STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1681

City of Zumbro Falls,
Respondent,

vs.

Pussycat Cabaret, LLC, et al.,
Appellants.

Filed April 20, 2010
Affirmed
Collins, Judge[*]

Wabasha County District Court
File No. 79-CV-09-110

James J. Thomson, Kennedy & Graven, Chartered, Minneapolis, Minnesota (for respondent)

Randall D.B. Tigue, Randall Tigue Law Offices, P.A., Golden Valley, Minnesota (for appellants)

Considered and decided by Wright, Presiding Judge; Worke, Judge; and Collins, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

COLLINS, Judge

Appellants challenge the denial of their motion to dissolve a temporary restraining order granted to respondent City of Zumbro Falls. Because we conclude that the district court did not abuse its discretion in denying the motion to dissolve the temporary restraining order, we affirm.

FACTS

Appellants opened the Pussycat Cabaret in Zumbro Falls in January 2009. The Pussycat Cabaret is a business establishment that features live nude dancing. On January 14, 2009, the Zumbro Falls City Council passed three ordinances. The first is an anti-nudity ordinance, and the second and third are related to the location and zoning of adult uses. The anti-nudity ordinance prohibits, in part, a person from knowingly or intentionally appearing in a public place in a state of nudity. Zumbro Falls, Minn., Ordinance § 09-02 (2009). The term "nudity" is defined as "the showing of the human male or female genitals, pubic regions, buttocks, anuses, or female breasts below a point immediately above the top of the areola." *Id.*

Respondent determined that appellants' business violated these ordinances and commenced an action seeking a declaratory judgment and a permanent injunction. After commencing the action respondent moved for a temporary injunction. The district court granted the temporary injunction relying solely on the anti-nudity ordinance. The district court ordered:

> Pending a judgment on the merits of [respondent's] claims, [appellants] are enjoined from operating the Adult Establishment . . . in any manner that violates the Ordinances of the City, and are enjoined from violating specific provisions of those Ordinances, including, but not limited to the following: a) the prohibition on total nudity established in Ordinance No. 09-02 of the City of Zumbro Falls.

Appellants continued to operate the Pussycat Cabaret with female dancers wearing pasties and g-strings. Respondent filed a motion requesting that the district court find appellants in contempt for violating the temporary injunction, arguing that pasties and g-strings did not provide sufficient covering to comply with the anti-nudity ordinance. The district court denied respondent's motion stating that "the literal interpretation of the ordinance being argued by the city would, if followed by the court, result in the ordinance being unconstitutionally overbroad." Appellants moved the district court to dissolve the temporary injunction, based on documents obtained in discovery, arguing that the court erred in its application of the law in granting the temporary injunction. This appeal is from the district court's order denying appellants' motion to dissolve the temporary injunction.

D E C I S I O N

This court reviews the district court's decision to grant a temporary injunction for an abuse of discretion. *Oxford Dev., Inc. v. County of Ramsey*, 417 N.W.2d 319, 321 (Minn. App. 1988) (citing *Thompson v. Barnes*, 294 Minn. 528, 533, 200 N.W.2d 921, 925 (1972)). Similarly, the district court's refusal to dissolve a temporary injunction will be reversed only when there is a clear abuse of discretion. *In re Amitad, Inc.*, 397 N.W.2d 594, 596 (Minn. App. 1986). "Every order granting an injunction and every

restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained[.]" Minn. R. Civ. P. 65.04. In determining whether the district court abused its discretion in granting a temporary injunction this court reviews the following factors: (1) the nature and relationship of the parties; (2) the balance of relative harm between the parties; (3) the likelihood of success on the merits; (4) public-policy considerations; and (5) any administrative burden involving judicial supervision and enforcement. *M.G.M. Liquor Warehouse Int'l, Inc. v. Forsland*, 371 N.W.2d 75, 77 (Minn. App. 1985) (citing *Dahlberg Bros., Inc. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965)). The district court must make specific factual findings in all actions tried without a jury, including "granting . . . interlocutory injunctions." Minn. R. Civ. P. 52.01.

