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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0027**

City of Duluth,
Respondent,

vs.

120 East Superior Street, Duluth, Minnesota,
Appellant.

**Filed September 16, 2013
Affirmed
Smith, Judge**

St. Louis County District Court
File No. 69DU-CV-12-2953

Gunnar B. Johnson, Duluth City Attorney, Nathan LaCoursiere, M. Alison Lutterman, Assistant City Attorneys, Duluth, Minnesota (for respondent)

Randall D.B. Tighe, Golden Valley, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Rodenberg, Judge; and Smith, Judge.

UNPUBLISHED OPINION

SMITH, Judge

We affirm the district court's order granting respondent's motion for a partial temporary injunction because the district court did not abuse its discretion by requiring appellant to pay for two police officers to be present at appellant's place of business during its operating hours, including one hour before opening to one hour after closing.

We decline to address the constitutionality of Minn. Stat. § 609.74(1) because appellant's argument that the statute is unconstitutionally vague is not properly before the court.

FACTS

A law banning synthetic cannabinoids went into effect in June 2011. *Compare* Minn. Stat. § 152.027, subd. 6 (2012), *with* Minn. Stat. § 152.027 (2010). As a result, appellant 120 E. Superior St., Duluth, Minnesota (LPOE)¹ became a popular place for people to buy synthetic or “legal alternatives” to controlled substances because it was the only commercial operation in the area selling such alternatives. Subsequently, LPOE experienced an increase in the number of customers standing outside the store an hour before opening and throughout the day as well. The effect of selling synthetic drugs and the resulting behavior of LPOE patrons, from September 2011 to August 2012, gave rise to respondent City of Duluth's (city) public nuisance action.

From September 2011 to August 2012, LPOE sold, and continues to sell, many items such as “spice,” “bath salts,” “incense,” “watch cleaners,” “pipe cleaners,” and synthetic or designer drugs, such as synthetic marijuana, which act as alternatives to controlled substances. *See* Minn. Stat. § 152.027, subd. 6 (2012) (making it unlawful to sell synthetic cannabinoids). LPOE also continues to market “bath salts” and “incense” as synthetic drugs, which, although labeled “not for human consumption,” are used by

¹ The named defendant in the underlying action is real property located at 120 E. Superior St., Duluth, Minnesota, commonly known as Last Place on Earth (LPOE). L.P.O.C., Inc., JRC Enterprises, Inc. and James R. Carlson are also named appellants in this civil action. L.P.O.C., Inc. owns and operates LPOE. JRC Enterprises, Inc. owns the real estate and building occupied by LPOE. James R. Carlson (Carlson) is the owner of both JRC Enterprises, Inc. and L.P.O.C, Inc.

patrons for ingestion. The effect of LPOE becoming the sole supplier of synthetic drugs has resulted in LPOE experiencing a surge in customers. The increase of customers created problems for surrounding businesses. Neighboring businesses complained of a mass number of people congregating and loitering around LPOE. Police received calls that LPOE patrons blocked sidewalks and access to surrounding buildings and were engaging in loud, belligerent, and violent conduct. Furthermore, LPOE customers vomited, urinated, and defecated near buildings surrounding LPOE. Moreover, LPOE customers engaged in littering, panhandling, and sexual overtures and verbal abuse of passing pedestrians and patrons of surrounding businesses. LPOE patrons also threatened, insulted, and intimidated employees of surrounding buildings. Affidavits from neighboring businesses also reported property damage, loss of walk-in revenue, and a reduction in foot traffic.

LPOE's sale of synthetic drugs and the resulting behavior of LPOE patrons also affected emergency responders and Duluth's resources. The conduct of LPOE patrons resulted in the police responding to 2,843 calls for service to LPOE and the neighboring blocks from September of 2011 to August of 2012. The increase in police presence resulted in an increased burden on taxpayers after LPOE became the sole retailer of designer drugs in Duluth. According to Lieutenant Eric Rish of the Duluth Police department:

The cost to the public of providing extra police enforcement and security at LPOE from November 2011 to [October 2012 was] at \$97,450 . . . This figure does not even begin to factor in the overall cost of police services related to the sale and

recreational use of synthetic cannabinoids and its derivative impacts throughout the community.

