

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MARIN GENERAL SERVICES
AUTHORITY et al.,

Plaintiffs and Respondents,

v.

NOVATO TAXI et al.,

Defendants and Appellants.

A130764

(Marin County
Super. Ct. No. CIV 1001653)

Local governments must regulate privately operated taxicab companies to protect public safety. (Govt. Code, § 53075.5)¹ The Marin General Services Authority (MGSA) administers a variety of county-wide programs in Marin County, including regulation and permitting of taxicabs. MGSA regulations require taxicab companies to report the results of state-required periodic screening tests of drivers for drugs and alcohol as a condition of permitting. Novato Taxi and its owner, Dan Carlson (collectively, appellants), maintained that the reporting requirement conflicted with, and was preempted by, section 53075.5, subdivision (b)(3)(A)(iv), and refused to comply.

MGSA and the City of Novato (collectively, respondents) obtained an order enjoining appellants from operating a taxicab business without the required permits. Rather than appeal from the order granting a preliminary injunction, appellants

¹ Unless otherwise noted, all further statutory references are to the Government Code.

unsuccessfully filed a motion to dissolve it. On appeal from the order denying the motion to dissolve, appellants argue that the trial court misconstrued section 53075.5. Because this argument should have been raised in an appeal from the order granting the preliminary injunction and the time to file such an appeal has long since passed, we must dismiss the appeal.

I. REGULATORY FRAMEWORK

The California Constitution provides: “A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” (Cal. Const., art. XI, § 7.) “The regulation of the taxicab industry is a traditional subject of the police power of cities and counties.” (*Cotta v. City and County of San Francisco* (2007) 157 Cal.App.4th 1550, 1560 (*Cotta*); see also Veh. Code, § 21100, subd. (b) “[I]ocal authorities may adopt rules and regulations by ordinance or resolution” regarding “[I]icensing and regulating the operation of vehicles for hire and drivers of passenger vehicles for hire”). “California courts have consistently held that taxicab drivers do not obtain any vested right in the grant of permission to operate taxicabs on the public roadways. Rather, that permission may be altered at the discretion of the issuing authority.” (*Cotta*, at p. 1560.)

The Legislature of the State of California has, in enacting section 53075.5, specifically determined that local governments must regulate privately operated taxicab companies to protect public safety. (Stats. 1983, ch. 1260, § 1, p. 4999.)

Section 53075.5 provides, in relevant part:

“(a) Notwithstanding Chapter 8 (commencing with Section 5351) of Division 2 of the Public Utilities Code, every city or county shall protect the public health, safety, and welfare by adopting an ordinance or resolution in regard to taxicab transportation service rendered in vehicles designed for carrying not more than eight persons, excluding the driver, which is operated within the jurisdiction of the city or county.

“(b) Each city or county shall provide for, *but is not limited to providing for*, the following: [¶] . . . [¶]

“(3)(A) A mandatory controlled substance and alcohol testing certification program. *The program shall include, but need not be limited to, all of the following requirements:*

“(i) Drivers shall test negative for each of the controlled substances specified in Part 40 (commencing with Section 40.1) of Title 49 of the Code of Federal Regulations, before employment. Drivers shall test negative for these controlled substances and for alcohol as a condition of permit renewal or, if no periodic permit renewals are required, at such other times as the city or county shall designate. As used in this section, a negative test for alcohol means an alcohol screening test showing a breath alcohol concentration of less than 0.02 percent.

“(ii) Procedures shall be substantially as in Part 40 (commencing with Section 40.1) of Title 49 of the Code of Federal Regulations, except that the driver shall show a valid California driver’s license at the time and place of testing, and except as provided otherwise in this section. Requirements for rehabilitation and for return-to-duty and followup testing and other requirements, except as provided otherwise in this section, shall be substantially as in Part 382 (commencing with Section 382.101) of Title 49 of the Code of Federal Regulations.

“(iii) A test in one jurisdiction shall be accepted as meeting the same requirement in any other jurisdiction. Any negative test result shall be accepted for one year as meeting a requirement for periodic permit renewal testing or any other periodic testing in that jurisdiction or any other jurisdiction, if the driver has not tested positive subsequent to a negative result. However, an earlier negative result shall not be accepted as meeting the pre-employment testing requirement for any subsequent employment, or any testing requirements under the program other than periodic testing.

