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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

RALPHS GROCERY COMPANY, Plaintiff and Respondent, v. MISSIONARY CHURCH OF THE DISCIPLES OF JESUS CHRIST et al., Defendant and Appellant.	B231005 (Los Angeles County Super. Ct. No. YC060329)

APPEAL from a judgment of the Superior Court of Los Angeles Andrew C. Kauffman, Judge. Affirmed.

Llewellyn † Spann and David L. Llewellyn, Jr., for Defendant and Appellant.

Morrison & Foerster, Miriam A. Vogel, Timothy F. Ryan and Jacob M. Harper for Plaintiff and Respondent.

Respondent Ralphs Grocery Company (Ralphs) brought suit against appellant Missionary Church of the Disciples of Jesus Christ (the Church) for trespass. On cross-motions for summary judgment, Ralphs established that Church members regularly placed themselves in front of the entry/exit doors of Ralphs' El Segundo grocery store to solicit donations without first seeking permission from store management or attempting to comply with Ralphs' rules for expressive activity. Ralphs further established that neither the El Segundo store nor the sidewalk/apron area where the Church members stood were places where members of the public were encouraged to gather or linger. Relying on *In re Lane* (1969) 71 Cal.2d 872 (*Lane*), the Church contended its members had an absolute right to solicit donations on Ralphs' property as a commercial location open to the general public.[1] The Church expressly disavowed reliance on the Supreme Court's landmark decision in *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899 (*Pruneyard*). Accordingly, the Church presented virtually no evidence concerning the attributes of the store or the sidewalk/apron area or its ability to comply with Ralphs' time, place and manner rules. The trial court granted summary judgment in favor of Ralphs and issued a permanent injunction barring Church members from, among other things, soliciting donations within 20 feet of the sidewalk and apron areas of the El Segundo store.

On appeal, the Church continues to contend that under *Lane*, it had an unfettered right to use the area in front of Ralphs' El Segundo store to solicit donations without regard to the owner's attempt to regulate the time, place and manner of expressive activity on its property. It now also contends the area

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[1] As will be discussed further, *Lane* held that an officer of a labor union was permitted to stand on the ten-foot wide private sidewalk in front of a 24,000 square foot grocery store to distribute handbills urging customers not to patronize the store. (*Lane, supra,* 71 Cal.2d at pp. 873, 878.)

constituted a public forum within the meaning of *Pruneyard*. We conclude that *Lane* does not support the Church's absolute right to solicit funds for charitable and religious purposes on any private property open to the public, and that the limited evidence presented supported Ralphs' position with respect to the characterization of the area for purposes of a *Pruneyard* analysis. Ralphs' summary judgment motion was, therefore, properly granted.[2]

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Complaint*

In August 2009, Ralphs sued the Church for trespass, seeking declaratory and injunctive relief. Ralphs alleged that in May 2009, two members of the Church began soliciting contributions at Ralphs' El Segundo grocery store. The complaint described the El Segundo store as a stand-alone building with a private sidewalk/apron that ran between the storefront and a fire lane that bordered the customer parking lot. The Church members allegedly set up a stand with a bucket and placed themselves in the fire lane directly in front of the entrance/exit doors. When asked to desist, the Church members refused.

The complaint stated that because the area in front of the typical Ralphs grocery store is similarly limited, Ralphs has adopted "uniform rules for expressive activity" which impose "time, place and manner restrictions on all forms of

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[2] In reaching this conclusion, we do not resolve whether the area in front of a mid-sized commercial establishment such as a retail grocery store can ever be considered a public forum. The issue whether the parking area and walkway in front of a different Ralphs grocery store constitutes a public forum is currently before the Supreme Court. (See *Ralphs Grocery Company v. United Food & Commercial Workers Union Local 8* (2010) 186 Cal.App.4th 1078, review granted Sept. 29, 2010, S185544.) In the same appeal, the court is considering whether the Moscone Act (Code Civ. Proc., § 527.3) and Labor Code section 1138.1 unconstitutionally afford preferential treatment to speech related to labor disputes.

expressive activity that individuals and groups seek to carry out on Ralphs store property." The rules state that individuals engaged in expressive activity must position themselves 20 feet from any store entrance.[3] According to the complaint, Church members made no attempt to contact Ralphs prior to engaging in activity on its property or to comply with its rules.