I.

Appellants contend that the district court abused its discretion in denying the motion to dissolve the temporary injunction and, in the original injunction order, concluding that respondent was likely to succeed on the merits of its claim. "[A]n order granting or refusing [a temporary injunction] neither establishes the law of the case nor constitutes an adjudication of the issues on the merits." *Village of Blaine v. Indep. Sch. Dist. No. 12, Anoka County*, 265 Minn. 9, 13, 121 N.W.2d 183, 187 (1963). The purpose of a temporary injunction is to "maintain the status quo until a case can be decided on the merits." *Id.*

Ordinarily, ordinances are "afforded a presumption of constitutionality, [but] ordinances restricting First Amendment rights are not so presumed." *State v. Castellano*, 506 N.W.2d 641, 644 (Minn. App. 1993). The district court reviewed the constitutionality of the anti-nudity ordinance under the framework established in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382 (2000). In *Pap's A.M.* the Supreme Court noted that the act of being "in a state of nudity" is not an inherently expressive condition but that nude dancing is expressive conduct within the outer ambit of the First Amendment's protection. *Pap's A.M.*, 529 U.S. at 289, 120 S. Ct. at 1391. The Court evaluated the general nudity ban under the framework set forth by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673 (1968) for content-neutral restrictions on symbolic speech. *Id*. at 296-302, 120 S. Ct. at 1395-98.

The *O'Brien* four-factor test requires that (1) the ordinance be within the power of the municipality to enact; (2) the ordinance further an important governmental interest; (3) the interest be unrelated to the suppression of free expression; and (4) the restriction be no greater than essential to further the municipality's interest. *Id.* Appellants argue that the district court abused its discretion in determining that respondent is likely to succeed on its claim that the ordinance is constitutional. Appellants specifically challenge the district court's conclusion that the ordinance furthers an important governmental interest and the restriction is no greater than essential to further the governmental interest.

The district court stated that respondent had demonstrated an important governmental interest when respondent made specific findings based on a report detailing

several studies examining the harmful secondary effects of nude-dancing establishments. The presence of harmful secondary effects may be sufficient to support an important governmental interest in prohibiting complete nudity, including totally nude dancing. *Id.* at 296, 120 S. Ct. at 1395. And the Supreme Court has held that, in determining whether secondary effects pose a threat, the respondent need not "conduct new studies or produce evidence independent of that already generated by other cities to demonstrate the problem of secondary effects, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* (quotation omitted). The district court's determination that respondent's secondary-effects justification would likely support a finding of an important governmental interest to support a ban on public nudity is not an abuse of discretion.

Appellants argue that respondent cannot demonstrate that it is likely to succeed in demonstrating an important governmental interest because it "considered absolutely no evidence whatsoever" of secondary effects when enacting the ordinance. Appellants base their argument on information gained in the course of discovery. In responding to appellants' discovery request for all documents reflecting the evidence considered by respondent in enacting the ordinances, respondent submitted only the meeting minutes and did not submit the documents enumerated in the ordinance as the basis for the secondary-effects determination. But the adult-use ordinances enacted together with the anti-nudity ordinance indicate that respondent considered the Minnesota Attorney General's analyses of several studies and reports detailing harmful secondary effects of sexually oriented businesses. Further, the meeting minutes do not compel a conclusion

that respondent does not have an important governmental interest in prohibiting people from being completely nude in public. Because the district court's decision is not a final determination on the merits, and because this court reviews the district court's determinations when granting a temporary injunction for an abuse of discretion, we are satisfied that the district court's determination that respondent was likely to succeed in demonstrating that the anti-nudity ordinance had an important governmental interest was not an abuse of discretion.