“(iv) *In the case of a self-employed independent driver, the test results shall be reported directly to the city or county, which shall notify the taxicab leasing company of record, if any, of positive results. In all other cases, the results shall be reported directly to the employing transportation operator, who may be required to notify the city or county of positive results.*

“(v) All test results are confidential and shall not be released without the consent of the driver, except as authorized or required by law.

“(vi) Self-employed independent drivers shall be responsible for compliance with, and shall pay all costs of, this program with regard to themselves. Employing transportation operators shall be responsible for compliance with, and shall pay all costs of, this program with respect to their employees and potential employees, except that an operator may require employees who test positive to pay the costs of rehabilitation and of return-to-duty and followup testing.

“(vii) Upon the request of a driver applying for a permit, the city or county shall give the driver a list of the consortia certified pursuant to Part 382 (commencing with Section 382.101) of Title 49 of the Code of Federal Regulations that the city or county knows offer tests in or near the jurisdiction.

“(B) No evidence derived from a positive test result pursuant to the program shall be admissible in a criminal prosecution concerning unlawful possession, sale or distribution of controlled substances.

“(c) Each city or county may levy service charges, fees, or assessments in an amount sufficient to pay for the costs of carrying out an ordinance or resolution adopted in regard to taxicab transportation services pursuant to this section.

“(d) *Nothing in this section prohibits a city or county from adopting additional requirements for a taxicab to operate in its jurisdiction.*

“(e) For purposes of this section, ‘employment’ includes self-employment as an independent driver.” (Italics added.)

II. FACTUAL AND PROCEDURAL BACKGROUND

The City of Novato has delegated primary responsibility for taxicab regulation to MGSA, but retained its traditional police power authority over enforcement of its ordinances. In 2006, MGSA passed the Marin General Services Authority Taxi Regulation Program (MGSA Taxicab Regulations), which are the subject of this litigation. The MGSA Taxicab Regulations require company, driver, and vehicle permits for taxicabs operating within Marin County.

Under the MGSA Taxicab Regulations, “[n]o company shall operate or permit a Taxicab owned or controlled by it to be operated as a vehicle for hire . . . without having first obtained a Company Permit from the MGSA.” One of the requirements for a company permit is “[s]ubmission of a copy of the Company’s drug and alcohol policy which must include at a minimum that employment or an offer of employment for any Driver is conditioned upon an acceptable drug and alcohol test meeting the requirements of these regulations and of . . . Section 53075.5” In order to obtain a permit, a driver is required to provide “[e]vidence of compliance with the mandatory controlled substance and alcohol testing certification program, as set forth below: [¶] i. Drivers shall show proof from a drug testing company approved by the Executive Officer that the Driver tested negative for each of the controlled substances specified in Part 40 (commencing with Section 40.1) of Title 49 of the Code of Federal Regulations, before employment. Drivers must also test negative for alcohol. Drivers must show proof of negative tests for these controlled substances and for alcohol as a condition of Permit issuance or renewal. Drivers may be also be [sic] subject to random drug and/or alcohol testing during the term of his/her Permit. . . . All test results shall be reported to the Executive Officer or his/her designee; and [¶] . . . [¶] iv. *In the case of either a Company employee or a self-employed independent Driver, the test results shall be reported directly to the Company and the Executive Officer, who shall notify the taxicab leasing company of record, if any, of positive results.*”² (Italics added.)

In April 2008, Novato Taxi’s employees began the process of applying for driver’s permits under the MGSA Taxicab Regulations. The applications were not completed because Carlson refused to sign a release allowing MGSA to directly receive the results of all employee drug tests.³ Carlson maintained that, pursuant to section 53075.5, subdivision (b)(3)(A)(iv), an independent driver’s test results must all be reported to

² The italicized language was added to the regulations in 2009.

³ Unlike other taxicab companies in Marin County, Novato Taxi’s drivers, other than Carlson and his wife, are employees and not independent contractors.

MGSA, but only an employee's *positive* test results can be reported outside the Company.

In December 2009, MGSA's executive officer issued a compliance order, which demanded that Novato Taxi comply with the MGSA Taxicab Regulations or face the threat of judicial enforcement. MGSA also notified appellants that it intended to seek termination of Novato Taxi's telephone service, pursuant to section 53075.8. Appellants filed a protest and requested a hearing.