The district court noted, “It is clear that the sale of these substances is the primary cause of the 81% increase in requests for law enforcement in the area.” In addition, the health effects on users ingesting drugs have created a burden on hospitals. As one medical professional noted:

Aside from the health risks . . . the emergency medical costs of treating these patients is often quite high, which generally raises the costs of medical care for all of us, particularly where the health care institutions themselves must cover the costs of treatment for the uninsured.

Beyond the burden imposed on emergency responders, the record demonstrates through a variety of affidavits wider community problems developing because of the use of such drugs. One example is parents using synthetic drugs being unable to take care of their children. Nearly 30% of all new petitions for CHIPS—Children In Need of Protection or Services—are related to synthetic drug use, which is creating an even larger burden on taxpayers. In addition, addiction centers are losing clients due to the ease and convenience of purchasing legal alternatives at LPOE.

Moreover, the record also shows that LPOE customers are facing severe health problems by ingesting synthetic products purchased at LPOE. Synthetic drugs are highly addictive and dangerous. One physician describes synthetic drugs as “products [that] are unsafe and are a definite threat to the health and lives of the individuals using them.” Emergency medical physicians report users experience agitation, elevated heart rates, elevated blood pressure, hyperthermia, paranoia, panic attacks, seizures, agitation,

anxiety, and psychosis. Users also exhibit aggression and combativeness. To treat these reactions, doctors treat users with heavy sedation, intubation, ventilation support, and/or admission into intensive care units.

As a result of LPOE selling synthetic drugs, and the resulting impact of LPOE patrons from September 2011 to August 2012, the city served LPOE with a notice of public nuisance in order to protect the health, safety, and welfare of the people of Duluth. The city filed a summons and verified complaint and filed for temporary injunctive relief under Minn. Stat. § 617.82(c). LPOE filed an answer and counterclaim, asserting that LPOE did not violate the public-nuisance statute and that Minn. Stat. § 609.74(1) is unconstitutional. However, LPOE has not disputed the factual allegations regarding LPOE customer behavior, or the effects of LPOE patrons on emergency services and the burden created by such services on taxpayers, emergency rooms, CHIPS, or any other effect created by such behavior claimed by the city, or the health risks of using such products. The district court granted, in part, the city's motion for temporary injunction (TI) ordering LPOE to reimburse the public for the cost and maintenance of daily police presence, but it did not order LPOE to suspend its commercial business or restrict or prohibit the sale of synthetic drugs. Further, the district court did not make any determination as to the constitutionality of Minn. Stat. § 609.74(1). This appeal, challenging the issuance of the partial TI, followed.²

² In a special term order, this court denied LPOE's motion to vacate the injunction and remand for determination on the constitutionality claim, and denied the city's motion to dismiss and expedite the appeal.

DECISION

LPOE contends that the district court erred by issuing the TI because (1) LPOE did not maintain a public nuisance, and (2) the public-nuisance statute is unconstitutionally vague. LPOE urges us to vacate the TI and remand for the district court to determine the merits of LPOE's constitutional claim. We address each argument in turn.

I.

We will not reverse a TI unless the district court has abused its discretion. *Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 209 (Minn. 1993); *Metro. Sports Facilities Comm'n v. Minn. Twins P'ship*, 638 N.W.2d 214, 220 (Minn. App. 2002), *review denied* (Minn. Feb. 4, 2002). When reviewing an issuance of a TI, we consider the facts in the light most favorable to the prevailing party. *Bud Johnson Constr. Co. v. Metro. Transit Comm'n*, 272 N.W.2d 31, 33 (Minn. 1978). “[W]here injunctive relief is explicitly authorized by statute . . . proper exercise of discretion requires the issuance of an injunction if the prerequisites for the remedy have been demonstrated and the injunction would fulfill the legislative purposes behind the statute’s enactment.” *Wadena Implement Co. v. Deere & Co.*, 480 N.W.2d 383, 389 (Minn. App. 1992), *review denied* (Minn. Mar. 26, 1992).

