IN THE COURT OF APPEALS OF THE STATE OF NEVADA

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES DISTRICT COUNCIL 15 LOCAL 159,
Appellant,
vs.
GREAT WASH PARK, LLC, D/B/A TIVOLI VILLAGE, A NEVADA LIMITED LIABILITY COMPANY,
Respondent.

No. 67453

FILED

JUL 29 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL

This is an appeal from a district court order granting a preliminary injunction. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

The issues in this appeal arise out of the district court's determination that union members trespassed when they projected light from a public sidewalk onto the façade of a building located on private property. Appellant International Union of Painters and Allied Trades District Council 15 Local 159 (Local 159) makes three arguments on appeal:[1] (1) the district court abused its discretion by enjoining Local 159's light projection because the projection did not constitute a trespass and moreover, that respondent Great Wash Park (GWP) failed to establish irreparable harm; (2) the district court lacked jurisdiction to adjudicate

[1]Local 159 lists four issues in its opening brief; however, as two of the issues challenge the district court's findings for the injunction, we address them as one issue.

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the claim because the claim is preempted by federal labor law; and (3) the district court abused its discretion because the injunction amounts to an unconstitutional prior restraint on protected speech. Our decision on the first issue is dispositive.

The facts of this case are not in dispute. The parties agree that members of Local 159 stood on a public sidewalk on Alta Drive and projected a message onto the façade of a building on GWP's property on several occasions. The message noted health code violations of a restaurant on the property. It is undisputed that the image did not cause any physical damage to GWP's property; GWP's claim of irreparable harm arises from the restaurant's lease agreement, which requires the restaurant to pay GWP a percentage of its sales as a portion of its base rent.

As a result of the projections, GWP filed a complaint for injunctive and declaratory relief and an application for a temporary restraining order. The complaint only alleged Local 159's actions would cause irreparable harm. On the other hand, GWP's application alleged physical[2] and light trespass and claimed irreparable harm in the form of lost revenue. Local 159 filed an answer and opposed the application. Local 159 argued that federal labor law preempted the matter, its actions did not constitute trespass, the First Amendment protected its actions, and that GWP could not meet its evidentiary burden for injunctive relief. Local 159 stipulated that it would cease its actions until the district court decided the matter.

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[2]The application alleged Local 159's members stood on GWP's property when they projecting the image. GWP acknowledged the members stood on a public sidewalk at the hearing in the district court.

The district court did not hold an evidentiary hearing, but entered an order after hearing argument of counsel.[3] The district court found that GWP would suffer irreparable harm "as the unauthorized and tortious use of [GWP's] façade by Local 159 constitutes an invasion of GWP's property, and further interferes with [GWP's] business." The court enjoined Local 159 from "trespassing on GWP's private property . . . for the purpose of projecting images on the façade of the building as part of Local 159's union demonstrations." This appeal followed.[4]

"The decision to grant or deny a preliminary injunction is within the sound discretion of the trial court, and that discretion will not be disturbed absent abuse." *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 407, 23 P.3d 243, 246 (2001). "A party seeking the issuance of a preliminary injunction bears the burden of establishing (1) a likelihood of success on the merits; and (2) a reasonable probability that the non-

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[3]The parties' dispute focuses not on Local 159's actions, but the impact of those actions. Specifically, the parties dispute whether the facts establish a trespass and whether GWP would have suffered monetary loss, and the extent of that loss; and further, whether such loss would have occurred in the absence of an injunction. While we recognize the only evidence before the district court were the conclusory affidavits submitted with GWP's motion, we need not decide whether the district court abused its discretion in finding irreparable harm.

[4]Amicus curiae Nevada AFL-CIO, International Brotherhood of Teamsters and UNITE HERE International Union filed briefs on behalf of Local 159 and amicus curiae Coalition of a Democratic Workplace, Associated Builders and Contractors, Inc., Independent Electrical Contractors, Inc., International Franchise Association, National Association of Manufacturers, National Association of Wholesaler-Distributors, National Federation of Independent Business, and National Retail Federation filed briefs on behalf of GWP.

moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy." *Id.* While we review the district court's factual findings for substantial evidence, we review questions of law de novo. *Id.* In order "to sustain a trespass action, a property right must be shown to have been invaded." *Lied v. Clark Cty.*, 94 Nev. 275, 279, 579 P.2d 171, 173-74 (1978).

