

State of Minnesota In Supreme Court

A20-0272

Jennifer Schroeder, Elizer Eugene Darris, Christopher James Jecevicus-Varner, and
Tierre Davon Caldwell,

Respondents/Plaintiffs,

v.

Minnesota Secretary of State Steve Simon,
in his official capacity,

Respondent/Defendant,

and

Minnesota Voters Alliance,
a nonprofit corporation,

Petitioner/Appellant/Proposed Defendant-Intervenor.

Petition for Accelerated Review and Addendum

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TO: The Supreme Court of the State of Minnesota.

Minnesota Voters Alliance (MVA) petitions for accelerated review by the Supreme Court of the above-entitled matter upon the following grounds:

I. Statement of Legal Issues

MVA in its Appellant's Principal Brief identified the following legal issues:

- I. Whether Minnesota Voters Alliance is entitled to intervene in district court under Rule 24.01 governing intervention of right.
- II. Whether the Attorney General's Office has shirked its duty to argue all successful, complete defenses on behalf of its clients?
- III. Whether the defense of no private cause of action is a successful, complete defense against all claims based on the government violating the Minnesota Constitution?

Br. at 1 (Mar. 23, 2020).

II. Statement of the Case

A. Summary of case

In this case, the plaintiffs sued the Secretary of State, on the basis, that Minnesota statutes banning felons from voting violate the Minnesota Constitution. Compl. at 1-17 (Oct. 12, 2019). In the Secretary of State's Answer, the Attorney General's Office shirked its duties by failing to allege that the defense of no private cause of action to sue the government required dismissal. Answer at 1-24 (Nov. 12, 2019) In response, Minnesota Voters Alliance (MVA), as a taxpayer and as an

association, filed a motion for limited intervention with a proposed Defendant-Intervenor's Answer alleging the successful, complete defense. Not. of Lmtd. Interv. at 1-16 (Nov. 18, 2019).

MVA's motion papers for intervention identified multiple appellate court and federal decisions dismissing claims under the Minnesota Constitution based on the successful, complete defense of no private cause of action.¹ Memo. in Supp. of Mot. for Lmtd. Interv. at 2; Reply Memo. in Supp. of Mot. for Lmtd. Interv. at 2. MVA's motion papers also identified that Minnesota Declaratory Judgment Act, Minn. Stat. § 555.01, et seq., does not provide a cause of action to sue the government. Memo. in Supp. of Mot. for Lmtd. Interv. at 2-3. There are no state appellate or federal cases that have stated that the Minnesota Constitution nor Minnesota Declaratory Judgment Act creates a separate private cause of action to sue the government.

The Attorney General's Office, by failing to cite these cases and failing to argue the successful, complete defense in its Answer, shirked its duties to zealously represent the state defendants in this case. Answer at 1-24. The Attorney General's Office's duty to argue successful, complete defenses on behalf of its governmental clients is established by statutes and rules, including Minnesota Statutes § 8.06, Rule of Professional Conduct 3.1 and Rule of Civil Procedure 12.02. These statutes and rules

¹ For sake of brevity, throughout the brief, the phrase "successful, complete defense" refers to "successful, complete defense of no private cause of action."

require the Attorney General's Office to file all successful, complete defenses on behalf of its governmental clients.

Because of the conduct of the Attorney General's Office, MVA and the public are left to wonder if the Attorney General's Office, in this high-profile voting rights case, is representing the narrower interests of the plaintiffs instead of the broader interests of the public. Further, has the Attorney General's Office's failings led the lower court to an unconstitutional usurpation of the legislative prerogative to waive sovereign immunity from lawsuits by enacting private causes of action?

So, in this appeal, MVA seeks reversal of the lower court's denial of the motion to intervene. First, MVA asserts that it is entitled to intervene in the lower court—even though, perhaps, not within the precise bounds of Rule 24.01 governing intervention of right—because there is a sound reason to allow the intervention—namely the Attorney General's Office shirking its duties leading to the lower court's constitutional usurpation. In absence of such intervention by MVA, the safeguarding of the taxpayers' interests and the public interests in this high-profile voting rights case is impermissibly left to the discretion of the Attorney General's Office and the lower court. Second, MVA's intervention must be allowed because MVA satisfies the Rule 24.01 criteria.

