STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0986

Denise Walker and Brian Walker,
on behalf of themselves and other Minnesota taxpayers,
Appellants,

vs.

Lucinda Jesson, in her official capacity as Commissioner,
Minnesota Department of Human Services,
Respondent,

and

Pro-Choice Resources,
Applicant of Intervention Below.

Filed May 5, 2014
Affirmed
Smith, Judge

Ramsey County District Court
File No. 62-CV-12-9027

Charles R. Shreffler, Shreffler Law, PLLC, Hopkins, Minnesota (for appellants)

Lori Swanson, Attorney General, Nathan A. Brennaman, Deputy Attorney General, Cynthia B. Jahnke, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Jill Gaulding, Lisa Stratton, Gender Justice, St. Paul, Minnesota; and

Stephanie Toti (pro hac vice), Center for Reproductive Rights, New York, New York (for amicus curiae Pro-Choice Resources)

Lawrence M. Shapiro, Jenny Gassman-Pines, Karl C. Procaccini, Janine A. Wetzel, Greene Espel PLLP, Minneapolis, Minnesota (for amicus curiae American Civil Liberties Union of Minnesota)

Erick G. Kaardal, James R. Magnuson, Mohrman & Kaardal, PA, Minneapolis, Minnesota; and

Teresa S. Collett (pro hac vice), Minneapolis, Minnesota (for amici curiae Frederick Douglass Foundation and Dr. Alveda King)

Considered and decided by Chutich, Presiding Judge; Halbrooks, Judge; and Smith, Judge.

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

SMITH, Judge

We affirm the district court's dismissal of appellant's challenge to the department of human services' expenditure of public funds to provide indigent women with abortions because appellants fail to establish taxpayer standing by alleging conduct that constitutes an unlawful expenditure.

FACTS

In November 2012, appellants Denise and Brian Walker sued the state as taxpayers, alleging that the Minnesota Department of Human Services (DHS) engaged in unlawful expenditure of state funds by paying for nontherapeutic abortions performed on indigent women. The Walkers alleged that DHS lacks "a process for reviewing the medical necessity of publicly funded abortions." They contended that DHS's reliance on a form submitted by doctors to certify that publicly funded abortions are medically necessary violates the supreme court's instruction in *Women of State of Minnesota by Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995) that state funds be used to pay for therapeutic abortions only. They asserted that "abortion providers are vastly overstating the number of publicly funded abortions being performed for 'other health reasons,'" that

"[a]s a result, the majority of abortions that have been paid for with public funds since at least 1999 have been performed for non-therapeutic reasons," and that comparing DHS's data to data from another state department proves that "DHS paid for at least 37,051 abortions performed on indigent women for non-therapeutic reasons," concluding that this demonstrates that DHS is engaging in unlawful expenditures.

Respondent Commissioner of DHS moved to dismiss the Walkers' complaint, and the district court granted the motion. The district court held that DHS's "decision to rely upon a physician's decision that a patient is seeking an abortion for legitimate therapeutic reasons is [not] illegal . . . ."

D E C I S I O N

The Walkers argue that the district court erred by dismissing their complaint because they alleged facts that would constitute illegal expenditures. We review de novo a district court's grant of a motion to dismiss under Minn. R. Civ. P. 12.02(e). *Sipe v. STS Mfg., Inc.*, 834 N.W.2d 683, 686 (Minn. 2013). In doing so, we accept as true all facts alleged in the complaint, and we independently consider whether those facts are sufficient to support a legal claim for relief. *Bodah v. Lakeville Motor Express*, 663 N.W.2d 550, 558-59 (Minn. 2003). A pleading should be dismissed only when "it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010) (quotation omitted).

The district court granted the commissioner's motion to dismiss the complaint because it found that the Walkers failed to allege any illegal expenditure by the state.

"To establish standing, a plaintiff must have a sufficient personal stake in a justiciable controversy." *Olson v. State*, 742 N.W.2d 681, 684 (Minn. App. 2007). "Absent express statutory authority, taxpayer suits in the public interest are generally dismissed." *Id.*; *see also Annandale Advocate v. City of Annandale*, 435 N.W.2d 24, 27 (Minn. 1989) (stating that standing is "essential" to a court's jurisdiction). "Taxpayers without a personal or direct injury may still have standing but only to maintain an action that restrains the 'unlawful disbursements of public money . . . [or] illegal action on the part of public officials.'" *Olson*, 742 N.W.2d at 684 (quoting *McKee v. Likins*, 261 N.W.2d 566, 571 (Minn. 1977)) (alteration in original). "Simple 'disagreement with policy or the exercise of discretion by those responsible for executing the law' does not supply the 'unlawful disbursements' or 'illegal action' of public funds required for standing to support a taxpayer challenge." *Id.* (quotations omitted).

The Walkers do not allege that any particular payment was illegal, nor do they challenge DHS's authority to fund therapeutic abortions. Rather, they contend that DHS's reliance on the medical-necessity form from physicians is insufficient. They contend that other data—gathered from other forms submitted to a different department and filtered through the Walkers' own definition of what constitutes a "therapeutic" reason—justifies the inference that abortion providers are falsely certifying that many publicly funded abortions are therapeutic. But our caselaw supports DHS's decision to rely solely on the judgment of a woman's physician to determine what constitutes a therapeutic abortion in a particular case. The supreme court has held that "the right of privacy under our [state] constitution protects not simply the right to an abortion, but

rather it protects the woman's *decision* to abort; any legislation infringing on the decision-making process, then, violates this fundamental right." *Gomez*, 542 N.W.2d at 31 (emphasis added). It defined the scope of a woman's right as "encompass[ing] her decision whether to choose health care services necessary to terminate or to continue a pregnancy without interference from the state." *Id.* The supreme court concluded that, "under our interpretation of the Minnesota Constitution's guaranteed right to privacy, the difficult decision whether to obtain a therapeutic abortion will not be made by the government, but will be left to the woman and her doctor." *Id.* at 32.[1] Thus, although the Walkers may prefer a more intrusive inquiry into the reasons that an abortion is therapeutic, DHS's method is not beyond the scope of its discretion. The Walkers therefore have failed to allege any illegal expenditure to support taxpayer standing.

The Walkers also contend that the legislature has enacted a statutory bar to DHS's reliance on physicians certifying medical necessity. They cite Minn. Stat. § 256B.04, subd. 13 (2012), to support their argument that "DHS has a statutory duty to independently review 'whether medical care to be provided to eligible recipients is medically necessary.'" But the cited statute relates to "person[s] *appointed by the commissioner* to participate in decisions" regarding medical necessity. Minn. Stat.

[1] Federal caselaw provides support for the principle that the determination of whether a particular abortion is therapeutic is entirely within the scope of a physician's medical judgment. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 163, 93 S. Ct. 705, 732 (1973) ("[T]he attending physician, in consultation with his patient, is free to determine, *without regulation by the State*, that, *in his medical judgment*, the patient's pregnancy should be terminated." (emphasis added)); *id.* at 164-65, 93 S. Ct. at 732 ("[T]he State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion *except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother*." (emphasis added)).

§ 256B.04, subd. 13 (emphasis added). It does not restrict independent physicians from certifying medical necessity because those physicians are not appointed by the commissioner.

Because DHS's reliance on physicians' certifications of medical necessity for abortions is not beyond the scope of its discretion, we affirm the district court's dismissal of the Walkers' suit for lack of standing.

Affirmed.