

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

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

Plaintiffs,

CIVIL ACTION NUMBER: 08-694
(ARH)

v.

GOOGLE, INC., a California cor-
poration,

Defendant.

Plaintiffs' Reply Brief

A pleaded cause of action for trespass is not, nor should be, legally complicated. Google was on Plaintiffs' land without permission.¹ That is a prima facie claim for trespass pursuant to the applicable substantive law of the Commonwealth of Pennsylvania.² And, indeed, Google is fully and fairly on notice to defend against the claim pursuant to the procedural rules of this Federal Court.³

Certainly, after discovery, if Google has evidence sufficient to refute Plaintiffs' claim that Google was not on Plaintiffs' property, Google may present an appropriate motion after discovery. Moreover, if, after discovery, Google has evidence sufficient to meet its own burden of proof for any affirmative defense that it has authority to enter onto Plaintiffs' property (and, possibly, everyone in the world's property), then Google may present that motion after discovery. And, finally, if, after discovery, Google has any other fact-based dispositive motion, then Google may present that motion after discovery.

¹ Factual issues such as signage, Google's commercial nature, benefit and profit-motive, and remediation are issues for the jury, but not issues to get to a jury. See also, footnotes 4, 6 and 11 of Plaintiffs' Motion.

² Citations in Plaintiffs' Motion, see Pg. 5, *et. seq.*; F.R.C.P. 8(a) (short and plain statement; powerful presumption against dismissal).

³ *Id.*

However, at this early stage of the litigation, Plaintiffs respectfully request that this Court properly draw all inferences in Plaintiffs' favor.

At the proper time, after discovery, Plaintiffs themselves expect to file a Motion for Partial Summary Judgment as to liability, at which point the sole issue for the jury simply will be one of damages.

Google took all of the court-allowed 20 days, and its virtually unlimited resources, to concoct abstract arguments such as *de minimis non curat lex*⁴ that would, after only a moment of careful reflection, effectively wipe-out, with one fell-swoop, the jurisprudence of nominal damages along with the jurisprudence of the general intent standard for trespass.⁵ Google wants desperately for this Court to prejudge its actions as an incidental, but they are not, and Plaintiffs need discovery to prove it.⁶

Furthermore, Google asserts off-the-merits, last-resort arguments such as standards for reconsideration that merely beg the question, while ignoring or side-stepping the precise question. Indeed, Plaintiffs raised no new facts in its Motion for Reconsideration, but only offered law as appropriate in light of the specific context of this Court's specific ruling. The difference is that, for clarity of analysis, Plaintiffs have removed Google's confusing privacy argument tentacles, which are fundamentally more factually and legally complex. Google tries again to recreate the tentacles of confusion here, hoping something sticks, but to no avail.

The absence of any response to the precise question is conspicuous.

⁴ Google, a defendant, makes presumptuous assertions that contradict the very inferences to which Plaintiffs are entitled. The intentional act of trespass requiring time and costs of Plaintiffs to rectify, in light of the systematic encroachment through a commercial mechanism of profit-making is not *de minimis*, and Plaintiffs are entitled to discovery to make their case without prejudgment. If the doctrine is applicable to conserve judicial resources in this matter, it is the best argument for reconsideration as asserted by Plaintiffs.

⁵ One only needs to intend to enter the land, not intend to trespass. Even so, Plaintiffs assert that intention can be inferred by Google driving from a main road, onto crunching gravel, past the "Private Road No Trespassing" sign, and then right up and onto Plaintiffs' removed driveway (where it took pictures).

⁶ See footnote 6, *infra*.

For example, Google cites cases which this Court's most basic check-list will disclose are inapplicable. Cases lacking precedential value, cases not grounded in trespass (not at issue here), cases in equity (on a different standard of review not at issue here), cases using specific state pleading standards (irrelevant), trespassers without a profit-motive (not at issue here), post-discovery (not at issue here) and post-trial (not at issue here).⁷ In fact, in cases such as Pile v. Pedrick, 167 Pa. 296, 31 A. 646 (1895), the Supreme Court of the Commonwealth of Pennsylvania itself took up Plaintiffs' argument and, in defending landowner rights, opined:

For one inch and three eighths the ends of the stones in the wall are said to project beyond the division line. The defendants have no right at law or in equity to occupy land that does not belong to them and we do not see how the court below could have done otherwise than recognize and act upon this principle. They must remove their wall so that it shall be upon their land.

