STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1975

Nancy Leppink,
Commissioner of the Minnesota Department of Labor and Industry, et al.,
Respondents,

vs.

Water Gremlin Company,
Appellant.

Filed June 1, 2020
Affirmed
Cochran, Judge

Ramsey County District Court
File No. 62-CV-19-7606

Keith Ellison, Attorney General, Peter Surdo, Special Assistant Attorney General, Oliver Larson, Colin O'Donovan, Assistant Attorneys General, St. Paul, Minnesota (for respondents)

Thaddeus R. Lightfoot, Timothy J. Droske, Anna K.B. Finstrom, Nur Ibrahim, Dorsey & Whitney LLP, Minneapolis, Minnesota (for appellant)

Considered and decided by Segal, Chief Judge; Ross, Judge; and Cochran, Judge.

S Y L L A B U S

A "public health nuisance" under Minn. Stat. § 145.075 (2018) is any activity or failure to act that adversely affects the public health. An activity or failure to act affects the public health if it affects a considerable number of persons, even if the effects are geographically dispersed.

O P I N I O N

COCHRAN, Judge

Appellant Water Gremlin Company challenges portions of an injunction order that require it to test for and clean up lead in the homes of its current and former employees. We affirm.

FACTS

This action stems from the discovery of a cohort of children with elevated levels of lead in their blood. Each affected child has at least one parent who was employed by Water Gremlin at the company's plant in White Bear Township, where lead fishing sinkers and battery terminals are manufactured. Following multiple inspections of Water Gremlin's operations, the department of labor and industry issued an order temporarily shutting down operations at the plant on October 28, 2019.

Also on October 28, 2019, the commissioner of labor and industry and the commissioner of health (respondents in this appeal) filed a complaint and a motion for a "preliminary injunction" in district court.[1] The complaint alleges that, following reports of the cohort of children with elevated blood lead levels, Ramsey County conducted an investigation that ruled out sources of lead exposure among the children other than lead from the Water Gremlin plant. According to the complaint, investigators "found incredibly high concentrations of lead in the Water Gremlin employees' cars, and elevated levels in

[1] Preliminary injunction is a term generally used in federal court, while the Minnesota Rules of Civil Procedure use "temporary injunction." *See* Minn. R. Civ. P. 65.02 (governing temporary injunctions).

certain areas of their homes, such as entryway floors and closets." The complaint further alleges that the investigators concluded that "take-home" lead dust from the Water Gremlin plant was the source of lead resulting in the elevated blood lead levels in the employees' children. And the complaint alleges that Ramsey County attempted to work with Water Gremlin to improve its industrial practices, but that after many months and the discovery of additional children with elevated blood lead levels, Ramsey County escalated the case to the department of health.

The complaint cites the commissioners' and district court's authority under Minnesota Statutes sections 145.075 and 182.662 (2018). As relief, the commissioners requested that operations at Water Gremlin be enjoined until it adopted measures to prevent the migration of lead from its plant, that Water Gremlin be required to facilitate notice to affected individuals, and that Water Gremlin engage in contamination cleanup, including testing and cleaning of employee vehicles and residences.

Following a hearing on October 31, 2019, the district court issued an order granting a temporary injunction, enjoining operations (continuing the shutdown), requiring the parties to meet and confer on a phased remediation plan, and continuing the matter to November 1, 2019. On November 1, 2019, the district court held a hearing and signed an order that lifted the injunction against manufacturing operations on November 5, 2019, and required Water Gremlin to comply with enumerated phase-one requirements, including employee training, worksite modifications, and third-party monitoring to ensure effective workplace procedures.

On November 6, 2019, the district court held a hearing on the remaining phases of the remediation plan. In a written submission to the district court and during the November 6 hearing, Water Gremlin challenged the authority of the commissioners and the district court to require Water Gremlin to perform testing and cleanup in residences of past and current employees. Water Gremlin argued that the commissioner of health was not authorized to seek such injunctive relief under Minn. Stat. § 145.075 because the migration of lead from Water Gremlin's plant into a number of employee homes did not constitute a "public health nuisance" within the meaning of that statute. *See* Minn. Stat. § 145.075 (authorizing commissioner of health to bring district court action to enjoin a public health nuisance). And Water Gremlin argued that the commissioner of labor and industry was not authorized to request such injunctive relief under Minn. Stat. § 182.662 because there were no "identified issues with the manufacturing process," and neither state nor federal law "provide any specific regulations related to the migration of lead particles from the workplace to other locations." *See* Minn. Stat. §§ 182.655 (governing adoption and enforcement of occupational safety and health standards), .662 (providing procedure for commissioner of labor and industry to seek injunctive relief related to dangerous workplace conditions) (2018).