The Nevada Supreme Court has not issued an opinion on whether light intentionally projected onto private property *invades* a property right, such that it can constitute a trespass.[5] And there is no statute for civil trespass in Nevada.[6] Our review of trespass law in other jurisdictions reveals two lines of cases. Jurisdictions that adhere to the traditional rule of trespass hold a trespass only occurs "where the invasion of land occurs through a physical, tangible object." *See Babb v. Lee Cty. Landfill SC, LLC*, 747 S.E.2d 468, 477 (S.C. 2013).[7] Jurisdictions that adhere to the modern theory hold that a trespass may also occur when

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[5]The district court's reliance on *S.O.C., Inc.* is misplaced. In that case, the Mirage made a prima facie case of trespass by demonstrating that commercial canvassers stood on its property. *S.O.C., Inc.*, 117 Nev. at 416, 23 P.3d at 251. Here, however, the issue is not whether individuals stood on private property, but rather whether GWP made a prima face case of trespass when it could only demonstrate that light was intentionally projected on its property.

[6]GWP filed supplemental authority consisting of possibly relevant Clark County Codes. We conclude the supplemental authority does not alter our analysis or the outcome of this case.

[7]Jurisdictions that adhere to the traditional view include Minnesota, *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546 (Minn. Ct. App. 2003) and Michigan, *Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215 (Mich. Ct. App. 1999).

intangible matter, such as particles emanating from a manufacturing plant, cause actual and/or substantial damage to the res. *See Pub. Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 390 (Colo. 2001).[8]

We need not address which theory Nevada should follow because Local 159 did not commit trespass using either theory. Jurisdictions that adhere to either doctrine have stated that light is intangible.[9] Because light is intangible, Local 159 did not commit trespass under the traditional theory. And because the light did not cause damage to GWP's building, Local 159 did not commit trespass under the modern theory.

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[8]Other jurisdictions adhering to the modern trend include Kansas, *Smith v. Kansas Gas Service Co.*, 169 P.3d 1052 (Kan. 2007); Washington, *Bradley v. Am. Smelting and Ref. Co.* 709 P.2d 782, 790 (Wash. 1985); California, *Wilson v. Interlake Steel Co.*, 649 P.2d 922 (Cal. 1982); and Alabama, *Borland v. Sanders Lead Co., Inc.*, 369 So. 2d 523, 529 (Ala. 1979).

[9]*See Babb,* 747 S.E. 2d at 146 (noting under the traditional test, "intangible matter or energy, such as smoke, noise, light and vibration, are insufficient to constitute a trespass."); *Kramer v. Angel's Path, L.L.C.*, 882 N.E.2d 46, 56 (Ohio Ct. App. 2007) ("We can find no Ohio cases, however, that have interpreted light to be a physical intrusion."); *see also Martin v. Reynolds Metals Co.*, 342 P.2d 790, 794 (Or. 1959) (noting "[w]e do not regard this statement as a pronouncement that a trespass can *never* be caused by the intrusion of light rays or other intangible forces"); *cf. In re WorldCom, Inc.*, 546 F.3d. 211, 218 n.5 (2d Cir. 2008) (noting that although physics may describe light as both energy and matter, tort law "has long distinguished between tangible and intangible invasions and has deemed invasions by light to be the latter."); *Celebrity Studios v. Civetta Excavating*, 340 N.Y.S.2d 694, 703-04 (N.Y. Spec. Term 1973) ("[I]t is not a trespass to project light, noise, or vibrations across or onto the land of another because there is no occupancy of space even for a brief period.").