B. Summary of the facts

1. The Plaintiffs sued the Secretary of State for violating the Minnesota Constitution without specifying a private cause of action.

In the Complaint, the Plaintiffs sued the Secretary of State. Compl. at 1. The Complaint alleges numerous claims that Minnesota statutes banning felons from voting violate the Minnesota Constitution. Compl. at 1-17. But, the Complaint does not specify a private cause of action. *Id.*

2. The Attorney General’s Office has a duty under Minnesota Statutes § 8.06, Rule of Professional Conduct 3.1 and Rule of Civil Procedure 12.02 to argue successful, complete defenses—there are no exceptions and there is no discretion.

The Attorney General’s Office, in this case, represents the Secretary of State. Answer at 1. Minnesota Statutes § 8.06 requires that the attorney general “shall act as the attorney” for such a state officer:

8.06 ATTORNEY FOR STATE OFFICERS, BOARDS, OR COMMISSIONS; EMPLOY COUNSEL.

The attorney general shall act as the attorney for all state officers and all boards or commissions created by law in all matters pertaining to their official duties.

§ 8.06 has no exceptions and no discretion mentioned to the Attorney General’s Office’s statutory obligation to “act as the attorney” for the Secretary of State. Specifically, in this case, the Attorney General’s Office has a statutory duty under § 8.06 to “act as the attorney” for the Secretary of State in this case.

Minnesota’s Rule of Professional Responsibility 3.1 establishes that the Attorney General’s Office, as an attorney for the Secretary of State, “has a duty to use legal procedure for the fullest benefit of the client’s cause.” *Id.*, cmt. (2005). Rule 3.1 has no exceptions and no discretion mentioned for the Attorney General’s Office’s duty to “use legal procedure for the fullest benefit of the client’s cause.” Specifically, in this case, the Attorney General’s Office as lawyers for the Secretary of State have a duty under Rule 3.1 to use all successful, complete defenses—as legal procedures—“for the fullest benefit of [its] client[s].”

Rule of Civil Procedure 12.02 requires the Attorney General’s Office, as attorneys for the Secretary of State to use legal procedures to the fullest benefit of its clients’ cause, by pleading all successful, complete defense. Rule 12.02 requires any civil defendant’s counsel to plead the defendant’s successful, complete defenses by using the phrase that every defense “shall be asserted”:

12.02 How Presented

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion...

Rule 12.02 has no exceptions and no discretion mentioned for the Attorney General’s Office to omit successful, complete defenses. Specifically, in this case, the Attorney General’s Office under Rule 12.02, as attorneys for the Secretary of State, have a duty

to present “every defense” on behalf of the Secretary of State, including the successful, complete defense of no private cause of action.

3. The defense of no private cause of action has been successful in dismissing claims against all levels of government for violating the Minnesota Constitution.

In Minnesota, governments at all levels have obtained dismissal orders against claims brought under the Minnesota Constitution based on the successful, complete defense. The Attorney General’s Office has won on behalf of state agencies. *See, e.g., Hummel v. Minnesota Dept. of Agriculture*, U.S. District Court for District of Minnesota, 2020 WL 32644 at *10 (D.Minn. 2020). The county attorneys have won on behalf of counties. *See, e.g., Davis v. Hennepin County*, 2012 WL 896409, at *2 (Minn.App. 2012). The city attorneys have won on behalf of cities. *See, e.g., Mlnarik v. City of Minnetrista*, 2010 WL 346402 at *1 (Minn.App. Feb. 2, 2010). The township attorneys have won on behalf of townships. *See, e.g., Eggenberger v. West Albany Tp.*, 820 F.3d 938, 941–42 (8th Cir. 2016).