On November 22, 2019, the district court issued an order adopting phase-two and phase-three requirements. The November 22 order included a variety of measures designed to reduce lead exposure in non-production areas of the plant and to prevent migration of "take-home" lead from the plant. The order also required cleaning of employee vehicles as well as residential lead testing and cleanup. The only provisions of the order that Water

Gremlin challenges on appeal are those related to residential testing and cleanup. The specific language at issue is set forth below:

> **Residential Testing and Cleanup**
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> 9. The Commissioners shall provide notice of potential residential lead contamination to all current Water Gremlin employees, and former employees who worked at Water Gremlin within the past two years, including full-time, part-time, and temporary employees. All notified employees shall be given the option of having their homes tested for lead contamination at no cost to them. Testing shall occur only with the express consent of the employee-resident.
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> 10. Water Gremlin shall, through the use of certified lead abatement contractors, conduct testing of the homes of all employees who request testing. Employees whose homes test above the applicable residential lead standards that exist at the time of testing shall be given the option of having their homes decontaminated at no cost to them. Cleanup shall occur only with the express consent of the employee-resident.
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> 11. Water Gremlin shall, through the use of certified lead abatement contractors, conduct the cleanup of the contaminated homes of current and former full-time and part-time employees who request cleanup. The decontamination standard shall be the residential lead standards that exist at the time cleanup takes place. (*See* Minn. R. 4761.2510, subp. 2.)
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> 12. This Court may, based on testing results, expand the scope of Water Gremlin's cleanup duty to current and former temporary employee homes contaminated by above-standard levels of take-home lead.
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> 13. All initial and post-abatement testing results shall be reported by the certified lead abatement contractors directly to the Commissioners.

On December 10, 2019, Water Gremlin appealed the November 22 injunction order and filed a motion to expedite the appeal, which this court granted. On December 27, 2019,

the district court issued an order staying paragraphs 10-13 of the November 22 order pending this appeal but ordering the parties to proceed with the notices required by paragraph 9.

Also on December 27, 2019, the district court issued an order setting forth findings of fact and conclusions of law related to its prior orders, which it incorporated into its prior orders. In the order, the district court found that "Water Gremlin has failed to take the steps necessary to prevent its employees from carrying lead off site, thereby endangering the safety of employees' children, subsequent occupants of contaminated residences and vehicles, and anyone else who comes in contact with such areas." The court further determined that "the migration of lead from the Water Gremlin plant into the homes and vehicles of past and present Water Gremlin employees is a 'public health nuisance' within the definition of Minn. Stat. § 145.075."

ISSUES

I. Did the district court err by determining that Water Gremlin's failure to prevent the migration of lead from its plant to its employees' homes is a public health nuisance under Minn. Stat. § 145.075?

II. Should this court reach Water Gremlin's argument that the district court exceeded the scope of its injunctive authority under Minn. Stat. § 145.075 by requiring Water Gremlin to perform residential lead testing and cleanup?

ANALYSIS

This court reviews a district court decision granting injunctive relief for an abuse of discretion. *See Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203,

209 (Minn. 1993) (temporary injunction); *Cherne Indus., Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 91 (Minn. 1979) (permanent injunction).[2] "A district court's findings regarding entitlement to injunctive relief will not be set aside unless clearly erroneous." *Haley v. Forcelle*, 669 N.W.2d 48, 55 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003). But we apply a de novo standard of review to statutory interpretation and the application of a statute to undisputed facts. *State v. Minn. Sch. of Bus., Inc.*, 899 N.W.2d 467, 471 (Minn. 2017).

The crux of this appeal is the scope of the district court's authority under Minn. Stat. § 145.075, which provides in its entirety:

> In addition to any other remedy provided by law, the commissioner [of health] may in the commissioner's own name bring an action in the court of appropriate jurisdiction to enjoin any violation of a statute or rule which the commissioner is empowered to enforce or adopt, or to enjoin as a public health nuisance any activity or failure to act that adversely affects the public health.