Here, the district court enjoined Local 159's activities on the basis that its "unauthorized and tortious use of [GWP's] façade . . . constitute[d] an invasion of GWP's property." Because we conclude Local 159's actions cannot constitute a trespass,[10] the district court abused its discretion in issuing the injunction.[11]

Accordingly, the ORDER of the district court granting the preliminary injunction is REVERSED and this matter may proceed in the district court consistent with this order.

_____, C.J.
Gibbons

_____, J.
Silver

TAO, J., concurring:

I join in the court's order of reversal, but as this case involves a protest tactic (using a light projector to beam a message onto a property wall) that may be adopted or copied by other groups or organizations in other circumstances, and in relation to which no Nevada precedent exists, I write to add some further thoughts on the reasons for reversal.

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[10]We note that since GWP did not allege nuisance, we express no opinion as to whether Local 159's actions would constitute a nuisance.

[11]We have considered Local 159's claim of a First Amendment infringement and find it is without merit. We have also considered Local 159's preemption arguments and find they are without merit in light of the nature of the pleadings.

I.

In order to guide future litigants and judges, I think we should clarify what we do not decide in this case.

Virtually all of the "light trespass" cases cited by the parties, and in the court's order, concern the potential trespassory effects of "ambient" light, by which I mean light intended to serve a legitimate ulterior purpose on a nearby property but which incidentally happens to leak or diffuse onto the claimant's property; common examples of this include construction lighting or light reflecting off the screen of a drive-in movie theater. *See Amphitheaters, Inc. v. Portland Meadows*, 198 P.2d 847 (Or. 1948) (ambient light from a drive-in movie theater).

In contrast, this case involves something arguably different: a beam of light specifically and intentionally directed at the Respondents' property and nowhere else that served no purpose other than to intentionally light up the Respondents' building the way the Union wanted.

Does this distinction make a difference? It seems to me that it possibly could, and if so then we are presented with a question of first impression, as almost all of the existing case law relates to ambient lighting. Yet by citing ambient light cases to dispose of this case, our order could be read as implicitly concluding that there is never any legal difference between the two. I write separately in part to make clear that this is not how the court's order should be interpreted.

Before the district court below, the Respondents argued that the light projection used here constituted a trespassory invasion because, unlike incidental ambient lighting, it carried a message specifically directed exclusively at their property. Their appeal briefing also contains

the same argument (page 9 of their brief: "this case does not involve the carryover of diffuse light onto a neighboring property as a normal consequence of conducting certain business activities"). Essentially, the argument is that by projecting a text-based light image onto the Respondents' wall, the Union interfered with the Respondents' property-based right to instead put their own message on that wall, or have no message there at all. Had this argument been vigorously re-asserted before us, then we would have to squarely confront it.

But during oral argument the Respondents appeared to shift away from this argument. When asked whether what made the light image projection objectionable was that it was in the form of readable text, counsel responded that whether the image was readable or not was not the problem; the problem was that the light image altered the appearance of the property, and the property owner possesses the right to control the appearance of the property at all times.

Whether they intended it or not, by identifying the root of the problem as the effect of the lighting upon the appearance of the property, the Respondents have rendered irrelevant the distinction between whether the light invasion resulted from ambient lighting or focused lighting, or whether it contained text or was merely color. If the argument is that the projected light image interfered with the Respondents' right to place their own message in the same place, then the interference could be accomplished just as easily with a monochromatic beam as with a textual light image. Furthermore, the question of whether light alters the appearance of property seems to me to have nothing to do with whether that light was ambient in nature or individually directed and focused at

the property; if of sufficient intensity, both could affect the appearance of the property in the same way.

To analogize to a conventional trespass, a trespass committed by a person walking onto prohibited land would be no less a trespass if that person also happened to invade other nearby properties as well during his travels. Similarly, a pedestrian's physical presence on the land constitutes a trespass regardless of whether he was there as part of an exercise routine utterly lacking a message, or whether he was there to make a point about something. Whether that person also trespassed onto other properties along the way, and whether his trespass was with, or free of, communicative purpose, are fundamentally irrelevant to whether a trespass occurred.