B. *Summary Judgment*

After preliminary matters were resolved, the parties submitted cross-motions for summary judgment.[4] Ralphs presented evidence to support that the El Segundo store was located in a stand-alone building in a "commercial strip development with a handful of other commercial retailers" and was fronted by a sidewalk/apron that was situated between the store and a fire lane abutting the customer parking lot. Ralphs has "exclusive control" over the interior of the store, "its entrance/exit ways" and "the surrounding sidewalk/apron areas." Ralphs also presented evidence that persons are invited onto the property solely to shop for food and related products, that the El Segundo store did not offer amenities such as plazas, walkways or central courtyards containing benches, and that Ralphs did not

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[3] According to the complaint, "the [r]ules prohibit any persons seeking to engage in expressive activity on store property . . . from . . . soliciting donations." The copy of the rules attached as an exhibit to the complaint stated that there would be "[n]o *unauthorized* requests for money or contributions or use of receptacles to solicit or receive money or contributions." (Italics added.) Whether these rules would have absolutely precluded Church members from soliciting donations anywhere on store property was not adjudicated below.

[4] After filing the complaint, Ralphs sought and obtained a preliminary injunction which prohibited the Church and its "agents, servants, assigns and all those acting in concert with it" from using the interior of the El Segundo store, its sidewalk/apron areas or areas within 20 feet of the sidewalk/apron areas in order to solicit donations or engage in threatening or obstructive behavior.

encourage customers to linger, meet friends, be entertained or congregate on store property for any purpose other than shopping.

Ralphs' evidence established that members of the Church regularly positioned themselves in the fire lane directly in front of the entrance/exit doors of the El Segundo store and solicited customers entering and leaving the store for contributions.[5] They obstructed the fire lane, disrupted customers and moved a Ralphs sign. Church members repeatedly ignored requests to comply with Ralphs' rules for expressive activity or to leave. On one occasion, the manager for operations for the El Segundo store gave a Church member soliciting in front of the store a copy of the rules. The member immediately threw the rules in the trash.

The Church objected to many of the factual assertions made by Ralphs in its moving papers as irrelevant, but presented no countervailing evidence to challenge Ralphs' factual assertions. In support of its cross-motion, the Church presented evidence that it is a nonprofit religious corporation whose goal is to teach the Bible and provide assistance to the poor and needy. It also presented evidence that Ralphs' El Segundo store is on a "busy" street "lined with commercial locations and businesses for miles in each direction" and that it "shares its parking lot with other businesses." The development in which the store is located was said to have "an attractive covered plaza and walkway area . . . with tables and chairs for sitting and relaxing."[6] The Church presented no other facts about the area or the attributes of Ralphs' El Segundo store.

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[5] Ralphs also sought to establish that Church members harassed and obstructed customers and interfered with its customer relations and good will. The supporting evidence consisted of hearsay statements from customers to store personnel and the Church's objections to this evidence were sustained. The court also excluded evidence pertinent to other grocery stores operated by Ralphs and declined Ralphs' request to broaden the scope of the injunction to cover all stores in the state.

[6] The seating area was not on Ralphs' property.

In its memoranda in support of its motion for summary judgment and in opposition to Ralphs' motion, the Church took the position that Ralphs' rules for expressive activity "fail[ed] the tests for reasonable time, place and manner regulations" and that application of the rules "prohibit[ed] or interfere[d] with [the Church's] speech activities and [its] solicitation of donations for religious and charitable purposes," but did not explain how or why that was the case. The Church asserted that the issue presented was governed not by *Pruneyard*, *supra*, 23 Cal.3d 899, but exclusively by *Lane*, *supra*, 71 Cal.2d 872. According to the Church, *Lane* established that "freedom of speech, without the permission of the store owner, is constitutionally protected on a privately owned sidewalk outside the doors of a single, free-standing grocery supermarket" and that the California constitution grants to members of the public the right "to engage in freedom of expression at or near the entrance to free-standing grocery stores."

The trial court granted summary judgment in favor of Ralphs and issued the requested permanent injunction. In the written order, the court explained: "The relevant facts are not in dispute. Representatives of [the Church], engaged in expressive conduct, in the form of soliciting donations from Ralphs' customers, while on the sidewalk 'apron' immediately outside the entrance to the Ralphs store in El Segundo, CA. The store is located in a stand-alone building within a retail strip development. Defendant's representatives engaged in this conduct in violation of [Ralphs'] established restrictions on time, place and manner, and despite objections of [Ralphs'] management personnel." The Church "fail[ed] to submit any evidence that its expressive activity was related to the conduct of [Ralphs'] business, or that the retail development in question was the functional equivalent of a [*Pruneyard*] town center." As there was "no dispute that [Ralphs] operates a privately-owned, free-standing grocery store," Ralphs was "entitled to judgment as a matter of law."

