C.A. NO. 09-2350

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AARON C. BORING and CHRISTINE BORING, husband and wife,
Appellants,

v.

GOOGLE, INC., a California corporation,
Appellee.

Appeal from Western District of Pennsylvania
2:08-cv-00694

PETITION FOR REHEARING EN BANC
REGARDING ORDER OF THIS COURT DATED JANUARY 28, 2010, AFFIRMING IN PART AND REVERSING IN PART THE ORDER BELOW DISMISSING PLAINTIFFS' AMENDED COMPLAINT, GRANTING DEFENDANT'S 12(B)(6) MOTION ON ALL COUNTS; APPEAL FROM ORDER DATED APRIL 6, 2009, DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

PETITION FOR REHEARING EN BANC
AARON AND CHRISTINE BORING

Gregg R. Zegarelli, Esq.
PA I.D. #52717
mailroom.grz@zegarelli.com
412.765.0401

Dennis M. Moskal, Esq.
PA I.D. #80106
mailroom.dmm@zegarelli.com
412.765.0405

Z E G A R E L L I
Technology & Entrepreneurial
Ventures Law Group, P.C.
Allegheny Building, 12th Floor
Pittsburgh, PA 15219-1616
v.412.765.0400
f.412.765.0531

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules

Other

I. PANEL DECISION MISINTERPRETS AND MISAPPLIES THE TWOMBLY STANDARD.

The undersigned respectfully submit that the Panel[1] misinterprets *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal.*[2] Notwithstanding the partial reversal of the Order below,[3] error yet remains.

1. The Twombly Standard. *Twombly* and *Iqbal* rest upon complex federal questions without federalism issues and traditional common law state causes of action. A federal court ruling on a federal question may entwine procedure and substance differently than when a federal court must restrain from creating general federal common law for a state claim.[4]

Having said that for the purpose of categorical consideration, the general pleading standard is straight-forward:

> **A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.[5]**

The Twombly Standard was not intended to create a "**convince**"[6] or an "**I know it when I see it**" standard of pleading, or to deny access to the courts on a prejudicial conclusory basis. Yet, the undersigned respectfully submit that both Opinions effectively do just that.[7]

---

[1] M. Rendell, K. Jordan, Circuit Judges, and J. Padova (by designation) (the "**Panel**"); Opinion, dated January 28, 2010 (the "**Panel Opinion**").
[2] *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007) (Alito, Breyer, Kennedy, Roberts, Scalia, Souter, Thomas; Ginsburg and Stevens dissenting); *Ashcroft v. Iqbal,* 129 S. Ct. 1937 (2009) (Alito, Kennedy, Roberts, Scalia and Thomas; Breyer, Ginsburg, Souter and Stevens dissenting). *Twombly* and *Iqbal* referenced hereafter as, the "**Twombly Standard**."
[3] A. Hay Opinion, February 17, 2009, A7, (the "**Mag. Opinion**"). The Panel Opinion and the Mag. Opinion, referred to as the "**Opinions**."
[4] *See, Erie R. Co. v. Tompkins*, 58 S.Ct. 817 (1938).
[5] *Iqbal,* at 1949; *see, also,* guidance of the four-justice dissent, at 1959 ("the [basis for dismissal] lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel...")
[6] See Borings' Br., at 20.
[7] *See,* Mag. Opinion, at pg. 4, A7; Borings Br., at 5; the Panel Opinion is addressed *infra*.

Both Opinions ignore assessment of crucial averments, such as the "**Private Road No Trespassing**" sign, the pleaded seclusion and the pleaded intent or disregard of Google for property or privacy. [Complaint ¶5, 6, 10, 11, 27; A30-31, A35]

Formulaically, the pleading of all types of facts is not the same, because the inherent nature of all facts is not the same.[8] There are three types of facts for pleading: elemental, compound and abstract:

> **1. Elemental.** The grass is green; the nose is broken. Without calling into the analysis existential philosophy or high-science (such as "is it really green?," a spectra scope or a doctor), these facts are self-evidencing.
>
> **2. Compound.** The man was drunk; there is an agreement. These facts are conclusory. They rest on elemental facts at some tier. The man had alcohol on his breath and was wobbling. On October 31st, the man told me to paint the door.
>
> **3. Abstract.** Love and deep love; hate and despise; anger and outrage; offense and high offense. These are facts, but they do not necessarily have simply-reduced elemental components, since, by their nature, they have unlimited particular implementations, which themselves may be abstract. Abstract facts are doubly if not impossibly analytically capable of objective degree separation. That is, how many degrees of love and hate are there? When does "offense" become "high offense"? Ultimately, the fact requires subjective judgment by a trier of fact, possibly with an expert report. These facts, by their very nature, press themselves as trial questions because, unless the claim element is exacting for purposes of demurrer, they beg, such as it is, "I know it when I see it" confusion.

