STATE OF MICHIGAN

COURT OF APPEALS

YOUNG OLDSMOBILE CADILLAC and ANTHONY M. YOUNG,

Plaintiff-Appellee,

v

JAMES POUILLON,

Defendant-Appellant.

UNPUBLISHED
October 14, 1997

No. 190407
Shiawassee Circuit Court
LC No. 94-004496 CZ

Before: Hood, P.J., and McDonald and Young, JJ.

PER CURIAM.

Defendant appeals by leave granted pursuant to MCR 7.205(D) the preliminary injunctive order of the trial court preventing him from engaging in abortion protest activities outside plaintiffs' business. We vacate the trial court's order.

Defendant James Pouillon is an ardent anti-abortion protester who demonstrated on public property in front of plaintiffs' car dealership from the early fall of 1994 until February 1995. Defendant began his protest when plaintiffs posted signs at the dealership for certain local political candidates that defendant considered to be "pro-choice." Beginning in December 1994, defendant would, four to five times per week during plaintiffs' business hours, stand on the grassy strip abutting the highway in front of plaintiffs' car showroom, display large signs containing various anti-abortion slogans and graphic photographs, and generally attempt to deliver his anti-abortion message to plaintiffs' customers and employees.

It is undisputed that many of defendant's comments bordered on the tasteless. On several occasions, defendant would directly target plaintiffs' black customers with comments such as, "Black baby killers, stay in Flint," or, "Pro choice people believe in killin' black babies," and "Jesus loves black babies." On one occasion, a black customer was so incensed by defendant's speech that he had to be physically restrained from approaching defendant.

Plaintiffs filed the instant action for slander, libel, trespass, tortious interference with contractual and business relations, stalking and nuisance in December 1994. Plaintiffs variously alleged that

defendant's speech had offended several of their employees and customers and caused plaintiffs to lose business. Plaintiffs requested preliminary injunctive relief to prevent defendant from protesting outside the dealership on the weekend of December 16 through 18, because plaintiffs were planning on conducting a highly-publicized sale. Additionally, plaintiffs requested the trial court to grant them permanent injunctive relief to bring a halt to defendant's protests outside the dealership.

At the hearing on plaintiffs' motion for preliminary injunctive relief, plaintiffs generally claimed that defendant's protests had driven away several potential buyers from the dealership, although Anthony M. Young and other witnesses were unable to affix a dollar value to the amount of business that had been lost. Moreover, plaintiffs disclaimed having taken any stance on the abortion issue, and therefore believed that defendant had unfairly targeted them for criticism.

On March 30, 1995, the trial court entered the first preliminary injunction in this case, which provided, in pertinent part:

> [D]efendant . . . is preliminarily enjoined from harassing, yelling at or in any way intimidating the owners, employees, visitors, customers, sales people or any other people thereto, at or in front of (including the highway right-of-way) [plaintiffs'] business . . . or from in any manner obstructing the advertising sign at said business location or from interfering with any business conducted at said location or from trespassing at said property, from using the names of any of plaintiffs or their employees in a libelous manner or displaying said names on any signs, messages or communications at or in front of the above described premises or locations.

This Court vacated the trial court's order granting plaintiffs' motion for preliminary injunctive relief, stating that the trial court's "injunction prevents or can be interpreted to prevent defendant's peaceful exercise of First Amendment rights on public property in the vicinity of plaintiffs' business and therefore burdens more speech than is necessary to serve a significant government interest." *Young Oldsmobile Cadillac, Inc v Pouillon*, unpublished order of the Court of Appeals, entered June 13, 1995 (Docket No. 185042). Plaintiffs filed a motion for immediate consideration and leave to appeal with the Supreme Court, which denied plaintiffs' motions in favor of further action by the trial court, subject to our review. See *Young Oldsmobile Cadillac, Inc v Pouillon*, 450 Mich 852; 538 NW2d 678 (1995).

Thereafter, the trial court held a hearing to ascertain the parties' positions on the subject of reworking its original order. Plaintiffs posited that the trial court should, in light of *Madsen v Women's Health Center, Inc*, 512 US 753; 114 S Ct 2516; 129 L Ed 2d 593 (1994), a case that both parties and the trial court deemed applicable to the instant facts, fashion a thirty-six foot "buffer zone" around plaintiffs' dealership from which defendant would be excluded from protesting. Defendant advanced that the trial court's original order was vacated because it could not constitutionally prevent him from engaging in peaceful, if annoying, protest activities on the public right-of-way in front of plaintiffs' business, which included the grassy strip upon which defendant had been conducting his protests.