4. The Attorney General’s Office has prevailed on the successful, complete defense in four recent cases.

In four recent cases, the Attorney General’s Office has raised the defense of lack of a private cause of action to obtain dismissals of claims based on violations of the Minnesota Constitution. *Hatton v. Piper*, 2019 WL 969787 at *1 (D.Minn., 2019); *Benson v. Piper*, 2019 WL 2017319 at *4 (D.Minn., 2019); *Ivey v. Johnston*, 2019 WL

3334346 at *3 (D.Minn., 2019); *Hummel v. Minnesota Dept. of Agriculture*, 2020 WL 32644 at *10 (D. Minn. 2020).

5. In the case below, the Attorney General’s Office waived the successful, complete defense.

A. The Plaintiffs’ Complaint for Declaratory and Injunctive Relief, paragraph 14, appears to plead an implied private cause of action under the Minnesota Constitution—and the Defendant’s Answer admits to jurisdiction and fails to plead the successful, complete defense.

The Plaintiffs’ pleading, the Complaint for Declaratory and Injunctive Relief, appears to have pled an implied private cause of action under Minnesota Constitution.

Paragraph 14 states:

14. This Complaint raises claims under the Minnesota Constitution and the laws of the State of Minnesota. Thus, this Court has jurisdiction over all of Plaintiff’s claims.

Id. at 4.

But, the Attorney General’s Office at page 6 of the Answer admits that the Court has jurisdiction over an implied private cause of action under the Minnesota Constitution:

ANSWER: Defendant admits that Plaintiffs assert these allegations and that the Court has jurisdiction, but denies that Plaintiffs can establish any claims.

Answer at 6. The Attorney General’s Office also omits the successful, complete defense from its affirmative defenses. Answer at 23-24.

MVA's proposed intervention objects to the Defendant admitting that the district court has subject matter jurisdiction where there is no private cause of action to sue the government and omitting the successful, complete defense from the affirmative defenses. Not. of Lmt'd. Interv. at 1-16.

B. The Attorney General's Office's opposition memorandum does not attempt to cure the waiver of the successful, complete defense.

The Attorney General's Office's opposition memorandum did not attempt to cure Defendant's waiver in the Answer of its right to assert the lack of private cause of action defense. Instead, the Attorney General's Office refers to the difference with MVA as "disagreements with litigation strategy." Def's Memo. at 8.

C. The Attorney General's Office's oral argument did not attempt to cure the waiver of the successful, complete defense.

At oral argument on January 30, 2020, the Attorney General's Office did not attempt to cure the waiver of the lack of private cause of action defense. Instead, the Attorney General's Office asserted a private cause of action under the Minnesota Constitution existed for declaratory and injunctive relief:

THE COURT: The only other question I had, Mr. Kaardal did attach a number of cases from -- that your office has represented parties involving this private cause of action. Can you just briefly respond to that. And I know you may have, or maybe the plaintiffs did in their brief. [Assistant Attorney General]: Certainly. And I think that's where Judge Gilligan also properly noted those were three cases where the Department of Human Services was the party. There's also been some

conflation of the attorney general. These are cases where -- representational capacity. The attorney general's not a party to this case either; the secretary's the party. But in each of the three cases attached to the motion, elsewhere in the memo it's also clear that damages were being alleged in those cases, so I think they are distinguishable.

Tr. at 28 (Jan. 30, 2020).

6. In response, MVA sought intervention to plead the successful, complete defense.

On November 12, 2019, the Attorney General's Office filed their Answer without alleging the successful, complete defense. Answer at 1-24. In response, about one week later, on November 18, 2019, MVA filed their notice of limited intervention to allege the defense of no private cause of action in a proposed Defendant-Intervenor's Answer. Not. of Lmtd. Interv. at 1-16. The parties objected to the intervention. Pl.'s Obj. at 1 (Dec. 18, 2019); Def.'s Obj. at 1 (Dec. 18, 2019). Then, MVA filed its motion to approve the limited intervention. Mot. for Lmtd. Interv. at 1-2 (Dec. 26, 2019).

7. The lower court denied MVA's motion to intervene for failure to meet the requirements for intervention.

On February 12, 2020, the lower court denied MVA's motion for limited intervention for failure to meet the requirements for intervention. Add. 1-2.