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[2] The law generally distinguishes between temporary and permanent injunctions. *See, e.g.*, *State ex rel. Neighbors Organized in Support of Env't v. Dotty*, 396 N.W.2d 55, 58 (Minn. App. 1986). Before granting a temporary injunction, a district court must consider the factors articulated by the supreme court in *Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn. 1965). *See In re Estate of Nelson*, 936 N.W.2d 897, 910-11 (Minn. App. 2019) (reversing temporary injunction issued without considering *Dahlberg* factors); *Dotty*, 396 N.W.2d at 58-59 (rejecting argument that appellant was entitled to temporary statutory injunction without consideration of *Dahlberg* factors). A critical distinction between temporary and permanent injunctions is that "the facts on which the [district] court acts in granting a temporary injunction are, by the nature of the situation, provisional and . . . the injunctive authority exercised will continue only until a more scientific analysis of the problem is made possible by trial on the merits." *Dahlberg*, 137 N.W.2d at 321. In this case, the district court did not apply the *Dahlberg* factors and granted what is, in essence, complete relief in the form of a temporary injunction based on provisional findings. Because Water Gremlin does not assert error in this regard, we do not address the propriety of the district court's injunction proceedings.

Water Gremlin makes two arguments on appeal in support of its assertion that the district court exceeded its authority under section 145.075. First, Water Gremlin asserts, as it did before the district court, that the authority for the injunction in this case cannot be based on section 145.075 because the circumstances underlying this case do not meet the definition of a "public health nuisance" under that statute and because there has been no allegation or finding of any statute or rule violation.[3] Second, for the first time on appeal, Water Gremlin argues that, even if its failure to prevent the migration of lead from its plant is a "public health nuisance," the scope of the district court's authority under section 145.075 extends only to enjoining the "activity or failure to act" that constitutes the public health nuisance, and does not extend to requiring residential testing and cleanup.

We address each argument in turn.[4]

[3] Water Gremlin limits its challenge in this appeal to the provisions of the order requiring residential testing and cleanup. Counsel for Water Gremlin asserted at oral argument that the vehicle-cleaning requirements of the order could be challenged on the same grounds on which it is challenging the residential requirements, but that Water Gremlin has elected to comply with the vehicle-cleaning requirements.

[4] Water Gremlin also asserts that the injunction cannot be based on Minn. Stat. § 182.662 because the authority of the commissioner of labor and industry under that statute is limited to conditions in the workplace. In response, the commissioners state that the district court did not make findings and conclusions as to whether section 182.662 provides authority for the challenged provisions of the injunction. They also request that, if this court does not affirm under section 145.075, the matter be remanded to the district court "to develop a record on whether section 182.662 applies." Because we affirm under section 145.075, we do not further address the arguments regarding section 182.662.

I. The district court did not err by determining that Water Gremlin's failure to prevent the migration of lead from its plant is a public health nuisance under Minn. Stat. § 145.075.

Section 145.075 authorizes a district court to "enjoin" a "public health nuisance," which it defines as "any activity or failure to act that adversely affects the public health." But the statute does not define "public health." "When a statute . . . does not contain a definition of a word or phrase, we look to the common dictionary definition of the word or phrase to discover its plain and ordinary meaning." *Jaeger v. Palladium Holdings, LLC*, 884 N.W.2d 601, 605 (Minn. 2016) (quotation omitted); *see also* Minn. Stat. § 645.08(1) (2018) (providing that in construing statutes, words and phrases are to be given "their common and approved usage"). The term "public health" is commonly understood to mean "the health of the community at large." *Black's Law Dictionary* 835 (10th ed. 2014).[5] Thus, a "public health nuisance" within the meaning of section 145.075 is any activity or failure to act that adversely affects the health of the community at large.

