State of Minnesota, et al.,
Respondents,

Matthew Franzese,
Appellant.

Filed April 3, 2023
Affirmed
Slieter, Judge

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

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

Tanya Pellegrini (*pro hac vice*), Lawyering Project, San Francisco, California (for respondents Dr. Jane Doe, Mary Moe, First Unitarian Society of Minneapolis, and Our Justice)

Keith Ellison, Attorney General, Liz Kramer, Solicitor General, Jennifer Olson, Assistant Attorney General, St. Paul, Minnesota (for respondents State of Minnesota, Governor of Minnesota, Attorney General of Minnesota, Minnesota Commissioner of Health, Minnesota Board of Medical Practice, and Minnesota Board of Nursing)

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

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

Appellant challenges the district court's denial of his postjudgment motion to intervene as a matter of right. Because appellant has not shown that he has an interest in the subject of the action, we affirm.

FACTS

The underlying litigation began in May 2019 when respondents Dr. Jane Doe, Mary Moe, the First Unitarian Society of Minneapolis (FUS), and Our Justice (the Doe parties) filed a complaint against respondents the state, governor, attorney general, commissioner of health, board of medical practice, and board of nursing (the state parties). The complaint sought declaratory and injunctive relief, arguing that certain statutes governing abortion and advertising related to treatment of sexually transmitted infections violate the Minnesota Constitution.

On July 13, 2022, the district court entered partial summary judgment ruling several of the challenged laws unconstitutional and enjoining their enforcement. On July 29, 2022, the remaining claims were dismissed. *See* Minn. R. Civ. P. 41.01(a).

On August 4, 2022, appellant Matthew Franzese, the Traverse County Attorney, moved to intervene as a matter of right.[1] On September 6, 2022, the district court denied intervention. Franzese appeals.[2]

DECISION

We review orders concerning intervention as a matter of right *de novo*. *State Fund Mut. Ins. Co. v. Mead*, 691 N.W.2d 495, 499 (Minn. App. 2005).

Intervention as a matter of right is governed by rule 24.01 of the Minnesota Rules of Civil Procedure. The rule 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. Thus, to be entitled to intervention as a matter of right, the proposed intervenor must satisfy four requirements: "(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

[1] Franzese also moved for permissive intervention pursuant to Minn. R. Civ. P. 24.02 and included the denial of permissive intervention in this appeal. An order denying permissive intervention is unappealable unless it is based on a finding that the proposed intervenor does not have a protectable interest in the litigation. *State v. Deal*, 740 N.W.2d 755, 760 (Minn. 2007); *see also Norman v. Refsland*, 383 N.W.2d 673, 675 (Minn. 1986). The district court based its denial of permissive intervention on untimeliness, not Franzese's lack of an interest in the action. Therefore, the denial of permissive intervention is unappealable.

[2] Franzese appealed the summary judgment and the denial of intervention. We address his appeal of the underlying summary judgment in a separate order released concurrently with this opinion.

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). The proposed intervenor must meet all four requirements. *Schroeder v. Minn. Sec'y of State Steve Simon*, 950 N.W.2d 70, 76 (Minn. App. 2020) (citing *League of Women Voters*, 819 N.W.2d 636 at 641).

Because we conclude that Franzese fails to claim a valid interest in the subject of the action, and Franzese must satisfy all four requirements, that is where we begin, and end, our analysis. *Id.*

To determine whether an intervenor has an interest in the subject of the action, we examine the pleadings, accept them as true "absent sham or frivolity," and give no consideration to "the merits of the proposed complaint." *Id.* (quoting *Snyder's Drug Stores, Inc. v. Minn. State Bd. of Pharmacy*, 221 N.W.2d 162, 164 (Minn. 1974)). A proposed intervenor is generally not entitled to intervention as a matter of right if a judgment will not affect his or her legal rights. *Id.* General, personal, or familial interests are usually not enough to support intervention as a matter of right. *Id.* A proposed intervenor must state "a direct and concrete interest that is accorded some degree of legal protection." *Miller v. Miller*, 953 N.W.2d 489, 494 (Minn. 2021) (quoting *Diamond v. Charles*, 476 U.S. 54, 75 (1986)).

Franzese contends that he has an interest in the subject of the action because, as a county attorney, he has a duty to enforce the law which is impaired by the state parties' decision not to appeal. *See* Minn. Stat. § 388.051 (2022) (outlining duties of county attorneys). He contends that the state parties' decision not to appeal the district court's

order creates "confusion and doubt about said statutes['s] enforceability throughout the state, specifically in Traverse County," and this "confusion and doubt" requires appellate review to clarify the order's statewide enforceability.

The subject of this action, as our court explained in an earlier intervention appeal, is abortion-related laws. *See Doe v. State*, No. A20-0273, 2020 WL 6011443, at *3 (Minn. App. Oct. 12, 2020), *rev. denied* (Minn. Dec. 29, 2020). Regarding his purported interest in this action to clarify the enforceability of the statutes in Traverse County, Franzese asks for an advisory opinion to solve his prospective "legal conundrum." Courts "do not issue advisory opinions and . . . do not 'decide cases merely to establish precedent.'"[3] *Schowalter v. State*, 822 N.W.2d 292, 298 (Minn. 2012) (quoting *In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989)).

Franzese also argues that he, as a county attorney, is able to intervene to defend the constitutionality of criminal statutes when the attorney general declines to pursue an appeal. He relies on *Baker v. Wade*, 769 F.2d 289, 291 (5th Cir. 1985), *overruled on other grounds by Lawrence v. Texas*, 539 U.S. 558 (2003). We have already concluded that Franzese lacks an interest in the subject of this action, so we need not address this argument. However, we briefly address his argument and are not persuaded.

[3] Respondents argue that the order is binding in all counties but the only case they cite to support this proposition is a nonbinding federal district court case. *See Devescovi v. Ventura*, 195 F. Supp. 2d 1146, 1149 (D. Minn. 2002) (holding that Beltrami County was bound by a Hennepin County district court injunction ruling Minnesota's anti-sodomy law unconstitutional). The only issue before us is Franzese's attempted intervention, so we do not opine on the state-wide impact of the district court's order.

Baker is distinguished because in that case the intervening district attorney was a member of the defendant class and the attorney general—the named class representative—timely appealed and later moved to withdraw the appeal. *Id.* "Crucial" to the holding in *Baker* was the existence of "binding Supreme Court authority" indicating that the district court ruled incorrectly. *Saldano v. Roach*, 363 F.3d 545, 552-53 (5th Cir. 2004). Franzese is not a defendant in the present case, a named party did not timely appeal, and he points to no binding precedent that the district court's order contravened. *Baker* is, therefore, unpersuasive.

Because Franzese does not have an interest in the subject of the action, we affirm the district court's denial of intervention.

Affirmed.