And that is the fundamental difference between an invasion by ambient lighting or focused lighting: whether the lighting went into many different directions and lit other properties in addition to this one with no communicative purpose, or whether it went only in one direction and lit only this property to convey a message. By conceding that the problem was the effect that the light beam had on the appearance of the property – and not either the nature of the beam itself or the message it conveyed – the Respondents have made irrelevant the origin of the light beam, the direction of its projection, and the intent of party projecting it. Thus, the question of whether it matters that the light was only ambient lighting or rather was purposefully directed at the property is no longer at issue[12] in this appeal.

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[12]This could possibly be because analyzing the light projection based upon the message it contained might implicate questions relating to speech under the First Amendment or to federal pre-emption under the

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Therefore, because we generally limit ourselves to answering only the question asked, I do not interpret our order here as addressing the question, which we necessarily leave unresolved, of whether it might make a difference in other cases for purpose of trespass law that the light at issue was not incidental leakage but rather was intentionally and specifically beamed at the affected property and served no other purpose than to light the Respondents' property with a readable message.

II.

Even if we considered the nature of the beam itself (as argued in the briefing), rather than its effect on the appearance of the property (as argued orally), I am not sure the district court injunction could stand.

The Respondents argue that the beam of light itself is, by definition, a "tangible" thing that can "invade" real property. This argument derives from the language commonly used by various courts attempting to define the tort of trespass. *See, e.g., Babb v. Lee County Landfill SC, LLC*, 747 S.E.2d 468, 477 (S.C. 2013) ("trespass only exists where the invasion of land occurs through a physical, tangible object"). *See generally* 75 Am.Jur.2d Trespass § 27. According to the Respondents, light is a physical thing that can invade and therefore trespass onto property; according to the Union, it is not. Tracking the traditional judicial language, my colleagues conclude that the light projection at issue here did not constitute a tangible property invasion, and I agree.

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National Labor Relations Act. *See Retail Property Trust v. United v. United Brotherhood of Carpenters and Joiners of America*, 768 F.3d 938, 960-61 (9th Cir. 2014).

But what does it really mean to say that something is "tangible" or amounted to a "physical" invasion? The Respondents do not allege that their property was physically harmed or damaged in any way;[13] that their access to the property was impeded or obstructed by the Union's activities; or that the Union attempted to possess or appropriate any portion of the property in any way, at least in the traditional sense of physically occupying space that belonged exclusively to the Respondents by virtue of their ownership of the land under the law of real property.

Rather, the argument made here is that the light projection constituted a trespass because light is composed of "particles" (according to the *Encyclopedia Britannica*, which the Respondents cite in their brief), and those particles are tangible and therefore capable of physically intruding across the Respondents' property line. But whether something is "tangible" or not does not seem to me to be a proper or clear legal test, at least not one that can be readily understood and applied to a wide range of facts. *See* Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," 73 Harv. L.Rev. 1 (1959) (explaining that judicial decisions must, when possible, rest upon reasoning and analysis which transcend the immediate result so that non-parties can know whether the holding extends to them); *see also United States v. Fidelity and Deposit Co.*, 895 F.2d 546, 554 (9th Cir. 1990) ("When crafting rules of law, appellate courts must attend to the very real problems of applying those rules in the crucible of litigation.") (Kozinski, J., dissenting).

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[13]I wonder if we might reach a different conclusion if the Union had instead utilized a powerful laser to seriously injure patrons or scorch a carved message into the walls of the property, even though a laser is technically only light; but that factual scenario is not presently before us.

Instead, the argument strikes me as a syllogism based upon superficial pseudo-science, and I am not sure that the outcome of this case ought to be governed by this kind of approach.

