

STATE OF MICHIGAN
COURT OF APPEALS

PATRICK EADY,

Plaintiff-Appellee,

v

J. CLAYTON LAFFERTY and HUMAN
SYNERGISTICS, INC.,

Defendants-Appellants.

UNPUBLISHED

January 8, 1999

No. 202416

Wayne Circuit Court

LC No. 95-507279 CK

Before: O'Connell, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Defendants appeal as of right from a trial court order granting plaintiff injunctive relief. We affirm.

Plaintiff's amended complaint sought damages for tortious interference with a contract and tortious interference with a business expectancy, stemming from defendant Lafferty's conduct in threatening legal action against Prism Performance Systems, Inc., which, pursuant to a contract with plaintiff, was marketing certain materials that were developed by plaintiff and Lafferty during a previous partnership. Plaintiff also sought to enjoin defendants from interfering with his future use, sale, or marketing of the materials in question. Although a jury found no cause of action in favor of defendants on the tortious interference with a contract and tortious interference with a business expectancy claims, the trial court issued a permanent mutual injunction which enjoined the parties:

individually, as well as their respective heirs, successors, assigns, and/or any person or entity acting in conscious concert with any of them, from any act or omission that would in any way prevent, impede, or impair, either directly or indirectly, either Eady, Lafferty, or HSI, individually, as well as their respective heirs, successors, assigns, and/or any person or entity acting in conscious concert with them, from any use or other commercial exploitation (without any restriction or limitation), in any manner whatsoever, of the ELM literary/visual works.

On appeal, defendants argue that the trial court erred in issuing the injunction.¹

The decision whether to issue an injunction is within the discretion of the trial court. *Azzar v Primebank, FSB*, 198 Mich App 512, 520; 499 NW2d 793 (1993). Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there is real and imminent danger of irreparable injury. *Id.*

We disagree with defendants' claim that the injunction was improperly issued because plaintiff had an adequate remedy at law and failed to show an irreparable injury. Defendants contend that no irreparable harm existed because plaintiff continued to make money from the sale of the prior partnership materials and continued to maintain a working relationship with Prism. However, plaintiff's efforts at using a larger company, such as Prism, would be thwarted if future interference occurred, which evidence indicated was likely to happen. Further, the harm to plaintiff's reputation constituted a threat to the viability of his business, which constitutes irreparable harm. *Tri-State Generation and Transmission Ass'n, Inc v Shoshone Rover Power, Inc*, 805 F2d 351, 356 (CA 10, 1986).

Defendants' contention that plaintiff had an adequate legal remedy is also without merit. As the trial court noted, Prism declined to use one of plaintiff's products in a large training program after defendant Lafferty's telephone call. The monetary effect of this lost opportunity could not be determined with any degree of certainty. It was also difficult to ascertain the monetary effect of the loss of exposure by Prism's marketing efforts. Accordingly, the trial court did not abuse its discretion in concluding that there was an inadequate legal remedy.

Next, defendants contend that the injunction is overly broad and too vague. We disagree. Injunctions must be specific in terms and must describe in reasonable detail the acts restrained. MCR 3.310(C)(2) and (3). Vagueness, generalities, and overbreadth are to be avoided. 4 Martin, Dean & Webster, Michigan Court Rules Practice, p 482. The purpose of these requirements is to enable the party restrained to determine, from the order itself, what is required of him or her. *Id.* Fair notice of the conduct prohibited must be given. *Id.*

In this case, the effect of the injunction is to preclude each party from interfering with the other's commercial exploitation of the subject property. The injunction necessarily is broad in scope to ensure that the parties are adequately protected. However, the injunction is specific in its terms and describes in reasonable detail the acts restrained, and provides sufficient notice of the conduct prohibited. Nor do we believe that the injunction is overly broad because it encompasses more than the two products that defendant Lafferty referenced in his phone call to Prism. The president of Prism testified that it was his impression that the two products in question were not all that Lafferty was objecting to. Moreover, Lafferty admitted at trial that he would object if any of the copyrighted materials were licensed by Eady and marketed by another company. Thus, the injunction properly included all of the former partnership works to effectuate complete relief.

Next, defendants contend that the injunction should not have issued after defendant Lafferty died. Defendants correctly observe that, because Lafferty is no longer living, the effect of the injunction is to enjoin his estate, in addition to the corporation. Defendants maintain that, since it was only Lafferty who previously interfered with plaintiff's use of the materials in question, there was no reason to enjoin the other two entities. We disagree. First, the evidence established that the corporation and Lafferty

were one and the same. Therefore, the injunction was properly extended to include the corporation. Second, without an injunction, the possibility existed that the estate, as the successor to Lafferty's interests, would attempt to interfere with plaintiff's efforts to market the materials in question. Therefore, the trial court did not err in issuing the injunction, notwithstanding Lafferty's death.