The injunction issued by the court precluded the Church "its agents, servants, assigns and all those acting in concert with it" from "using the interior of the Ralphs store located [in El Segundo], the sidewalk and apron areas at the front of the Store, and up to and including 20 feet from the sidewalk and apron areas in front of the Store, for the following activities: [¶] A. obstructing store entrance and exit doors, shopping cart carrels, or fire lane access; [¶] B. touching or threatening to touch customers, store employees, vendors, or others having business with Ralphs; [¶] C. verbally threatening or insulting customers, store employees, vendors, or others having business with Ralphs, including with use of expletives; [¶] D. asking for, soliciting, or demanding donations from customers, store employees, vendors, or others having business with Ralphs; [¶] E. placing or positioning on the Store sidewalk or apron a bucket, cup, table, or any other receptacle into or onto which to place donations; [¶] F. placing or positioning on the Store sidewalk or apron any posters, pamphlets, magazines, . . . or papers; or [¶] G. moving or obstructing any signs, products, or barriers." The Church appealed the judgment.

DISCUSSION

Article I, section 2 of the California Constitution provides, in pertinent part, that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right." (Art. I, § 2, subd. (a).) There is no dispute that "[t]his provision is 'broader and more protective than the free speech clause of the First Amendment.'" (*Snatchko v. Westfield LLC* (2010) 187 Cal.App.4th 469, 480, quoting *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 366.)

Half a century ago, federal law and California law were aligned, "mov[ing] steadily toward the protection of the exercise of free speech upon private business

property open to the public." (*Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (1979) 25 Cal.3d 317, 327.) In *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union* (1964) 61 Cal.2d 766 (*Schwartz-Torrance*) and *Food Employees v. Logan Plaza* (1968) 391 U.S. 308 (*Logan Plaza*), overruled in *Hudgens v. NLRB* (1976) 424 U.S. 507, both our Supreme Court and the United States Supreme Court held that peaceful picketing by union members of a business located in a privately-owned shopping mall was constitutionally protected expressive activity that the owner of the property could not forbid. The United States Supreme Court expressed particular concern over the unfair advantage businesses situated in malls would have over businesses located adjacent to public streets and sidewalks should it rule otherwise: "Business enterprises located in downtown areas would be subject to on-the-spot public criticism for their practices, but businesses situated in the suburbs could largely immunize themselves from similar criticism by creating a *cordon sanitaire* of parking lots around their stores." (*Logan Plaza*, *supra*, 391 U.S. at pp. 324-325.)

Not long after, however, the United States Supreme Court held in *Lloyd Corp. v. Tanner* (1972) 407 U.S. 551 that the owners of a shopping mall had the right to prohibit members of the public from distributing political handbills unrelated to the operation of the mall.[7] Our Supreme Court had previously concluded that the owners of a privately owned mall could not deny all use of the

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[7] Although in *Lloyd Corp*., the Supreme Court purported to address only "the question reserved [in *Logan Plaza*], as to the right of a privately owned shopping center to prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations" (*Lloyd Corp. v. Tanner*, *supra*, 407 U.S. at p. 552), the Supreme Court later explained in *Hudgens v. NLRB*, that "the rationale of *Logan Plaza* did not survive the Court's decision in the *Lloyd* case" and that union picketers "did not have a First Amendment right to enter [a] shopping center for the purpose of advertising their strike against [one of the stores]." (*Hudgens v. NLRB*, *supra*, 424 U.S. at pp. 518, 520-521.)

premises to persons who wished to solicit signatures on an initiative petition, even though the petition was unrelated to the mall's operations. (*Diamond v. Bland* (1970) 3 Cal.3d 653, 665-666 (*Diamond I*).) Subsequent to *Lloyd Corp*., our Supreme Court reversed *Diamond I* in *Diamond v. Bland* (1974) 11 Cal.3d 331, 335 (*Diamond II*), finding *Lloyd Corp.'s* rationale "controlling."