Again, the trial court granted plaintiffs' request for preliminary injunctive relief. The trial court's second order was more specific than its first order, going so far as to specify the message that defendant was forbidden to convey to plaintiffs' customers. The order provided, in pertinent part:

> [D]efendant . . . is preliminarily enjoined from standing or walking, or touching with any part of his body or any instrumentality plaintiffs' private property . . . . Plaintiffs' private property, for purposes of this injunction, is located on the south side of State Highway M-21 and includes the grassy strip maintained by plaintiffs and immediately bordering plaintiffs' showroom and paved car lot, which grassy strip defendant is to keep off during plaintiffs' normal business hours;
>
> **IT IS FURTHER ORDERED** that defendant is enjoined from in any way obstructing plaintiffs' business by yelling at or communicating with plaintiffs' customers on plaintiffs' premises words to the effect, "Go back to Flint" or "Don't buy a car here, they're baby killers", or ["]pro-choice";
>
> **IT IS FURTHER ORDERED** that this injunction shall not be interpreted or used to prevent defendant's peaceful exercise of his First Amendment rights on public property in the vicinity of plaintiffs' property[.]

Defendant appeals by leave granted the trial court's modified preliminary injunctive order.

We first address defendant's claim that the trial court erred in granting a preliminary injunction because plaintiffs failed to meet its burden of proof under MCR 3.310(A). We review the trial court's decision for an abuse of discretion. *Fruehauf Trailer Corp v Hagelthorn*, 208 Mich App 447, 449; 528 NW2d 778 (1995). Moreover, because this is an equity case, we give due deference to the trial court's findings of fact, and we will sustain those findings unless we are convinced that we would have reached a different result. *Id*. *Kern v City of Flint*, 125 Mich App 24, 27; 335 NW2d 708 (1983).

Preliminary injunctions are authorized under MCR 3.310. In determining whether a preliminary injunction should issue, there are four factors to consider:

> (1) the likelihood that the party seeking the injunction will prevail on the merits[;] (2) the danger that the party seeking the injunction will suffer irreparable injury if the injunction is not issued[;] (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief; and (4) the harm to the public interest if the injunction is issued. *Fruehauf Trailer Corp, supra* at 449.

The party seeking a preliminary injunction has the burden of establishing that the relief should be granted. MCR 3.310(A)(4); *Campau v McGrath*, 185 Mich App 724, 727-728; 463 NW2d 486 (1990).

Having reviewed the record, we conclude that the trial court erred in granting preliminary injunctive relief. We agree with defendant that plaintiffs failed to establish that they would suffer

irreparable harm in the absence of a preliminary injunction. Plaintiffs presented testimony suggesting that they had experienced and faced the threat of further loss of potential business as a result of defendant's activities. However, plaintiffs provided no evidence of any specific business earnings that had been or would be lost. In any event, economic injuries do not constitute irreparable harm because they can be remedied by damages at law. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Local 6000 v Michigan*, 194 Mich App 482, 507; 487 NW2d 494 (1992).

Plaintiffs have also failed to establish the likelihood of their success on the merits. We note that plaintiffs fail to even address their claims for slander, libel, trespass, stalking, and nuisance. In order to prove their claim of tortious interference with a contractual or business relationship, plaintiffs must, in part, establish "the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). It is clear that a boycott, at least to the extent that it is supported by speeches and nonviolent picketing, is lawful activity entitled to constitutional protections. *NAACP v Claiborne Hardware Co*, 458 US 886, 907; 102 S Ct 3409; 73 L Ed 2d 1215 (1982). This is so even if the purpose of the picketing is to induce customers not to patronize the business. *Id*. at 909. While plaintiffs maintain that some of defendant's activities (e.g., use of fighting words) remain unprotected, we do not believe that plaintiffs have shown that their claim for tortious business interference would succeed on the merits.

For the reasons stated above, we conclude that the trial court abused its discretion in granting the preliminary injunction. In light of this determination, we need not reach or address the constitutional issues presented. See *City of Detroit v Qualls*, 434 Mich 340, 358, n 31; 454 NW2d 374 (1990).

Vacated and remanded. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Gary R. McDonald
/s/ Robert P. Young, Jr.