Next, defendants contend that the doctrine of res judicata bars issuance of the injunction. Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. *Dart v Dart*, 224 Mich App 146, 156; 568 NW2d 353 (1997). A second action is barred when: (1) the first action was decided on the merits; (2) the matter contested in the second action was or could have been resolved in the first; and (3) both actions involve the same parties or their privies. *Id.* Michigan has adopted a broad application of the doctrine of res judicata, barring not only claims actually litigated in the prior action, but every claim arising out of the same transaction that the parties, exercising reasonable diligence, could have raised but did not. *Id.* The purpose of res judicata is to avoid relitigation of claims; the doctrine recognizes that endless litigation leads to vexation, confusion, and chaos for litigants and inefficient use of judicial resources. *ABB Paint Finishing, Inc v National Union Fire Insurance Co*, 223 Mich App 559, 562; 567 NW2d 456 (1997).

In this case, res judicata is inapplicable because, although the parties are the same and the prior action involved a decision on the merits, the matter contested in this action was not and could not have been resolved in the first action. This action involved defendants' alleged interference with plaintiff's use and marketing of the prior partnership materials. There is no indication that this was a potential problem at the time of the first suit or that the type of injunctive relief sought here was necessary. Accordingly, res judicata did not bar this action.

Defendants, in their brief, also challenge some of the trial court's factual findings. However, review of this issue is inappropriate because it was not raised in the statement of questions presented, *Marx v Dep't of Commerce*, 220 Mich App 66, 81; 558 NW2d 460 (1996); *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995); *Preston v Dep't of Treasury*, 190 Mich App 491, 498; 476 NW2d 455 (1991), and because defendants cite no factual support for their argument. *Great Lakes Division of National Steel Corp v Ecorse*, 227 Mich App 379, 424; 576 NW2d 667 (1998). Defendants' contention that the trial court erred by adopting plaintiff's proposed order and by allegedly failing to make its own factual findings is also waived for failure to raise the issue in the statement of questions presented, *Marx, supra*, and failure to argue the merits of the issue. *Midland v Helger Construction Co, Inc*, 157 Mich App 736, 745; 403 NW2d 218 (1987).

Next, defendants contend that an injunction was improperly issued because the trial court lacked jurisdiction and also because of preemption. We disagree. Whether subject matter jurisdiction exists is a question of law that is reviewed de novo. *Bruwer v Oaks (On Remand)*, 218 Mich App 392, 395; 554 NW2d 345 (1996). The question of preemption is also a legal question, for which the de novo standard of review applies. See *Martinez v Ford Motor Co*, 224 Mich App 247; 568 NW2d 396 (1997).

28 USC 1338(a) provides for exclusive federal jurisdiction over claims "arising under" federal copyright laws. If a plaintiff's lawsuit is founded directly on a breach of some right created by the

copyright laws, the case is one arising under those laws and only a federal court has jurisdiction. However, if the lawsuit is founded on some right vested by the common law, the case is one arising under state law and a state court has jurisdiction. See *MGA, Inc v LaSalle Machine Tool, Inc*, 148 Mich App 350, 353; 384 NW2d 159 (1986).² In determining whether a suit is founded directly on federal copyright laws or on state common law, a court must look to the pleadings, specifically the relief sought. *Id.* A case founded on a principle of tort, contract, or equity law is a case arising under state law. *A & C Engineering Co v Atherhold*, 355 Mich 677, 682; 95 NW2d 871 (1959). As one federal court has noted:

[A]n action “arises under” the Copyright Act if and only if the complaint is for a remedy expressly granted by the Act, . . . or asserts a claim requiring construction of the Act, . . . or, at the very least and perhaps more doubtfully, presents a case where a distinctive policy of the Act requires that federal principles control the disposition of the claim. [*T B Harms Company v Eliscu*, 339 F2d 823, 828 (CA 2, 1964).]

In this case, there is nothing in plaintiff’s complaint suggesting that the action is based upon a right derived from the federal copyright laws. Further, the complaint does not seek a remedy expressly granted by the Copyright Act or assert a claim requiring construction of the Copyright Act. Nor does it appear that any distinctive policy of the Copyright Act requires that federal principles control disposition of the lawsuit. Accordingly, the action does not “arise under” the Copyright Act and jurisdiction was properly vested in the trial court. *Harms, supra*. The mere fact that copyrighted works were involved is not sufficient to dictate a conclusion that the federal court had exclusive jurisdiction. *Bear Creek Productions, Inc v Saleh*, 643 FSupp 489, 491 (SD NY, 1986).

Nor does the Copyright Act preempt plaintiff’s claim, as defendants contend. If federal preemption applies, state courts have no jurisdiction over the subject matter. *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997). When a statute contains an express preemption clause, the plain wording of the clause must be examined because it contains the best evidence of Congress’ preemptive intent. An express preemption of a law or regulation includes common law liability. *Martinez, supra* at 253. Here, the relevant statute is 17 USC 301, which expressly preempts

all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103[.]

The displacement of state law is limited by section 301(b), which provides that

[n]othing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to . . . activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106[.]