Ordinarily we apply the five *Dahlberg* factors to determine whether the district court abused its discretion by ordering the TI. *See, e.g., Morse v. City of Waterville*, 458 N.W.2d 728, 729 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990) (citing *Dahlberg Bros., Inc. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-

22 (1965)). However, because the public-nuisance statute sets a statutory framework for the district court to apply when issuing a TI on the basis of public nuisance, we analyze whether the district court abused its discretion in its application of that statutory framework. *See Wadena*, 480 N.W.2d at 389. Minn. Stat. § 617.82(c) explicitly authorizes the district court to issue a TI if the following four prerequisites have been satisfied: (1) the prosecuting attorney provided notice, as stipulated pursuant to Minn. Stat. § 617.81, subd. 4, (2) 30 days have passed since service of the notice, (3) the named respondent received a prior show cause notice of hearing and had an opportunity to be heard, and (4) there was proof of nuisance as described under Minn. Stat. § 617.81, subd. 2. *See* Minn. Stat § 617.82(c). LPOE is appealing only the fourth prerequisite, contending that LPOE did not engage in public nuisance. Therefore, we determine whether the district court abused its discretion by finding that LPOE violated Minn. Stat. § 617.81, subd. 2.

Minn. Stat. § 617.81, subd. 2 lists ten acts that constitute a nuisance. The most pertinent act of nuisance, to this case, is listed under section 617.81, subd. 2(a)(2)(iii), which defines an act as public nuisance when there are two or more separate behavioral incidents within the previous twelve months, such that a person intentionally “maintains or permits a condition, within a building, which unreasonably annoys, injures or endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public.” Minn. Stat. §§ 609.74(1), 617.81, subd. 2.

The district court determined that the products sold by LPOE created a public nuisance because LPOE patrons created conditions that “unreasonably annoy[ed],

injur[ed], or endanger[ed] the safety, health, morals, comfort, or repose of any considerable number of members of the public.” Minn. Stat. §§ 609.74(1), .81, subd. 2(a)(2)(iii). The district court found that LPOE’s sale of the synthetic products created a public nuisance due to the behavior by LPOE patrons. The district court considered the 81% increase in police calls resulted from disruption to nearby businesses, and LPOE patrons’ disorderly, unsafe, and violent behavior. After comparing the calls to police in the 12 months before and after LPOE became the sole retailer of synthetic drugs in Duluth, the district court concluded LPOE was the cause, thus LPOE violated Minn. Stat. § 617.81, subdivision 2.

LPOE’s contention that there was no proof of nuisance is unpersuasive. There is ample evidence in the record that LPOE patrons created a public nuisance and that the selling of synthetic drugs caused the following behavior: LPOE patrons engaged in urinating, vomiting and defecating in other business’ entranceways, and LPOE patrons harassed, threatened, intimidated patrons and employees of other businesses. Such conduct is dangerous to the safety and health of the citizens of Duluth. The fact that LPOE sold synthetic drugs from September 2011 to August 2012, resulting in several incidents of conduct that endangered the safety and health of the public, satisfies Minn. Stat. § 617.81, subd. 2. Because the record is replete with evidence of nuisance behavior, the district court did not abuse its discretion when it found LPOE maintained a public nuisance.

II.

LPOE next argues Minn. Stat. § 609.74(1) is unconstitutionally vague on its face and as applied, requesting this court to vacate the TI and remand the matter to the District Court to consider LPOE's constitutional challenge.

As a preliminary matter, the district court did not address LPOE's constitutional claim. The district court was not required to analyze such a claim during a TI hearing because a TI does not establish the law of the case and does not determine the issues involved. *Vill. of Blaine v. Indep. Sch. Dist. No 12*, 265 Minn. 9, 13, 121 N.W.2d 183, 187-188 (1963). The Minnesota Supreme Court recognizes that TIs do not establish law or the merit of a claim. *Indep. Sch. Dist. No. 35 v. Engelstad*, 274 Minn. 366, 370, 144 N.W.2d 245, 248 (1966) (“[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.”). Because a TI does not establish law or determine the issues involved, the district court was not required to analyze the constitutionality of the public-nuisance statute during a TI hearing making LPOE's request to vacate and remand is unnecessary because LPOE can raise its constitutional challenge during the permanent injunction hearing.

Regarding the constitutionality of the public-nuisance statute, we generally do not consider matters that were not argued to or considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (“A reviewing court must generally consider ‘only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.’”) (quoting *Thayer v. Am. Fin. Advisors, Inc.*, 322

N.W.2d 599, 604 (Minn. 1982)). Because the trial court did not consider or address LPOE's constitutionality claim, it is inappropriate for this court to analyze the issue.

Affirmed.