This was not the last word. Less than a decade later, our Supreme Court addressed the scope of the California constitution's guarantee of free speech in the landmark case of *Pruneyard*, *supra*, 23 Cal.3d 899. There, the owners of a shopping mall covering 21 acres encompassing walkways, plazas, and buildings containing 65 shops, 10 restaurants and a cinema, prohibited any tenant or visitor from engaging in publicly expressive activity not directly related to the mall's commercial purposes. Finding that "central business districts" had "yield[ed] their functions more and more to suburban centers" and recognizing that "protect[ing] free speech and petitioning is a goal that . . . matches the protect[ion] of health and safety, the environment, aesthetics, property values and other societal goals that have been held to justify reasonable restrictions on private property rights," the court held that on the facts before it "the California Constitution protect[s] speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." (23 Cal.3d at pp. 907, 908, 910.)

The court in *Pruneyard* made clear that its holding would not apply to every commercial property to which the public was invited. It emphasized that the mall in question was not "a modest retail establishment," comparing its size and the facilities it offered to the shopping center in *Diamond II*, where "'25,000 persons [were] induced to congregate daily to take advantage of the numerous amenities offered by the [shopping center].'" (*Pruneyard, supra*, 23 Cal.3d at pp. 910-911, quoting *Diamond II* .) The court also made clear that those who wished to disseminate their ideas on private property would not have "free rein." (*Ibid.*) It

expressed support for the property owner's promulgation of rules regulating the "time, place and manner" of any free speech activities. It quoted approvingly from Justice Mosk's dissent in *Diamond II* which anticipated that the result of a rule supporting free expression would be "[a] handful of additional orderly persons soliciting signatures and distributing handbills . . . under reasonable regulations adopted by [the property owner] to assure that these activities do not interfere with normal business operations [citation]," and that such activity "would not markedly dilute [the owner's] property rights." (*Pruneyard*, *supra*, at pp. 910-911.)

Throughout the proceedings before the court below, the Church expressly eschewed reliance on *Pruneyard*, stating unequivocally that "[t]his case is not governed by *Robins* [*v. Pruneyard*]." The Church relied solely on *Lane*, asserting that the holding permits members of the public to engage in expressive activities on the private property of any commercial establishment open to the public, without regard to the owner's rules regulating such conduct. As we explain below, *Lane* does not support the Church's position. Moreover, the Church's failure to contest the facts established by Ralphs or to put forth evidence or argument with respect to factors important to a *Pruneyard* analysis -- such as whether the area in front of the El Segundo store was amenable to expressive activity, whether there were alternate locations that could be utilized for such activity, whether the conduct of its members was reasonable or whether Ralphs' rules for expressive conduct were unreasonable -- precludes any meaningful *Pruneyard* analysis on appeal.

A. *Burden of Proof and Standard of Review*

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.

[Citation.]" (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843.) "A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The defendant or cross-defendant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (Code Civ. Proc., 437c, subd. (p)(1).)

"[A]fter a motion for summary judgment has been granted [by a trial court], [an appellate court] review[s] the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.]" (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 334.) "'"[W]e construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it." [Citations.]'" (*Troyk v. Farmers Group, Inc*. (2009) 171 Cal.App.4th 1305, 1322.) "On review of a summary judgment, the appellant has the burden of showing error, even if he did not bear the burden in the trial court." (*Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 230.) "'[D]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have

been adequately raised and briefed.'" (*Ibid.*, quoting *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 116.)

B. *The Church's Solicitation of Contributions on Ralphs' Property Is Not Protected by Lane*

Before we resolve whether *Lane* supports the right of Church members to solicit funds on Ralphs' property, we must determine the current viability of *Lane* as precedent. *Lane*, which as we have said, involved a union official who stationed himself in front of a store and passed out pamphlets urging customers to boycott the store, was decided shortly after *Schwartz-Torrance*, *supra*, 61 Cal.2d 766, and *Logan Plaza, supra*, 391 U.S. 308. Citing both cases, as well as other California and federal authority, the court in *Lane* stated: "The only significant distinction between the cases cited and the instant case is the more limited purposes for which the particular sidewalk is designed to serve; here, the customers of one store, and in the other cases customers of two or more stores, or as a route of access to other places or purposes. Certainly, this sidewalk is not private in the sense of not being open to the public. The public is openly invited to use it in gaining access to the store and in leaving the premises. Thus, in our view it is a public area in which members of the public may exercise First Amendment rights." (*Lane, supra,* 71 Cal.2d at pp. 874-878.)

