

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AARON C. BORING and CHRISTINE
BORING, husband and wife, re-
spectively, Plaintiffs,

09-2350 (Third)

Appeal from:
W.D.Pa 08-694

v.

Mag. Judge Amy Reynolds Hay

GOOGLE, INC., a California cor-
poration, Defendant.

CONCISE STATEMENT

Appellants filed the action against Google, Inc., among other claims, for trespass and invasion of privacy. The claims relate to Google's "Street View" practices, whereby Google traverses geographical areas with one or more 360° cameras and then automatically publishes the results throughout the world via the Internet.

Notwithstanding a "**Private Road No Trespassing**" road sign, Google drove from a paved public road onto a graveled privately owned road while taking 360° photographic imagery of the surroundings. Continuing on the private road past the "no trespass" signage, Google then intentionally drove from the private road onto and into Appellants' private residential driveway. Then, Google proceeded to take additional close-up pictures of Appellants' residence while on their driveway. The acts by Google were without Appellants' consent.

The lower court dismissed the case on the pleadings giving rise to this appeal. There is neither transcript nor discovery, so the question on appeal will be determined from the pleadings. Appellants' position is set forth in its Motion for Reconsideration (Docket No. 46) and Reply Brief (Docket No. 48).

Because discovery was logistically denied, Appellants cannot cite to an evidentiary record, but Appellants have reason to believe that discovery will reveal other trespasses by Google. Further, that Google fails to institute proper prevention policies because of the cost to do so, and it continues to escape responsibility because the violations do not cause physical damage to the property.¹

Appellants believe their private property rights, particularly in the context of their marked private road, must be vindicated. Quite simply, Appellants seek their day in court, before a jury, with the benefit of a post-discovery expert damage calculation.

There is apparently no dispute that Google was on Appellants' property without permission. Having established trespass by definition, there are three intertwined analytical rationales that might have

¹ As a factual matter, Google admits to having instituted a post-injury mitigation system for removal of its offending publications for those persons who, by whatever circumstance, discover the issue.

been used for dismissal, but none of them are proper in light of the record and applicable law in this case:

1. Google has an absolute affirmative defense, such as, without discovery or trial to determine the scope thereof (which Google has the burden to prove), Google and all other commercial entities similarly situated (however so), have an absolute right to enter private property for commercial gain for some undefined period of time. This basis was not articulated by the court below, but it is implied by result.

2. The cause of action for trespass requires physical damage. This is the "grass will stand back up defense." Whether physical damage is an element of trespass is a substantive law issue, or, it may tie itself back together as an affirmative defense. Nevertheless, if the law imposes my front lawn to be made the subject of unlimited run-acrosses allowing others to get to a pot of gold on the other side, my property has become a servient tenement, or slave,² dragging along my own human effort that was required to produce the wealth to acquire the land clear and free. The lower court stated it would be futile to amend, as there is no physical damage proximately caused. [See Docket 43, Pg. 12, fn. 8] Appellants assert that physical damage is not an element of trespass. [See Docket 46, Pg. 9, fn. 11]

3. There is a cause of action for trespass without physical damage, but there are technical pleading rules required to assert damage. For this, the Court below seemed to opine that compensatory damage is unavailable as a matter of law for trespass without physical damage proximately caused, and only nominal damages are available. And, for those, the proximately caused nominal injury must be technically pleaded under the Federal Rules. Appellants believe it is clear error for the Court below to opine that only nominal damages are available for trespass without physical damage, and, further, that the Federal Rules require abstract technical pleading. [Docket No. 46, Pg.4, fn. 6; Docket No. 48, Pg. 4]

A copy of the Memorandum and Order of Court dismissing the Amended Complaint [Docket Nos. 42 and 43] and the Order of Court denying Plaintiffs' Motion for Reconsideration [Docket Nos. 49 and 50].

Dated: May 26, 2009

s/Gregg R. Zegarelli/
Gregg R. Zegarelli, Esq., PA#52717

s/Dennis M. Moskal/
Dennis M. Moskal, Esq., PA#80106

²Google and the Court below referenced the undersigned's use of the term "slave" as hyperbole, but, respectfully, it is not so: the facts are what they are. Google's unprecedented power to invade and publish, in light of the Court's opinion, bodes danger for fundamental freedoms. Freedom begins with the right to be left alone. Whether the phraseology is "slave," "servitude" or "servient tenement," the point is substantively immaterial. My property is compelled to serve. If you use my property without compensation, you use my time without compensation.

CERTIFICATE OF SERVICE

The following person or persons are believed to have been served electronically in accordance with the procedures and policies for Electronic Case Filing (ECF) on this date:

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