As an initial observation, the science relied upon by the Respondents appears to be wrong, or at least incomplete. If one really wants to get into the physics of the question, light has the properties of both a wave and a particle. *See* John Gribbin, *In Search of Schrodinger's Cat: Quantum Physics and Reality* (Bantam 1984); *see also* Richard P. Feynman and A. Zee, *QED: The Strange Theory of Light and Matter* (Princeton 2014); Constantin Meis, *Light and Vaccum: The Wave-Particle Nature of Light and the Quantum Vacuum Through the Coupling of Electromagnetic Theory and Quantum Electrodynamics* (World Scientific Publishing 2014). Scientifically speaking, light sometimes has the qualities of a particle and sometimes has the qualities of a wave, and, to make things even more complicated, it can have both qualities at the same time. So the scientific answer to whether light is a particle or a wave is that it is both; therefore, following the Respondents' syllogism, sometimes light is arguably physical and sometimes it is clearly not. If this is our inquiry, then we are dealing with nothing more than an exercise in subjectivity, something akin to a Rorschach ink blot in which any judge can find a trespass, or not, depending on his or her personal predilections because both conclusions would be supported by the underlying science of the matter.[14] But as a method of legal analysis, that gets us nowhere fast.

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[14]To dive even deeper into the realm of quantum physics, light has other curious qualities as well: at a subatomic level, matter and energy are interchangeable (in the proportion $e=mc^2$), particles can influence each other from a distance, and photons can travel backwards through time. I

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More fundamentally, technical merit aside, scientific analysis and legal analysis are two different modes of inquiry designed to accomplish very different goals. *See* Richard A. Posner, *The Problems of Jurisprudence*, Chapter 2: "Legal Reasoning as Practical Reasoning" (Harvard 1990) (distinguishing between deductive scientific reasoning and the types of legal reasoning that courts employ). In science, data-based objective truth is all that matters. In law, courts care about the "truth" in the sense of achieving a just (or "right") result in a particular case; but they also care about other things and can sometimes sacrifice individual truth in order to achieve other important policy goals, such as making the law predictable, consistent, stable, and clear even if not well-matched to the facts of every individual case. *See* Posner, Chapter 1: Law as Logic, Rules, and Science, pp.51 ("Law, however, unlike science, is concerned not only with getting the result right but also with stability, to which it will frequently sacrifice substantive justice."); *see also* Sidney Beckman, *Hiding the Elephant: How the Psychological Techniques of Magicians Can Be Used to Manipulate Witnesses at Trial*, 15 Nev. L. J. 632, 633 (2015) ("[A] trial is not a scientific inquiry into truth. A trial is the resolution of a dispute").

Consequently, even if it were unequivocally true that a quantum physicist would think of light as formed of particles, that conclusion alone should not govern whether we should find a trespass here as a matter of legal analysis and underlying public policy. There is a place

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am not even going to open the Pandora's Box of what we might have to conclude as a matter of law if light can go backwards in time and invade property retroactively.

for science in drafting and interpreting the rules that govern human conduct, but determining what scientists may think about a matter in legal dispute is not the ultimate goal of what courts do.

Properly framed, I think the question before us is not whether light is tangible or not, but instead: what legal right inherent in property ownership does the light projection supposedly violate?

III.

To answer this question, we must start with the "bundle of rights" that all owners acquire when they purchase real property. Fundamentally, the right to own property is the right to exclude others from entering, using, or possessing it. *S.O.C., Inv. v. Mirage Casino-Hotel*, 117 Nev. 403, 412, 23 P.3d 243, 249 (2001). *See* Nevada Const., Art. 1, § 1 (stating that acquiring, possessing and protecting property are inalienable rights); *see also McCarran Intern. Airport v. Sisolak*, 122 Nev. 645, 659, 137 P.3d 1110, 1120 (2006) ("Nevadans' property rights are protected by our State Constitution."). In a real sense, whenever property is bought or sold, what has really been purchased is the right to sue someone in court for trespass for entering, using, or possessing the property without the owner's permission. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* §13, at 67, 70 (5th ed.1984); Restatement (Second) of Torts §163 cmt. d (Am. Law Inst. 1965) ("A common use of the action of trespass is to obtain a determination of a plaintiff's right to exclusive possession.").

The Nevada Supreme Court has said that a trespass occurs when a property right has been physically invaded. *Lied v. County of Clark,* 94 Nev. 275 (1978). Alternatively, the tort has also been described more broadly as protecting against "[a]ny misuse of the land or deviation

from the intended use of the land." *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403 (2001).