C. Status of appeal

The Appellant seeks reversal of the lower court's decision. The notice of appeal was filed on February 20, 2020. A motion to consolidate this appeal with A20-0273

was denied by the Court of Appeals on March 10, 2020. The Appellants' Principal Brief was filed on March 23, 2020.

III. Argument

A. The matter satisfies standards for review under Rules 117 and 118.

Rule of Civil Appellate Procedure 118 authorizes accelerated review by this Court prior to a decision by the Court of Appeals if the criteria of Rules 117 and 118 are met. This petition satisfies the criteria of both Rules 117 and 118.

B. The criteria of Rule 117 is satisfied for discretionary review because the appeal is an important one upon which the Supreme Court should rule.

The criteria of Rule 117 is satisfied. Rule 117, subd. 2, states the criteria the Court uses to grant discretionary review:

Subd. 2. Discretionary Review.

Review of any decision of the Court of Appeals is discretionary with the Supreme Court. The following criteria may be considered:

- (a) the question presented is an important one upon which the Supreme Court should rule; or
 - (b) the Court of Appeals has ruled on the constitutionality of a statute; or
 - (c) the lower courts have so far departed from the accepted and usual course of justice as to call for an exercise of the Supreme Court's supervisory powers; or
 - (d) a decision by the Supreme Court will help develop, clarify, or harmonize the law; and
- (1) the case calls for the application of a new principle or policy; or
 - (2) the resolution of the question presented has possible statewide impact; or
 - (3) the question is likely to recur unless resolved by the Supreme Court.

Here, the Court need go no further than the first criteria: “the question presented is an important one upon which the Supreme Court should rule.”

Here, the questions presented by the appeal, quoted above, go to the heart of the Minnesota Constitution and the important questions of which plaintiffs can sue which governmental defendants in which subject areas. The lower court’s decision of denying limited intervention to the Appellant has effectively left to the discretion of the Attorney General’s Office and the lower court whether the heretofore successful, complete defense of no private cause of action to sue the government will be applied. This successful, complete defense—and its consistent enforcement by the judiciary—protects the Minnesota Constitution’s delegation to the legislature of the exclusive prerogative of waiving sovereign immunity from lawsuit by establishing private causes of action.

Article III of the Minnesota Constitution sets out the separation of powers among the branches of our state government:

The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.

Minn. Const. art. III, § 1. The Supreme Court in *State ex rel. Patterson v. Bates* stated that this provision includes three elements: a distributive clause that identifies the three branches; a prohibitive clause that prevents one branch from exercising the

powers of another branch; and an exceptions clause, which allows one branch to exercise another type of power when the constitution expressly provides for it. 96 Minn. 110, 104 N.W. 709, 712 (1905). “Together, these clauses create not merely a separation of functions, but also, importantly, a balance of powers among the branches of our government.” *Ninetieth Minnesota State Senate*, 903 N.W.2d at 629.

In Minnesota, it is axiomatic that the state legislature has the exclusive power to waive sovereign immunity from lawsuits by enacting private causes of action to sue the government. *See, e.g.*, Administrative Procedures Act, Minnesota Statutes § 14.001, et seq.; Environmental Rights Act; Minnesota Statutes § 116B.01, et seq., the Data Practices Act, Minnesota Statutes § 13.01, et seq.; Minnesota Tort Claims Act, Minnesota Statutes § 466.01, et seq. Minnesota Constitution, Article III, section 1, only allows for express constitutional exceptions to this legislative power:

The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.

Minn. Const. art. III, § 1 (emphasis added). *See also Ninetieth Minnesota State Senate v. Dayton*, 903 N.W.2d 609, 629–30 (Minn. 2017); *State ex rel. Decker v. Montague*, 195 Minn. 278, 262 N.W. 684, 689 (1935); *State ex rel. Birkeland v. Christianson*, 179 Minn. 337, 229 N.W. 313, 314 (1930); *State ex rel. Patterson v. Bates*, 104 N.W. 709, 712 (1905). Since there is no express constitutional provision for the judiciary to recognize private

causes of action and since article III, § 1 forbids any judicially-recognized implied private cause of action, the lower court's decision usurps the legislative prerogative to waive sovereign immunity from lawsuits by enacting private causes of action.