The Twombly Standard implicitly sets forth "common sense" factors:

1	Is the fact elemental, compound (conclusory) or abstract?	"High offense" and "mental suffering" are abstracts. In *Twombly,* the "agreement" is a compound.
2	Does the defendant need the benefit of more facts to frame a defense?	Will the required fact change the nature of the response by the defendant. In *Iqbal*, the pleading standard was pursuant to the federal statute using a statutory term of art. Not existing in this case: irrespective of additional facts for mental suffering or offensiveness, Google's response is materially substantively unchanged.

[8] *See*, Fed. R. Civ. P. 9.

3	Does the fact "possibly" flow from conduct averred; is it "plausible" (suggested); is it "contradicted"?	Mental suffering and high offense can occur for a trespass.[9] More so, trespass that infringes a pleaded seclusion interest and is wrapped into the context of worldwide publication derived from the trespass, is tantamount to a million eyes of invasion.
4	Does the fact relate to conduct (cause) or damage (effect)?	Notice of the averred conduct [*Twombly, Iqbal*] is distinct from notice of damages, often a function of post-discovery with the aid of experts.
5	Is there an equally plausible alternative that creates facial ambiguity?	Google was on the Borings land, took pictures and commercialized, as it intended.
6	Is there a claim to the scope of statutory intent or public policy?	Particularly with statutory causes of action, there may be a need to plead into or over a governmental interest.
7	Is the cause of action federal or state based?	Federalism issues require deference to general federal common law, such as, creating *de facto* state claim elements. Importantly, federal use of state case law with fact-pleading must separate the claim element standard from the pleading standard.
8	If the fact is abstract, is there objective legal clarity on satisfaction of the claim element, thereby making the fact elemental? Is the fact request tantamount to fact pleading or "magic words"?	Is the court's requirement tantamount to creating an implicit element in violation of general federal common law. For example, does a plaintiff have a reasonable basis for satisfying or "convincing" the court, apart from notice to the defendant for the claimed conduct. What is the appropriate pre-evidentiary objective pleading standard, and where is that standard articulated: for example, does the federal standard to survive a 12(b)(6) demurrer require pleading of taking aspirins, more, different or less.
9	Is the quality of fact a matter of degree or a bursting bubble for satisfaction of the element?	Compare loss of consortium prior to legal recognition; the existence of the fact did not permit relief. Here, the facts are claimed by the court to be "not good enough" to "convince" the court.

Moreover, pleading demands for abstract facts is inherently a slippery slope, as demonstrated by the Magistrate Judge's own admission:

[9] *See Jacque v. Steenberg Homes*, 209 Wis. 2d 605; 563 N.W.2d 154, 159-162 (1997) (emphasis added). ("Although dueling is rarely a modern form of self-help, one can easily imagine a frustrated landowner taking the law into his or her own hands when faced with a brazen trespasser, like [defendant], who refuses to heed no trespass warnings...."), emphasis added. It is reasonable, and easy to imagine, that resentment, mental suffering and high offense can exist per the Wisconsin Supreme Court framework of dueling and someone willing to injury or kill.

> **[I]t is easy to imagine that many whose property appears on Google's virtual maps resent the privacy implications..."[10]**

"Resent" means "to have a feeling of pain or distress..." "Suffering" means "the bearing of pain or distress." [11] The Supreme Court did not intend to deny access on such pre-evidentiary hair-splitting distinctions.

2. Error in Dismissing Privacy Count.

The Panel Opinion states, at pg. 8:

> **Publication is not an element of the claim, and thus we must examine the harm caused by the intrusion itself.**
>
> **No person of ordinary sensibilities would be shamed, humiliated, or have suffered mentally as a result of a vehicle entering into his or her ungated driveway and photographing the view from there.**

i. Error by Misapplication of *Borse*.[12] A plain reading of the Panel Opinion states that "publication is not an element of the claim" apparently for the proposition to ignore and to dissect publication from the claim. The conclusion does not follow the premise, it inverts it. This is clear error and confuses the interpretation of *Borse*.