But these are relatively generic phrases, and it is not entirely clear how they can be applied to the particular facts at hand. The difficulty in this case arises from three observations: first, there is not much published Nevada law on the tort of trespass to guide us; second, authority from other states is divided; and, third, to the extent that Nevada authority exists, it generally involves facts that have little to do with this case.

Fundamentally, the problem here is that we are confronted with a clash between very old law and evolving new technology. *See* Jeffrey S. Sutton, *Courts, Rights, and New Technology: Judging in an Ever-Changing World*, 8 N.Y.U. J. L. & Liberty 261 (2014). Trespass is one of the oldest torts known to Anglo-American jurisprudence, dating as far back as twelfth-century England. *See* George E. Woodbine, *The Origins of the Action of Trespass*, 34 Yale L.J. 343 (1925). But back then, even the most advanced thinkers of the day were not aware of such things as atoms, electrons, or photons; it would be another two centuries before Galileo proved that the earth revolved around the sun, a revelation so antithetical to prevailing thought that he was burned at the stake for suggesting it.

It should come as no surprise, therefore, that the tort of trespass was originally limited to physical invasions of property by people or objects composed entirely of matter; as far as anyone knew, there was nothing else that existed in the universe that could invade anything. In an era lit by wax candles, and then whale-oil lamps, and then kerosene, there was not much that one could do to another's property with light.

But nowadays light can be so many more things and can be used in so many more ways; searchlights, lasers, and light projectors of the kind involved in this case are now commonplace. The inquiry here is whether the bundle of rights traditionally protected by the ancient tort of trespass should be read to include the right to stop the newly-developed light projection used here.

IV.

The torts of trespass and nuisance are closely related, so much so that some courts have observed that expanding the tort of trespass to cover such things as light, gas, or odors effectively blurs the two torts together and makes them one. *See Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215, 220-221 (Mich.App. 1999).

The traditional common-law view was that property injury caused by such things as light, gas, sound, smoke, odors, or vibrations might constitute an actionable nuisance under the right circumstances, but could not support a cause of action in trespass. *See id.* and cases cited therein; *Amphitheaters, Inc. v. Portland Meadows*, 198 P.2d 847 (Or. 1948) (same).

On the other hand, a substantial minority of modern cases have held that light invasions can constitute a trespass so long as substantial harm results to the property. *See, for example, Cook v. Rockwell Intern. Corp.*, 273 F.Supp.2d 1175, 1200 (D.Colo. 2003), and cases cited therein.

But, speaking generally, most commentators and the majority of courts consider light invasions to be better suited for the law of nuisance rather than trespass. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 13, at 67, 71-72 (5th ed.1984); *Adams v.*

Cleveland-Cliffs Iron Co., 602 N.W.2d 215 (Mich.App. 1999) ("We do not welcome this redirection of trespass law toward nuisance law.").

I agree with the view that light invasions – at least of the kind at issue here – are better suited to be addressed by the law of nuisance than the law of trespass. The fundamental conceptual difference between a trespass and a nuisance is that trespass is the right to exclude something absolutely, while nuisance is the right to exclude something that might have to be tolerated in small quantities but may become the subject of judicial relief when it becomes excessive and unreasonable even in an urban environment. *Compare Crook v. Sheehan Enters., Inc.*, 740 S.W.2d 333, 335 (Mo.App. E.D.1987) ("Trespass is the unauthorized entry by a person upon the land of another, regardless of the degree of force used, even if no damage is done, or the injury is slight.") *and Kitterman v. Simrall*, 924 S.W.2d 872, 878 (Mo.App. W.D.1996) (noting that liability for trespass "exists whether or not done in good faith and with reasonable care, in ignorance, or under mistake of law or fact") *with Sowers v. Forest Hills Subdivision*, 129 Nev. ___, ___, 294 P.3d 427, 431 (2013) (nuisance "may arise from a lawful activity conducted in an unreasonable and improper manner" and in evaluating whether an activity constitutes a nuisance, "it is necessary to balance the competing interests of the landowners, using a commonsense approach."). *See generally* Restatement (Second) of Torts, § 821D (Am. Law Inst. 1979) (trespass is an interference with a property owner's right to exclusive possession of a property, while a nuisance is an interference with the owner's use or enjoyment of the property).