Section 106 sets forth the exclusive rights of a copyright owner respecting his copyrights. Namely, (1) to reproduce it (2) to prepare derivative works from it (3) to distribute copies or phonorecords of it to the public by sale or other methods (4) to publicly perform it and (5) to display it publicly.

Thus, Section 301 preempts only those state law rights that may be abridged by an act which, in and of itself, would infringe upon one of the exclusive rights provided by federal copyright law. *Computer Associates International, Inc v Altai, Inc*, 982 F2d 693, 716 (CA 2, 1992). If the state law right is predicated upon an act incorporating elements beyond mere reproduction or the like, the federal and state rights are not equivalent and there is no preemption. *Id.* Here, there is no preemption because plaintiff's state law claims do not allege rights equivalent to those created by the Copyright Act. The nature of plaintiff's causes of action are qualitatively different from an infringement claim and, therefore, the causes of action are not preempted. Accordingly, the doctrine of preemption does not apply.

Defendants next raise two evidentiary issues. First, defendants contend that the trial court admitted irrelevant copyright registrations. Second, defendants argue that the trial court refused to admit certain expert testimony regarding copyright ownership. Defendants maintain that these evidentiary errors led to the court's erroneous issuance of the injunction. Again, however, neither of these issues are raised in the statement of questions presented. Therefore, they are not properly before this Court. *Marx, supra*. In any event, neither of these claims warrant reversal. First, for reasons previously discussed, the admission of the copyright registration evidence did not cause the court to decide issues outside its jurisdiction. Second, although defendants contend that their proffered expert testimony would have assisted the court in understanding the issues, according deference to the trial court's superior opportunity to determine whether it needed additional evidence in order to comprehend the issues raised, we find no abuse of discretion in refusing to admit the testimony.

Next, defendants contend that the trial court should have granted their motions for summary disposition and directed verdict. The trial court's grant or denial of summary disposition is reviewed de novo, because this Court must review the record to determine whether the moving party is entitled to judgment as a matter of law. *Garvelink v The Detroit News*, 206 Mich App 604, 607; 522 NW2d 883 (1994). In reviewing a trial court's failure to grant a defendant's motion for a directed verdict, we examine the testimony and all legitimate inferences that may be drawn in the light most favorable to the plaintiff. If reasonable jurors could honestly have reached different conclusions, the motion should have been denied. If reasonable jurors could disagree, neither the trial court nor this Court has the authority to substitute its judgment for that of the jury. *Matras v Amoco Oil Co*, 424 Mich 675, 681-682; 385 NW2d 586 (1986).

Although defendants' statement of the issue challenges the trial court's denial of summary disposition under both MCR 2.116(C)(8) and (10), only the denial under subsection (C)(8) is argued in the body of defendants' brief. Because defendants have failed to argue the merits of their motion under subsection (C)(10), this latter issue is waived. *Midland, supra*.

With respect to the motion under subsection (C)(8), defendants contend that plaintiff's complaint was deficient because plaintiff failed to allege 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, as required by *Prysak v RL Polk*, 193 Mich App 1, 12; 483 NW2d 629 (1992). However, in examining the complaint, the trial court was required to accept as true all material factual allegations, as well as any reasonable inferences or conclusions that could be drawn from the facts. *Marcelletti v Bathani*, 198 Mich App 655, 658; 500 NW2d 124 (1993). Plaintiff's amended complaint alleged that plaintiff had the right to use the materials in question pursuant to a judgment in a prior case in which Lafferty was a party, that Lafferty nevertheless contacted Prism and informed it that plaintiff did not have the right to use, market, sell or otherwise deal with the materials, and that Lafferty further informed Prism that he had only acquiesced to plaintiff's prior use of the materials because the nature of their use was "small potatoes." These allegations, and inferences drawn therefrom, accepted as true, were sufficient to state a valid claim as to whether Lafferty acted with malice and whether his actions were unjustified in law for the purpose of invading plaintiff's contractual rights and business relationship with Prism. Accordingly, summary disposition under MCR 2.116(C)(8) was properly denied.

Defendants' claim that the trial court erred in denying their motion for directed verdict is also without merit. The jury had before it evidence from which it could find that plaintiff had the right to allow Prism to license the materials and that Lafferty's phone call was unjustified.

Defendants also contend that the trial court erred in allowing plaintiffs to orally amend their complaint to request injunctive relief, even though the jury found in favor of defendants. Again, defendants have waived this issue by not raising it in their statement of questions presented. *Marx, supra*. In any event, we have reviewed the record and find that the trial court did not abuse its discretion.

Affirmed.

/s/ Peter D. O'Connell

/s/ Roman S. Gribbs

/s/ Michael J. Talbot

¹ Defendant Lafferty died after the trial was completed, but before the injunction was issued. A consent order was subsequently issued substituting his estate as a party to this action.

² Although *MGA* involved patents, not copyrights, its reasoning is applicable to this case because claims "arising under" the patent laws are, like the copyright laws, exclusively vested in the federal courts. 28 USC 1338(a).