Here, the district court found that "Water Gremlin has failed to take the steps necessary to prevent its employees from carrying lead off site, thereby endangering the safety of employees' children, subsequent occupants of contaminated residences and vehicles, and anyone else who comes in contact with such areas." On this basis, the district

[5] "Public health" is sometimes defined as a discipline, rather than a state or condition. *See, e.g.*, *The American Heritage Dictionary of the English Language* 1424 (5th ed. 2011) (defining "public health" as "[t]he science and practice of protecting and improving the health of a community, as by preventive medicine, health education, control of communicative diseases, application of sanitary measures, and monitoring of environmental hazards"). In the context of section 145.075, the state-or-condition definition is more apt.

court concluded that "the migration of lead from the Water Gremlin plant into the homes and vehicles of past and present Water Gremlin employees is a 'public health nuisance' within the definition of Minn. Stat. § 145.075." Based on the plain language of section 145.075 and the common understanding of "public health," the district court did not clearly err in this regard. As the district court explained during the November 6 hearing: "The community that's impacted is the community of the employees, their families, their friends, and all those that may have contact with them or their property. The migration of lead is an unreasonable interference with the public's right not to be exposed to lead."

Relying on public-nuisance caselaw, Water Gremlin argues that lead migrating from its plant does not adversely affect the public health because it does not affect a large enough group of people and because the effects are geographically dispersed. As we note above, "public health" is "the health of the community at large." *Black's Law Dictionary* 835 (10th ed. 2014). "Community" in turn, is defined as "[a] neighborhood, vicinity, or locality" or "[a] society or group of people with similar rights or interests." *Id.* at 338. In the context of public-nuisance claims, the supreme court has recognized that "[a] 'public' nuisance does not necessarily mean one affecting the government or the whole community of the state. Very few nuisances are thus extended in their effects. It is 'public' if it affects the surrounding community generally or the people of some local neighborhood." *Village of Pine City v. Munch*, 44 N.W. 197, 197-98 (Minn. 1890). The supreme court has also stated that a nuisance becomes public when "a considerable number of persons" are affected by it. *City of St. Paul v. Gilfillan*, 31 N.W. 49, 50 (Minn. 1886). In this case, the

district court found that Water Gremlin's failure to prevent the migration of lead from its plant endangered the health of its employees, their family members, subsequent occupants of their residences, and all other members of the public who may have come in contact with their property.[6] The impact of Water Gremlin's conduct extends to numerous members of the surrounding community. We reject Water Gremlin's argument that this group of persons was not sufficiently large or localized to support a finding of a public health nuisance. *Id.*[7]

Water Gremlin also argues that lead dust that has migrated to private homes cannot constitute a public health nuisance. But the "public health nuisance" within the meaning of Minn. Stat. § 145.075 found by the district court was "the migration of lead" as a result of Water Gremlin failing "to take the steps necessary to prevent its employees from carrying lead off site." This migration of lead is adverse to public health because lead exposure can have very serious health consequences, particularly for young children.[8] That

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[6] While the full scope of the impact of Water Gremlin's conduct is not currently known, Water Gremlin's brief to this court acknowledges that as many as 1,000 employees' homes may have been affected by "take-home" lead over the last two years.

[7] Water Gremlin also relies on this court's interpretation of the word "public" in a statute governing recreational-use immunity, Minn. Stat. § 604A.20 (2016), in *Ouradnik v. Ouradnik*, 897 N.W.2d 300, 306 (Minn. App. 2017). In that case, this court addressed an argument that an individual was entitled to recreational-use immunity because he opened his property to family members for recreational use. *Ouradnik*, 897 N.W.2d at 306. This court held that recreational-use immunity applies only when a property owner opens up land for use by the public, and that "public" means "community, which is more than a few family members." *Id.* at 305-06. *Ouradnik* involved a distinct statutory scheme. Moreover, the lead migration in this case extended beyond a "few family members."

[8] There is no dispute in this appeal that lead exposure is dangerous for children. The district court took judicial notice that "lead is a known neurotoxin, and is especially dangerous to young children." The district court also accepted as credible, for purposes of granting injunctive relief, a declaration submitted by the commissioners averring that "even low

the consequences of the migration may manifest in private homes does not undermine the conclusion that Water Gremlin's failure to take the necessary steps to prevent the migration of lead is itself "a public health nuisance" within the meaning of the statute. The phrase "public health nuisance" includes any "*failure to act* that adversely affects the public health." Minn. Stat. § 145.075 (emphasis added). The statute contains no limit on where the adverse health effects must occur.

In sum, the record supports the district court's determination that Water Gremlin's failure to take steps to prevent the migration of lead from its manufacturing plant to the homes of past and present employees is a public health nuisance.