On February 9, 2010, the MGSA Board held a hearing at which appellants, represented by counsel, argued that the MGSA Taxicab Regulations violated section 53075.5, as well as federal regulations from which the statute was derived. MGSA took the position that its regulations did not conflict with section 53075.5 because it was merely imposing "additional requirements for a taxicab to operate in its jurisdiction." (§ 53075.5, subd. (d).) MGSA also argued that its regulations did not conflict with federal law. It relied on 49 C.F.R. § 40.331(e) (2008), which provides: "If requested by a Federal, state or local safety agency with regulatory authority over you or the employee, you must provide drug and alcohol test records concerning the employee." Accordingly, the MGSA Board rejected appellants' argument. Thereafter, respondents filed an action, in Marin County Superior Court, requesting that the court issue a preliminary injunction and, then, a permanent injunction restraining appellants from operating a taxicab company without the necessary permits. Respondents also sought an order terminating Novato Taxi's telephone service.

Respondents pursued the application for a preliminary injunction, which appellants opposed. Appellants continued to maintain that the requirement that all employee drug test results be reported directly to MGSA conflicted with, and were preempted by, section 53075.5, subdivision (b)(3)(A)(iv). At the hearing on an order to show cause, the trial court indicated that it did not agree with appellants' construction of the statute. On June 17, 2010, the trial court issued an order granting a preliminary injunction. The order stated: "[A] preliminary injunction shall issue against Defendants NOVATO TAXI and DAN CARLSON, restraining them from operating a taxicab

business anywhere within the County of Marin until they have secured the necessary permits from the [MGSA].” Notice of entry of the order was served on appellants that same day.

On September 1, 2010, appellants moved, pursuant to Code of Civil Procedure section 533, to dissolve the preliminary injunction.⁴ In their motion, they raised the same arguments previously made, but also provided the court with the legislative history of section 53075.5, subdivision (b)(3)(A)(iv), and the declaration of Carolina Rose, an attorney, who opined that “there is no evidence in the legislative history that local government was given discretionary authority to require that all test results of employees be reported directly to local government.” Appellants argued: “[G]athering and interpretation of the entire legislative record, obtaining the [legislative history] analysis undertaken and completed by Ms. Rose is analogous to the ‘new evidence’ or change of law contemplated in [Code of Civil Procedure section] 533 and, under any circumstance, the interests of justice compel dissolution of the preliminary injunction when Section 53075.5 is examined in light of legislative intent.”

Respondents opposed the motion to dissolve the preliminary injunction, arguing that the showing required, by Code of Civil Procedure section 533, had not been made. Respondents also objected to Rose’s declaration as inadmissible legal opinion and argued that the legislative history was irrelevant because the plain language of section 53075.5 was clear.

On October 21, 2010, the trial court denied the motion to dissolve. The court’s statement of decision provides: “This Court *has previously concluded* that the MGSA permit procedure is not inconsistent with the Government Code’s provision on the subject

⁴ Code of Civil Procedure section 533 provides: “In any action, the court may on notice modify or dissolve an injunction or temporary restraining order upon a showing that there has been a material change in the facts upon which the injunction or temporary restraining order was granted, that the law upon which the injunction or temporary restraining order was granted has changed, or that the ends of justice would be served by the modification or dissolution of the injunction or temporary restraining order.”

and that, for this reason, an injunction should issue. The Legislative History and the opinion of Carolina Rose do not change the Court's conclusion that the requirement that substance and alcohol test results should be reported to a driver's employer and the MGSA is a proper 'additional requirement' as described in [section] 53075.5[, subdivision] (d). . . . [¶] Considering the evidence provided to date, the Court cannot find that the [appellants'] evidence changes facts or the law upon which the injunction was based ([Code of Civil Procedure,] § 533.) Similarly, when the rationale for the testing program is balanced against the privacy interests raised by [appellants], the ends of justice are not served by dissolving the injunction." (Italics added.) On December 23, 2010, appellants filed an appeal from the order denying the motion to dissolve.

III. DISCUSSION

Appellants contend that the trial court erred, in its statutory construction, because the express terms of section 53075.5, subdivision (b)(3)(A)(iv), prohibit an employee driver's negative drug test results being reported to MGSA. Respondents, on the other hand, argue that section 53075.5, subdivisions (b)(3)(A) and (d), authorizes them to require direct government reporting of all drug test results. Appellants insist that their reading of legislative intent is confirmed by the statute's legislative history and by its incorporation of federal regulations, which purportedly preclude the direct government reporting required by MGSA. Whatever the merits of these arguments, we are unable to address them because they are not properly before us.