Thus, the lower court decision recognizing a new private cause of action to seek declaratory and injunctive relief against the government for violations of the Minnesota Constitution violates the separation of powers requirements under Minnesota Constitution, Article III, section 1. Add. 7.

C. The criteria of Rule 118 for accelerated review is satisfied because this appeal is of such imperative public importance as to require immediate review.

The criteria of Rule 118 is satisfied. Rule 118, states the criteria the Court uses to grant accelerated review includes showing that the appeal is of such imperative public importance as to require immediate attention in this Court:

Any party may petition the Supreme Court for accelerated review of any case pending in the Court of Appeals upon a petition which shows, in addition to the criteria of Rule 117, subdivision 2, that the case is of such imperative public importance as to justify deviation from the normal appellate procedure and to require immediate determination in the Supreme Court.

This appeal satisfies the criteria because (1) the appeal is addressing the lower court's application of a new private cause of action under the Minnesota Constitution; (2) the resolution of the question will have statewide impact; (3) the question is likely to recur unless resolved by the Supreme Court; and (4) immediate determination is required to

avoid further contradictory decisions among the lower courts and to avoid plaintiffs' consequential forum shopping.

First, as detailed above, the appeal is addressing the lower court's application of a new private cause of action under the Minnesota Constitution. The Ramsey County District Court, the most important venue for lawsuits against the state, is recognizing in this case a new private cause of action for plaintiffs to sue the government in Minnesota. The Court must review and adjudicate whether the new private cause of action is constitutionally authorized or constitutionally barred.

Second, the Court's reviewing and adjudicating whether the new private cause of action is constitutionally authorized or constitutionally barred will have statewide impact. Ramsey County District Court's decisions as to new private causes of action will affect other jurisdictions: Hennepin County; the suburban counties; and the rural counties. Without the Court's review and adjudication, the other district courts are left to their own discretion to decide whether to follow Ramsey County District Court's new private cause of action. The statewide application of district court discretion in regard to private causes of action to sue the government will create a checkerboard pattern across the state where the new private cause of action applies and where it doesn't. Plaintiffs will forum shop to determine the best venues for suing the government. In response, to ensure statewide uniformity, the Court should review and adjudicate whether the new private cause of action is constitutionally sound.

Third, the question is likely to recur unless resolved by the Supreme Court. The lower courts have issued contradictory decisions on whether the Minnesota Constitution authorizes a private cause of action. The Supreme Court alone has the power to resolve this matter as it has the exclusive power to recognize and abolish common law doctrines, as well as to define common law torts and their defenses. *Larson v. Wasemiller*, 2007, 738 N.W.2d 300, rehearing denied. *See Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 439 (Minn.1990) (“Creating a new tort is a function properly reserved for the supreme court based upon appropriate facts and record.”). Further, it is axiomatic that the Minnesota Supreme Court is the final interpreter of the Minnesota Constitution. And, “[i]n resolving any substantive issues of state law, [federal courts] are bound by the decisions of the Minnesota Supreme Court.” *Integrity Floorcovering, Inc. v. Broan-Nutone, LLC*, 521 F.3d 914, 917 (8th Circ. 2008). Without the Supreme Court making a decision, the lower courts will continue to contradict themselves.

Fourth, the appeal needs immediate determination by the Court to avoid further contradictory decisions among the lower courts and plaintiffs’ consequential forum shopping. Some lower courts denying a private cause of action and some courts allowing a private cause of action is constitutionally intolerable. The judicial system cannot afford to allow the lower courts to issue contradictory decisions on such a fundamental, constitutional question affecting government liability. Meanwhile, the plaintiffs are forum shopping for the best venues to sue the government. The only

method to mitigate the effects of the lower court's contradictory decision-making and the plaintiffs' forum shopping is for the Court to take the appeal for immediate consideration.

CONCLUSION

For these reasons, the petitioner requests an order granting accelerated review of this appeal now pending in the Court of Appeals.

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