II. Water Gremlin did not properly preserve, and we therefore do not reach, its argument that the district court exceeded its authority under Minn. Stat. § 145.075 by ordering Water Gremlin to conduct residential lead testing and cleanup.

Water Gremlin next argues that the district court exceeded the scope of its injunctive authority under Minn. Stat. § 145.075 by ordering Water Gremlin to conduct residential testing and cleanup to address the public health nuisance found by the district court. Water Gremlin contends that the district court's authority under Minn. Stat. § 145.075 to enjoin "a public health nuisance" is limited to enjoining only an "activity or failure to act" by Water Gremlin and does not extend to ordering it to test for and clean up lead in its

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blood lead levels can cause learning disabilities and problems with cognition and attention." And Water Gremlin admitted in its answer to the commissioners' complaint that "lead can have neurotoxic effects, including in children."

employees' homes.[9] Water Gremlin makes this argument "separately and independently" from its primary argument addressed above. The commissioners argue that Water Gremlin failed to make this argument to the district court and that this court should not address it. We agree.

"It is an elementary principle of appellate procedure that a party may not raise an issue or argument for the first time on appeal and thereby seek appellate relief on an issue that was not litigated in the district court." *Doe 175 ex rel. Doe 175 v. Columbia Heights Sch. Dist., ISD No. 13*, 842 N.W.2d 38, 42 (Minn. App. 2014) (citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988)); *see also Thayer v. Am. Fin. Advisers, Inc.*, 322 N.W.2d 599, 604 (Minn. 1982), *abrogated on other grounds by Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344 (Minn. 2003); *Thompson v. Barnes*, 200 N.W.2d 921, 927 (Minn. 1972). "Nor may a party obtain review by raising the same general issue litigated below but under a different theory." *Thiele*, 425 N.W.2d at 582. This principle "applies whether the question is one of fact or of law." *Doe 175*, 842 N.W.2d at 43 (quoting *In re Judicial Ditch No. 1*, 167 N.W. 124, 125 (Minn. 1918)). Moreover, although not "ironclad," *Putz v. Putz*, 645 N.W.2d 343, 350 (Minn. 2002) (quotation omitted), the principle is regularly observed by both the supreme court and this court. *See Doe 175*, 842 N.W.2d at 43 n.1 (collecting Minnesota cases and noting consistency with federal caselaw); *cf. Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 584 n.2 (Minn. 2010) ("We have

[9] Water Gremlin acknowledges that section 145.075 also authorizes a district court to enjoin certain statute and rule violations, but emphasizes that there has been no allegation or finding that Water Gremlin has violated any statute or rule.

reserved the right in rare cases to examine such an issue not considered by the [district] court as the interests of justice may require." (citing Minn. R. Civ. App. P. 103.04)).

Before the district court, Water Gremlin's argument with respect to Minn. Stat. § 145.075 was limited to its assertion that the migration of lead from its plant and into employee homes did not constitute "a public health nuisance" within the meaning of the statute. Water Gremlin did not argue any other basis for limiting the district court's authority to issue injunctive relief under Minn. Stat. § 145.075. In other words, the only argument that Water Gremlin made to the district court regarding the scope of Minn. Stat. § 145.075 is the argument that we have addressed in section I.

The commissioners argue in their appellate brief that Water Gremlin's failure to raise its alternative argument regarding the district court's authority under Minn. Stat. § 145.075 precludes our consideration of that issue on appeal. In its reply brief, Water Gremlin does not dispute that it failed to raise the issue below. Nor does it respond to the commissioners' argument that the issue has been waived. Because Water Gremlin did not raise this second argument to the district court, and because it has articulated no basis for this court to depart from the principle against reviewing issues that have not been so preserved, we do not reach this issue in this appeal.[10]

D E C I S I O N

The district court did not err by determining that the migration of lead out of Water Gremlin's plant and into employee homes constitutes a public health nuisance under Minn.

[10] We do, however, recognize that the parties have differing views on the merits of this issue. We express no opinion as to the merits.

Stat. § 145.075. Water Gremlin failed to preserve for appellate review an alternative argument regarding the scope of the district court's authority under Minn. Stat. § 145.075. Because our determination of the only issue properly preserved for appellate review does not provide a basis for reversing the district court's injunction order, we affirm.

Affirmed.