⁷ Yeakel v. Discoll, 321 Pa.Super. 238, 467 A.2d 1342 (Pa.Super. 1983) (equity case with different standard of review, fact hearing conducted); Bates v. Provident Consumer Discount Company, 493 F.Supp. 605, 1979 U.S. Dist. LEXIS 8497 (E.D.Pa. 1979) (contract case; fact discovery completed); Palmieri v. Lynch, 392 F.3d 73, 2004 U.S. App. LEXIS 25468 (2d Cir. 2004) (discovery completed, governmental trespasser); North Pennsylvania Railroad Company v. Rehman, 49 Pa. 101, 1865 Pa.LEXIS 63 (Pa. 1865) (trial completed, roaming animal case in unenclosed woods/wastelands); Bailey v. Zoning Board of Adjustment of the City of Philadelphia, 569 Pa. 147, 801 A.2d 492 (Pa. 2002) (non-trespass zoning case); Suppan v. Dadonna, 203 F.3d 228, 2000 U.S. App. LEXIS 1443 (3d Cir. 2000) (non-trespass labor case, discovery completed); Rutan v. Republican Party, 497 U.S. 62 (1990) (free speech case with statutory implications, remanded for trial); Student Public Interest Research Group v. AT&T Laboratories, 617 F.Supp. 1190, 1985 U.S. Dist. LEXIS 16888 (NJ 1985) (discovery completed, non-commercial, statutory interpretation, declined to apply rule); Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658, 687, 99 S.Ct. 3055 n. 29 (1979) (Indian treaty/sovereign nation case, non-trespass); C&K Coal Co. v. United Mine Workers of Am., 537 F.Supp. 480, 511 (W.D.Pa. 1982) (special pleading requirements under 29 USC 106, trial conducted, applicable statute, non-commercial); In re One Meridian Plaza Fire Litigation, 820 F.Supp. 1460, 1993 U.S. Dist. Lexis 5021 (E.D.Pa. 1993) (class action, economic loss doctrine with contract implications, non-human fire case); Duquesne Light v. Westinghouse, 66 F.3d 604, 618 (3d Cir. 1995) (no contract here so economic loss doctrine not applicable); Costlow v. Cusimano, 34 A.D.2d 196, 311 N.Y.S.2d 92, 1970 N.Y. App. Div. LEXIS 4849 (N.Y. App. Div. 4th Dep't 1970) (NY code/fact-pleading [not notice pleading] case; court expressly acknowledges that trespass action is viable if pleaded, and, even so, other courts in a trespass action have found a party is entitled to recover compensatory damages for injury resulting from publication of information acquired by tortuous conduct, quoting, Hammond v. County of Madera, 859 F.2d 797 (9th Cir. 1988) quoting Belluomo v. KAKE TV & Radio, 596 P.2d 832 (Ka. 1979); the issue of damages is a question for the jury and compensatory damages available, see Hammond quoting Belluomo). **If this is the best Google can do, these cases unquestionably drive this Court to grant Plaintiffs' motion.**

Id., 167 Pa. at 300-1, 31 A. at 647 (emphasis added) (applicable in actions at law). Google purposely mixes it all up, again. This is a pleading case, at law and not equity, pursuant to Pennsylvania substantive elements of the claim placed in light of liberal federal notice standards for pleading. Plaintiffs cited numerous cases to this Court for the precise proposition that damage is not a pleaded element of a cause of action in trespass in this Commonwealth, and that Google is on full and fair notice to enter a defense to the claim in this federal court. Moreover, Plaintiffs cited numerous cases that clearly express the fundamental rationale in the historical, social and legal contexts.

Plaintiffs cited the Restatement on Restitution (Second) not to have a ruling on damage points, *per se*, but to demonstrate the certainly objective, analytical and well-reasoned basis that damages are not nominal. A jury may or may not find the damages nominal or compensatory, but we are not there yet.

There are no confusing facts or issues here that would be reviewed on appeal. This issue is precise: **the role of averring damages as an element of a substantive cause of action in a trespass case under the Federal Rules of Civil Procedure.**

The references by the undersigned to our American Forefathers in the Motion were not hyperbole. The undersigned are zealously impassioned by the legal principles at issue in this case, and trust that that there are other constitutional historians who will review this case with sincere interest. Security in our private property is a fundamental American right. At oral arguments, the undersigned would (and will) look in the eye this Court, the Third Circuit and the Supreme Court and repeat every single line.

Without a broken fence to aver, or a direct monetary diminution, Plaintiffs are treaded upon, injured and without remedy.

Whether my property is a slave to serve unlimited commercial profiteers or I am taxed as a slave to build a fence, it is of no matter: my property, my time and my money are committed to serve the interests of another against their will.

Sure, it is just a little slavery from everyone, but it adds up.

And, Google can look these same courts in the eye and argue that it has a legal right to exist on our clients' property, just for a moment—and not hurting it—and similarly everyone else in the world's property, in succession—and not hurting it, with every other commercial enterprise, in succession—and not hurting it.⁸

So be it; the question will play out to precise finality in due course.

But, the undersigned should not be too bold to reference to the traditional common-sense wisdom of every good mother:

"Mom, I took the property, but I gave it right back...and I didn't damage it," said the child.

"That is no excuse," said the mother. "Not hurting someone else's property has nothing to do with it. What would the world be like, child, if everyone also got to trespass onto other people's property and just said they gave it right back undamaged? Now, you need to be punished."⁹

Plaintiffs pray for this Court's open-mind, their day in court, and to let a jury of the People decide the question.

Dated: March 24, 2009

s/Gregg R. Zegarelli/
Gregg R. Zegarelli, Esq.

s/Dennis M. Moskal/
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⁸ Defendant seems to claim that without a broken fence or diminution in value, and nothing more to plead, Plaintiffs must concede that "it is okay, Google and others, to tread on me."

⁹ See Plaintiffs' Motion, footnote 11 (Although Wisconsin did not use Plaintiffs' counsel's mother example, it did properly apply the wisdom. It opined to the individual and societal interest in private property in America, and cited to the Supreme Court of the United States; making a special exception to the general rule in Wisconsin allowing punitive damages without any compensatory damages because of the unique importance of trespass and private property rights; trespass unique in character.)

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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