Because of its reference to "First Amendment rights" and its reliance on *Logan Plaza*, a United States Supreme Court case later overturned, several appellate courts have questioned whether *Lane* remains good law.[8] (See, e.g.,

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[8] *Lane's* continuing vitality may be affected by the issue currently before the Supreme Court concerning the constitutionality of the Moscone Act and Labor Code section 1138.1, which allegedly afford preferential treatment to speech concerning labor disputes. That issue is not before us.

Albertson's Inc. v. Young (2003) 107 Cal.App.4th 106, 123; *Trader Joe's Co. v. Progressive Campaigns, Inc*. (1999) 73 Cal.App.4th 425, 435.) Our Supreme Court, however, has repeatedly cited *Lane* with approval and acknowledged its precedential value. For example, in *Diamond II*, although the court supported the shopping mall owners' authority to exclude persons wishing to engage in expressive activity unrelated to the operations of the mall, the court distinguished, rather than overruled *Lane* (and *Schwartz-Torrance*), on the ground that "in both cases labor unions had a labor dispute with, and were picketing, businesses located within the shopping centers. The labor activity in those cases had a direct relation to the businesses affected by that activity, a factor which led us to strike the balance between private property rights and First Amendment activities in favor of the latter." (*Diamond II, supra*, 11 Cal.3d at p. 334, fn. 3.) In overruling *Diamond II* in *Pruneyard*, the Supreme Court cited *Lane* and *Schwartz-Torrance* with approval, stating: "The fact that those opinions cited federal law that subsequently took a divergent course does not diminish their usefulness as precedent." (*Pruneyard, supra,* 23 Cal.3d at p. 908.) In *Sears, Roebuck & Co. v. San Diego County Dist. County of Carpenters*, *supra*, 25 Cal.3d 326, decided later that year, the court described *Lane* as "[r]elying both on federal free speech guarantees as set out in [*Logan Plaza, supra*, 391 U.S. 308] and state labor policy as established in *Schwartz-Torrance*" and stated that the holdings in *Lane* and *Schwartz-Torrance* "have not been overruled or eroded in later cases." (*Sears, supra,* 25 Cal.3d at pp. 326-327, 328.) The Supreme Court reaffirmed the validity of *Lane* most recently in *Fashion Valley Mall, LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850 (*Fashion Valley*), where the mall owners sought to preclude union members from standing in front of a particular store and passing out leaflets urging customers to boycott the store. Similar to the contention raised by Ralphs here, the owners argued that *Lane* and *Schwartz-Torrance* could not be relied on "because

they were based upon the First Amendment." (*Id.* at p. 864, fn. 6.) The Supreme Court stated that it found the principles enunciated in those cases "'persuasive in interpreting California's free speech clause'" and quoted *Pruneyard* to support their continued "'usefulness as precedent.'" (*Ibid*.)

Although we decline Ralph's invitation to find *Lane* outdated, we conclude it fails to support the Church's position. As explained in *Diamond II*, *Lane* weighed private property rights against the right of expression at issue and found the balance tipped in favor of the person seeking to engage in free speech because that speech had a "direct relation" to the business on whose property it was being undertaken. (*Lane*, *supra*, 11 Cal.3d at p. 334, fn. 3.) The *Lane* court itself stated that it had before it "the identical situation the court warned against [in *Logan Plaza*, *supra*, 391 U.S. 308]": "If we were to hold the particular sidewalk area to be 'off limits' for the exercise of First Amendment rights[,] in effect we would be saying that by erecting a '*cordon sanitaire*' around its store, [the owner] has succeeded in immunizing itself from on-the-spot public criticism." (*Lane*, *supra*, 71 Cal.2d at p. 876; see also *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, *supra*, 25 Cal.3d at p. 328 [describing *Lane* as "establish[ing] the legality of union picketing on private sidewalks outside a store as a matter of state labor law"]; *Diamond I*, *supra*, 3 Cal.3d at p. 661 [describing *Lane* as "involving union picketing in [a] shopping center[]" and "establish[ing] constitutional protection for picketing and other First Amendment activities which are related in their purpose to the normal use to which the shopping center property is devoted"].)