The concept to remove the "expanse of view"[13] from an invasion of privacy claim is not comprehensible. The expanse of view is the counterweight of the expectation of privacy. It is seclusion from the expanse of the view. Privacy seclusion is relative to a view or intrusion. It does not follow that, because I live on a cul-de-sac with an occasional drive-by, means that I expect the million eyes of a televised daily New York parade. [Borings' Reply Br., at 11; n. 21, *supra*]

---

[10] Opinion, at 4, A7; *see, infra.* n. 9.
[11] Oxford English Dictionary (Online Subscr.), Second Ed. 1989.
[12] This Court will note that the Panel uses *Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co.*, 809 A.2d 243, 247 (Pa. 2002), quoting a statement of the required averment in a fact-pleading jurisdiction. The Panel does not analyze or distinguish the element for purposes of liability from the pleading difference under the Federal Rules.
[13] *See* Borings Reply Br., at 11.

ii. Error by "Door Knock" Immunity. The Panel Opinion concludes that a claim for trespass and worldwide publication of data is less than a door knock and, therefore, Google is immune. The Panel changes the facts and rules on an entirely different context argumentatively, in clear error to the Twombly Standard. Although it may be subtle, the Panel discloses prejudice on the merits apart from the Borings' filed pleading.

iii. Error by the "Fleeting Presence" Immunity. The amount of time necessary to do the averred injury is immaterial; it is clear error to assert otherwise. There is no basis to assert that the time of presence is insufficient intrusion when the result of that presence is recorded with worldwide publication. Injury can be done in a nanosecond. Google profited until its conduct was discovered.[14] The Panel describes the presence as "fleeting," but that term is not supported in the pleading at issue.

iv. The Conclusion Begs the Trial Question. All that remains in the Panel Opinion is exactly the draconian conclusory determination that begs the ultimate trial question, as a matter of law, without evidence:

> **No person of ordinary sensibilities would be shamed, humiliated, or have suffered mentally as a result of a vehicle entering into his or her <u>ungated</u> driveway and photographing the view from there.[15]**

The Panel clearly admits its error, ignoring pleaded seclusion, trespass and a "**Private Road No Trespassing**" expectation of privacy:

> **It is plausible that a reasonable person *could be* highly offended and incur mental suffering, shame or humiliation, having discovered that someone recently entered onto secluded private property, took 360° pictures within and while close-up on the driveway close to the home and swimming pool, while trespassing, after also trespassing and driving far down a privately maintained road and past "Private Road No Trespassing" signage, having commercialized the pictures, as intended by the trespass, with publication throughout the world via the trespasser's pervasive proprietary index system.**

[14] *See,* Borings Br., at 7.
[15] Panel Opinion, at 8, emphasis added.

The Panel's use of fact that it is "ungated" may be Google's argumentative defense, but it is certainly not plaintiffs' averment. The Twombly Standard is not a *carte blanche* for dismissal for what a court may believe is a better argument or better facts. Dissection of the context, and ignoring pleaded facts, is clear error. The undersigned is respectfully trying to assess the claim element: as a matter of law, would a blinking "**Private Road No Trespassing**" sign satisfy the element? Should the required gate be locked? Is a guard dog an equivalent to a gate? What exactly is the objective federal law claim element for reference to survive the "so what" of a demurrer and allow the claim to pass?[16] The Panel creates the new general federal element of a required "gate."

v. Other Examples of Case Law. The Panel issued a non-precedential opinion, then cites to lower courts.[17] The lower courts are presumably acting in accordance with the precedent that should be established by this Court as a case of first impression, causing an endless loop of non-authority. *E.g.,* the Panel citing to *Diaz*[18] for the proposition that the district courts sustain cases for "highly offensive"[19] is non-responsive

[16] *See also,* Panel Opinion, at 9. The existence of "relevant factors," such as viewing inside the home on the merits, does not defeat plaintiffs' pleading. Once again, it does not follow that the failure to find a relevant factor means that the pleaded factors are finally adjudicated on the merits or may be ignored. *Pacitti v. Durr,* Civ. A. No. 05-317, 2008 WL 793875 (W.D. Pa. Mar. 24, 2008), aff'd, 310 F. App'x 526 (3d Cir. 2009), is another inapplicable example; dismissal was based upon truth as a defense.