Thus, the tort of nuisance involves a balancing of competing interests with an eye toward ascertaining the reasonableness of the

intrusion, while the tort of trespass is absolute and involves no such balancing. What this means for this case is that, by claiming a trespass to have occurred, the Respondents are seeking an absolute bar against the invasion of projected light, without any inquiry whatsoever into whether the intensity, duration, or other qualities of the projection were unreasonable or excessive. Indeed, the Respondents specifically argue in their brief that

> The fact that [the Union] only projected images for a limited duration of time . . . does not absolve it of trespass liability. . . . the question of trespass is *not one of scope or degree*; rather any interference . . . no matter its manner or duration – is actionable.

But while it is true that manner and duration do not matter when applied to traditional trespasses committed by people or super-atomic objects, when applied to light, the Respondents' argument goes too far and takes the law of trespass to a place it was never meant to go.

V.

Human beings see things only when light is either projected by, or reflects *off of*, an object and enters the retina; without light, nothing is visible and the world would be dark. Thus, a property such as the Respondent's building can only be seen at all if some source emits enough light to reflect off of the building with sufficient intensity to trigger the nerves within the eye of a human observer. During the daytime, this source can be natural rather than artificial (the sun), but, at night, artificially created and projected light (that is, excluding light from the sun, the moon, and the stars) might be necessary to light the building or else it might be invisible.

Every property located in a densely populated urban area like Las Vegas is continually bombarded by multiple artificial light sources, including such assorted things as street lamps, commercial neon signs, neighboring porch lights, automobile headlights, helicopter searchlights, the ambient glow cast by the Las Vegas Strip over the horizon, and the like, even such barely visible things as pedestrian cell phone screens or cigarette embers. Everything that a human being can see from the property is, technically speaking, a light wave crossing the property line and invading the property.

All of these lights affect the appearance of the property with varying intensity and duration, some brief and barely perceptible, and some with great intensity for long periods of time. If the Respondents are correct and neither intensity nor duration are relevant to whether a trespass has occurred, then all can be the subject of judicial relief no matter how transient or barely perceptible the effect on a property. If the Respondents' argument is correct, then a court could enjoin every light visible from the property anywhere in the city – could order it all turned off – under the rubric of protecting a property right.[15]

Ultimately, when the question is properly framed, the answer strikes me as quite simple: I do not think that the absolute right to block

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[15]Indeed, the Respondents light their own property with an array of lights. Surely they do not believe that the light they project stops at their property line and doesn't intrude into neighboring properties; quite to the contrary, the very point of their lighting is to make the property visible from far away so that customers can find it at night. So, if the Respondents are correct that projected light constitutes a trespass when it crosses a property line, then the Respondents are themselves trespassing onto every neighboring property from which their property is visible.

artificial light emanating from somewhere off of the property – without any inquiry into its intensity, duration, reasonableness or unreasonableness – should be included within the "bundle of rights" that one acquires when purchasing a parcel of land in a densely populated urban center like Las Vegas. Trespass law does not convey the right to live in a black hole. I would therefore conclude that the light that was projected in this case does not constitute a violation of the law of trespass. The injunction below was based upon the wrong tort.

On the other hand, simply because a property owner does not have the right to exclude all light emanating onto a property under trespass law does not mean that one must tolerate every kind of light that is beamed onto the property no matter how excessive or unreasonable it may be. In some cases, projecting artificial light onto someone else's property might constitute an actionable private nuisance. The district court's order contains no factual findings regarding whether such a nuisance occurred in this case, and so that question is not before us.

I therefore agree with my colleagues, for all of the reasons set forth in the court's order but also for the additional reasons outlined herein, that the injunction is void and a reversal is in order.

_____, J.
Tao

cc: Hon. Gloria Sturman, District Judge
Lansford W. Levitt, Settlement Judge
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