The Supreme Court expressed a similar view regarding the importance of the relationship between the location and the speech at issue in *Fashion Valley*, where mall rules precluded parties exercising expressive rights from urging a boycott of any mall store. The court quoted *Diamond I* for the proposition that "'[w]hen the

activity to be protected is the right to picket an employer, the location of the employer's business is often the only effective locus; alternative locations do not call attention to the problem which is the subject of the picketing and may fail to apply the desired economic pressure.'" (*Fashion Valley*, *supra,* 42 Cal.4th at p. 861, quoting *Diamond I, supra,* 3 Cal.3d at p. 662.) Explaining that the decision in *Diamond I* "recognized that citizens have a strengthened interest . . . in speech that presents a grievance against a particular business in a privately owned shopping center . . . ." and that "a privately owned shopping center must permit peaceful picketing of businesses in shopping centers, even though such picketing may harm the shopping center's business interests," the court held in *Fashion Valley* that "[t]he Mall's rule prohibiting speech that advocates a boycott cannot withstand strict scrutiny." (42 Cal.4th at p. 869.)

Here, the evidence established no relation whatsoever between the Church's expressive activities and Ralphs' El Segundo location. The Church had no grievance against Ralphs, much less a labor grievance of the kind at issue in *Lane*. The sole message the Church wished to communicate was its need for funds to support its efforts on behalf of the poor and needy. The Church had no reason to choose Ralphs' El Segundo store over the myriad other locations where its members could have congregated to communicate their message. Accordingly, the Church's reliance on *Lane* to preclude the grant of summary judgment on Ralphs' trespass claim was misguided.

C. *The Church Did Not Contend or Present Evidence to Establish that Ralphs' El Segundo Store or the Sidewalk/Apron in Front Is a Public Forum Within the Meaning of Pruneyard*

In the trial court, the Church expressly disclaimed reliance on *Pruneyard* ("[t]his case is not governed by *Robins* [*v. Pruneyard*]"). It presented virtually no

evidence concerning the attributes of the El Segundo store or the sidewalk/apron on which its members regularly stood, and no argument that any part of the El Segundo store premises should be deemed a public forum within the meaning of *Pruneyard*. In opposing summary judgment, it accused Ralphs of "misconstru[ing] the grounds of [the Church's] free speech rights . . . [by] arguing as if the rights were based on the shopping center cases, *Pruneyard* and progeny . . . [¶] . . . [¶] [d]espite the fact that [the Church] has made no argument that the speech rights of [its] missionaries rely on the shopping center cases . . . ." Reversing course on appeal, the Church now argues that *Pruneyard* requires Ralphs to permit free expression at the El Segundo store because the store "is located in a retail shopping center," "shares a parking lot with other retail stores" and, at some unspecified area in the vicinity, there is "a covered plaza and walkway . . . with tables and chairs for seating and relaxing." In reviewing the trial court's grant of a motion for summary judgment, we need not consider a potential ground for denial made for the first time on appeal. Under the principle of """theory of the trial,""" a party appealing a grant of summary judgment is """not permitted to change his position and adopt a new and different theory on appeal."""" (*Saville v. Sierra College* (2005) 133 Cal.App.4th 857, 872-873, quoting *North Coast Business Park v. Nielsen Construction Co*. (1993) 17 Cal.App.4th 22, 28-29.) """To permit [a party] to do so would not only be unfair to the trial court, but manifestly unjust to the opposing party" . . . and contrary to judicial economy.'" (*Saville v. Sierra College, supra*, 133 Cal.App.4th at p. 873.)

Moreover, even were we to consider the merits of the Church's new contention, we would not be persuaded to reverse the trial court's ruling. Neither *Pruneyard* nor the decisions interpreting it have ever suggested that there is a bright line rule requiring every retail establishment located in a "shopping center" to allow members of the public to engage in expressive activity on its premises.