In their notice of appeal, filed on December 23, 2010, appellants indicated their challenge was to the order denying the motion for dissolution of the preliminary injunction, entered on October 21, 2010, and for which notice of entry of order was served on October 26, 2010. An order refusing to dissolve an injunction is an appealable order. (Code Civ. Proc., § 904.1, subd. (a)(6).) But, an order granting a preliminary injunction is also an appealable order. (*Ibid.*; *Cinquegrani v. Department of Motor Vehicles* (2008) 163 Cal.App.4th 741, 745.) Appellants do not argue here that the motion to dissolve should have been granted because there was a material change in law or fact, or that the ends of justice required dissolution of the preliminary injunction. (See Code

Civ. Proc., § 533.) Instead, the sole issue presented is whether the trial court misconstrued section 53075.5. Respondents are correct that this issue should have been raised via an appeal from the order granting the preliminary injunction.⁵

In *Malatka v. Helm* (2010) 188 Cal.App.4th 1074 (*Malatka*), the Sixth District Court of Appeal considered a similar question. In *Malatka*, the appellant filed an appeal from a trial court's order modifying a restraining order and implicitly denying the appellant's request to dissolve it. (*Id.* at p. 1076.) The respondent filed a motion to dismiss, arguing that the appellant's arguments should have been presented in an appeal from the original restraining order, for which the time to appeal had long since expired. (*Id.* at pp. 1076, 1080–1081, 1085–1086.) The court began by noting: "It is established that an order denying a motion to vacate a judgment is deemed appealable only to the extent it raises new issues unavailable on appeal from the judgment. This restriction is imposed to prevent both circumvention of time limits for appealing and duplicative appeals from essentially the same ruling. [Citations.] To further implement this policy, on an appeal from an appealable ruling, an appellate court will not review earlier appealable rulings. [Citations.]" (*Id.* at p. 1082.) By application of the same reasoning, the court concluded: "[T]o the extent the current appeal from an order implicitly refusing to dissolve a restraining order presents issues that could have been raised in an appeal from the original restraining order, those issues are not reviewable in this appeal. On the other hand, to the extent the motion to dissolve was dependent on new facts and law, such issues are reviewable." (*Id.* at p. 1084.)

The *Malatka* court's reasoning is sound. Here, appellants have not raised any issue that could not have been addressed on appeal from the original order granting the preliminary injunction. But, appellants' notice of appeal was filed more than 60 days after service of notice of entry of that order. (See Cal. Rules of Court, rule 8.104(a)(2).) The fact that the legislative history was not presented to the trial court until the motion to

⁵ We requested and received supplemental briefing regarding whether this appeal should be dismissed as untimely.

dissolve was filed makes no difference. As appellants themselves admit, statutory interpretation is a question of law. Rather than providing a basis to distinguish *Malatka*, this only demonstrates that an earlier appeal could have been filed. The legislative history could have been considered on an appeal from the order granting the preliminary injunction. (See *Burnsed v. State Bd. of Control* (1987) 189 Cal.App.3d 213, 218 & fn. 3 [reviewing courts are “not limited by the interpretation of the statute made by the trial court, and may properly consider any matter which bears upon the issue”]; *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699 [“interpretation of a statute . . . is a question of law, and we are not bound by evidence presented on the question in the trial court”].) Having failed to present any new facts or law in the subsequent motion to dissolve the injunction, we see no reason why appellants should be allowed to circumvent the time limits for appeal, and no reason why appellants should be permitted two bites at the appellate apple.

Appellants contend we should exercise discretion to consider their appeal because review will prevent future litigation on an issue “of broad public interest.” But, we have no discretion to relieve appellants from the consequences of their delay in filing a notice of appeal. (*Chico Feminist Women’s Health Center v. Scully* (1989) 208 Cal.App.3d 230, 254.) Because appellants did not perfect a timely appeal from the order granting the preliminary injunction, we are without jurisdiction to review the trial court’s statutory construction.⁶ (Cal. Rules of Court, rule 8.104(a), (b); *Malatka, supra*, 188 Cal.App.4th at pp. 1085–1087; *Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579, 582–583.)

⁶ Both appellants and respondents have filed requests for judicial notice, upon which we deferred ruling. Appellants ask us to judicially notice the legislative history of section 53075.5 and excerpts from the Federal Register. Respondents ask us to take judicial notice that appellants did successfully apply for company and driver permits after the trial court refused to dissolve the injunction. We deny the requests because the material is not relevant to the sole jurisdictional issue we have decided.

IV. DISPOSITION

The appeal is dismissed. Respondents are to recover their costs on appeal.

Bruiniers, J.

We concur:

Jones, P. J.

Needham, J.