Finally, regarding the secondary-effects rationale supporting the important governmental interest, appellants argue that they have successfully cast doubt on respondent's purported important governmental interest and therefore the burden would shift to respondent to supplement the record with evidence renewing support for the theory that justifies the ordinance. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-39, 122 S. Ct. 1728, 1736 (2002) (dealing with a zoning ordinance). However, simply because a litigant contesting an ordinance has presented studies that cast some doubt on the evidence relied upon by the city does not mean that the city cannot continue to rely on its evidence. *See County of Morrison v. Wheeler*, 722 N.W.2d 329, 341 (Minn. App. 2006), *review denied* (Minn. Dec. 20, 2006). Whether or not appellants' studies are ultimately persuasive in undermining respondent's purported important governmental interest for the ordinance remains to be determined following the trial on the merits. The district court's interlocutory ruling that respondent has demonstrated support for its governmental interest of preventing harmful secondary effects is not an abuse of discretion.

Appellants also challenge the district court's determination that the ordinance's "incidental impact on the expressive element of nude dancing is *de minimuis.*" *See Pap's A.M.*, 529 U.S. at 301, 120 S. Ct. at 1397. The district court noted that "a very minimal" amount of covering is required to be in compliance with the ordinance. The subsequent denial of the contempt motion indicates that, for the purposes of the temporary injunction, the district court read the ordinance as requiring only pasties and a g-string to be in compliance with the ordinance. Because *Pap's A.M.* supports the district court's conclusion that a ban on total nudity may be constitutional, and because the district court has concluded that the ordinance may be subject to a more limiting construction, the district court's determination that respondent will likely succeed on the element requiring minimal incidental impact was not an abuse of discretion.

As stated above, the finding in a temporary-injunction proceeding that a party is likely to succeed on the merits is not binding, is not a determination of the merits of the case, and is not the law of the case. *Village of Blaine*, 265 Minn. at 13, 121 N.W.2d at 187. Likewise, any language in the district court's temporary-injunction order suggesting a view on the constitutionality of the anti-nudity ordinance is preliminary and not binding on the district court or the parties in the trial on the merits.

II.

Appellants next argue that the district court erred in only addressing the likelihood-of-success factor when issuing the original temporary injunction. Generally it is error for a district court to fail to analyze all of the *Dahlberg* factors when granting a temporary injunction. *State by Ulland v. Int'l Ass'n of Entrepreneurs of Am.*, 527

N.W.2d 133, 135 (Minn. App. 1995), *review denied* (Minn. April 18, 1995); *see also M.G.M. Liquor Warehouse*, 371 N.W.2d at 77 (holding it was error for the district court to only consider the public policy factor).

Here, however, appellants' memorandum in opposition to respondent's motion for a temporary injunction rested entirely on the argument that respondent's claims were unlikely to succeed on the merits. Although the memorandum does contain brief arguments alluding to the "other" *Dahlberg* factors, those arguments are premised entirely on the conclusion that respondent was unlikely to succeed on the merits. Similarly, appellants' motion to dissolve the temporary injunction is based strictly on a challenge to the preliminary determination that respondent is likely to succeed on the merits. Because respondent did not present the district court with arguments independent of the likelihood-of-success factor on the remaining *Dahlberg* factors, we decline to reach appellants' challenge to the district court's failure to analyze the remaining factors. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding appellate courts only review issues presented to and considered by the district court).

III.

Finally, appellants argue that the district court abused its discretion in denying the motion to dissolve the temporary injunction without findings of fact or a supporting memorandum. Appellants cite Minn. R. Civ. P. 52.01, for the proposition that findings on a motion to dissolve a temporary injunction are required. But the rule applies only to the original injunction order, stating that in "granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which

constitute the grounds for its action." Minn. R. Civ. P. 52.01. Appellants have not cited to any other authority requiring a district court to support denial of a motion to dissolve a temporary injunction with reiterated or additional findings.

We note that the district court's original temporary-injunction order contained ample detailed findings and legal analysis to support its conclusion that respondent was likely to succeed on the merits of its claim. Because appellants' motion to dissolve the temporary injunction contains no allegation that one or more of the factual or legal bases for the issuance of the temporary injunction has ceased to exist, we hold that the district court's summary denial of appellants' motion without factual findings was within the district court's discretion.

Affirmed.