As explained in *Trader Joe's Co. v. Progressive Campaigns, Inc., supra*, 73 Cal.App.4th 425: "*Pruneyard* establishes that there is a state constitutional right to exercise free speech and petitioning activity on private property. However, the *Pruneyard* court did not purport to articulate the precise scope of that right. It did not hold that the free speech and petitioning activity can be exercised only at large shopping centers. Nor did it hold that such activities can be exercised on any property except for individual residences and modest retail establishments. Rather, in resolving the specific dispute before it, the court developed a balancing test which can be applied to other situations. *Pruneyard* instructs us to balance the competing interests of the property owner and of the society with respect to the particular property or type of property at issue to determine whether there is a state constitutional right to engage in the challenged activity." (73 Cal.App.4th at p. 433, italics omitted; see also *Van v. Target Corp*. (2007) 155 Cal.App.4th 1375, 1391 ["[N]either *Pruneyard* nor its progeny has ever characterized an individual retailer as a public forum. The focus of the *Pruneyard* decision was on balancing the constitutional guarantees of speech and petition against private property rights"]; *Planned Parenthood v. Wilson* (1991) 234 Cal.App.3d 1662, 1668 ["In light of the state's constitutional concern in obtaining a protective balance between an individual's expressional rights and legitimate interests in private property, we must interpret the scope of the [*Pruneyard*] holding when applied to private property more modestly used by the public than large shopping complexes."].) In determining the nature of the retail establishment at issue, the court in *Trader Joe's* looked at such factors as the limited nature of the store's invitation to the public; the lack of space to meet friends, eat, rest or be entertained; and the fact the premises at issue were a single structure, single-use store with no plazas, walkways or central courtyard. (*Trader Joe's Co. v. Progressive Campaigns, Inc., supra,* 73 Cal.App.4th at p. 433; accord, *Van v. Target Corp., supra,* 155 Cal.App.4th at

pp. 1383-1384, quoting *Albertson's, Inc. v. Young*, *supra*, 107 Cal.App.4th at p. 1660 ["Courts consider several factors in [determining whether private property serves as the functional equivalent of a public forum] . . . 'the nature, purpose and primary use of the property; the extent and nature of the public invitation to use the property; and the relationship between the ideas sought to be presented and the purpose of the property's occupants.'"].)

Here, Ralphs presented evidence that the El Segundo store was in a free-standing building located near "a handful" of other retailers, that its invitation to the public was limited, and that it did not offer amenities such as plazas, walkways or central courtyards, or encourage customers to linger, meet friends, be entertained or congregate on store property for any purpose other than shopping for food and related products. The Church did not dispute this evidence. Nor did it present evidence of any factors to support that the store was the functional equivalent of a public forum. Its factual presentation was limited; it did not explain the relationship between the store and any other business, or explain how the area was in any way conducive to expressive activities or the equivalent of the mall found to be a public forum in *Pruneyard*.

Finally, even had the evidence presented been sufficient to establish that the area in question could be deemed a public forum or its functional equivalent, the right *Pruneyard* affords to engage in free speech in such venues is subject to reasonable time, place and manner restrictions. The record below made clear the Church members' disdain for any attempt to limit their activities or subject them to appropriate regulation. Accordingly, the record below fails to establish that Church members were deprived of a right to engage in the reasonable use of Ralphs' property for expressive purposes, further supporting the trial court's decision to grant summary judgment in favor of Ralphs.

In its reply brief, the Church raises yet another new contention, asserting that Ralphs failed to prove that the Church members' activities caused actual interference with its business. The Church cites another pre-*Pruneyard* Supreme Court decision -- *In re Hoffman* (1967) 67 Cal.2d 845 (*Hoffman*) -- for the proposition that "to prove trespass, owners of private property open to the general public . . . must prove that free speech activities by members of the public caused actual interference with the business." We need not consider points raised for the first time in a reply brief. (*City of Merced v. American Motorists Ins. Co*. (2005) 126 Cal.App.4th 1316, 1328-1329; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) Moreover, the record showed that Church members blocked the fire lane, disrupted Ralphs' customers, and moved its property. In any event, *Hoffman* does not support the Church's position that its members are entitled to unfettered access to all commercial retail property. *Hoffman* involved the non-disruptive distribution of leaflets at a large train station. As the court there observed: "[P]ersons present [on private property to engage in expressive activity] can be required so to place themselves as to limit disruption" and "can be excluded entirely from areas where their presence would . . . block the flow of passenger or carrier traffic, such as doorways . . . ." (*Hoffman, supra,* 67 Cal.2d at p. 853.) The Church sought the right to place its members at a place of its choosing, without regard to the flow of customer traffic or the need to keep fire lanes clear. *Hoffman* does not support that right.

DISPOSITION

The judgment is affirmed. Ralphs is awarded its costs on appeal.

CERTIFED FOR PUBLICATION

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.