[17] Panel Opinion, at 9.

[18] *Diaz v. D.L. Recovery,* 486 F.Supp. 2d 474, 475-480 (E.D. Pa. 2007).

[19] Panel Opinion, at n. 4, pg. 9: " **[W]e note Google's assertion, which is not seriously contested by the Borings, that the Street View photograph is similar to a view of the Borings' house that was once publicly available online through the County Assessor's website.**" That is incorrect. The Borings contest any reliance upon an unconstitutional entry on, and surveillance of, their property by a government agency as any basis for adjudication herein. Allegheny County's removal of the picture tacitly admits it is not permitted to publish data that taken by illegal entry. It suggests extrinsic evidence that is not properly qualified is unreliable.

as a pleading standard in this case: courts uphold and dismiss cases in their own contexts.[20] As set forth in the Distinction Table,[21] no case is comparable to this: there is no case that has both two key elements that are here intertwined and unseparable: trespass and worldwide publication.[22] Controlling case law is not cited because it is not known to exist. Offense and outrage in the privacy count are serviced and supported by the trespass. The Panel Opinion merely identifies other cases which have their own particular facts, and doing so is not a proper analysis of legal principles applied to plaintiffs' pleading. For example, in neither of the Opinions does the court analyze and articulate the obvious meaning of the "**Private Road No Trespassing**" sign, which would make the claim more plausible. The fact is ignored in clear error.

3. Error in Dismissing Punitive Damages.

The Panel states:

> **The Borrings' [sic] complaint fails to allege conduct that is outrageous or malicious. There is no allegation that Google intentionally sent its driver onto their property or that Google was even aware that its driver had entered onto the property. Moreover, there are no facts suggesting that Google acted maliciously or recklessly or that Google intentionally disregarded the Borings' rights.**

The undersigned most respectfully asserts that the above is legally incomprehensible pursuant to Fed. R. Civ. P. 8. It demonstrates how far the Twombly Standard is misinterpreted: *Twombly* is now the unintended standard for conclusory opinions, prejudice and the creation of unintended

---

[20] *See Wolfson v. Lewis,* 924 F. Supp. 1413 (1996 E.D.Pa), Borings Reply Br., at 13 ("a court should consider all of the circumstances ..."), *citing, Hill v. National Collegiate Athletic Assoc.,* 7 Cal. 4th 1, 865 P.2d 633, 648 (Ca. 1994) [following evidentiary hearing] (emphasis added). The Panel Opinion identifying examples of cases is not a replacement for proper analysis of the facts actually pleaded in this case.

[21] See Borings' Reply Br., Addendum A.

[22] Id.

elements and burdens of proof at the pleading stage. [See Complaint ¶¶6, 11, 27 A30-31, A35.]

The Borings have secured a valid claim for intentional trespass. Google is the driver, and its driver was trespassing onto secluded property, taking the pictures it intended to take for the benefit of its commercial enterprise, not requesting opt-ins, and publishing the illegal fruits of the trespass for its enrichment. Google drove past the clearly marked "**Private Road No Trespassing**" sign, and, with nowhere to go but to drive into the pool, turned around in the driveway, drove back and published the pictures anyway, worldwide.

Under the Twombly Standard, it is clearly error to determine that Google is immune from trespassing with intentional disregard or recklessly when expressly pleaded. [*See,* Complaint ¶¶6, 11, 27; A30-31, A35] If the Panel Opinion element is to be facially understood, it appears that would-be tortfeasors are immune from liability for being generally reckless, such as being immune to the particular person hit for intentionally or recklessly shooting a gun into a crowd. Moreover, the Panel denies the legal right to acquire or to present evidence of intention. A plaintiff should not have to plead workproduct or evidence to plead its general claim of the defendant's intention and/or reckless disregard. Requiring it is clearly error.

Regarding the use of *Jacques*,[23] undersigned understand the point of the stated Barnard Rule. As expressly stated, "the Supreme Court of Wisconsin also eloquently stated the socio-philosophical policy behind puni-

[23] Borings' Br., at 29.

tive damages in a trespass count."[24] It speaks well for itself and the importance of punitive damages in a trespass action.

Finally, damage claims can be dismissed in state court "in advance of trial."[25] But, it is clearly error for the Panel to immunize Google for its profit activities by attributing intention against the inference to which the Borings are entitled. For purposes of pleading, the plausibility regarding intention speaks for itself: Google is not supposed to be on the Borings' land or pass the "**Private Road No Trespassing Sign**."

4. Error in Dismissing Unjust Enrichment.

Data is the new oil. If an oilman trespassed onto my land, took my oil and commercialized it for a profit, I would have a claim not only for the trespass but also a claim for the commercialized value of the oil. The obligation to pay is implied because the use is for a commercial profit by the taker. If an oilman can take oil from a public domain source, that is not at issue in this case. But if the oilman trespasses onto my land to take my oil, he is liable for its value. That is simply fair. Each property owner is entitled to extract any and all value from their own private investment in their land.

The value of the oil remains to be determined. But, we know that each generation has its clever buyer who knows the ultimate value, but would never, of course, admit the value. Land for beads.

> **The complaint does not allege, however, that the Borings gave or that Google took anything that would enrich Google at the Borings' expense.[26]**

This is a conclusion not supported in the pleadings. The Panel cannot, at the pleading stage, without the aid of the information provided by discov-

[24] Id.
[25] The Panel cites to *Phillips v. Cricket Lighters,* 883 A.2d 439, 445, 447 (Pa. 2005), a post-evidence summary judgment ruling.
[26] Panel Opinion, at 14.

ery rule as a matter of law, make value determinations regarding the value of the extracted data in Google's hands.[27] The Borings properly satisfy the elements of the state-law claim, and the same have been pleaded: (1) benefits conferred on Google; (2) appreciation of such benefits by Google; and (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. *Lackner v. Glosser*, 892 A. 2d 21, 34 (Pa. Super 2006). If Google extracted data acquired from the Borings' land, the Borings are entitled to the fair value, and have clearly pleaded a plausible claim.

5. Error in Dismissing Equitable Relief.

In denying the right to claim equitable relief, the Panel stated:

> **The complaint claims nothing more than a single, brief entry by Google onto the Borings' property. Importantly, the Borings do not allege any facts to suggest injury resulting from Google's retention of the photographs at issue, which is unsurprising since we are told that the allegedly offending images have long since been removed from the Street View program.** [Panel Opinion, at 15-16, emphasis added.]

As the Panel reviewed *de novo,*[28] the undersigned has been unable to reference in the record the circumstances under which the Panel was "told" anything about particular "offending images" or that the entry was "single" or "brief." The Panel Opinion does not provide references, nor are those facts in the Amended Complaint. The offending images, as claimed in the Amended Complaint, are all images taken while trespassing on the Borings' property. [Amended Complaint, 21-22; A33] Exactly for the reasons stated in this appeal, plaintiffs have not had the opportunity to discover, adduce evidence and/or reference exactly what images are in Google's possession, irrespective of publication; therefore, plaintiffs

[27] Google is enriched by use of the wrongfully acquired data. See Amended Complaint, ¶¶27-28, A35.
[28] Panel Opinion, at 5.

themselves do not yet completely know of the scope of the offending images. There is no proper record indicating Google only appeared one-time, for how long, and whether any other pictures exist containing the Borings and/or their swimming pool guests of various ages.

That said, a "single, brief entry" is all it takes to injure, and, in a digital world, to continue to injure or risk injury. As stated in Borings' Br. at 31 and Reply Br., at 18, the original digital picture remains available on Google's worldwide computers, and the *claim* for a destruction order is appropriate under the Twombly Standard. There is a distinction between the publicized data and the unredacted retained data that is expressly disregarded as a matter of law by the Panel. Formulaically, let us take a hypothetical situation, testing the metes and bounds of the Panel rationale:

> **The streets of a low-rent neighborhood. It is a 90° day in August. Children are playing in a rarely travelled dead-end street. The proverbial fire hydrant is uncapped and the children are running past it. Children are in their underwear instead of more modest swimwear.**
>
> **In a "single, brief" drive-by, a "Street Watch" car drives by. The Street Watch car records the children in their wet underwear because, "it records what anyone would see on the street." This recording is stored on the Street Watch disks. The original source images of the children are replicated and distributed on computers distributed throughout the world.**
>
> **Technicians necessarily have access to these pictures. There are thousand of technicians working on the project. As a matter of statistical probability, some technicians may have predatory inclinations and the original source pictures are subject to mischief. Later, one of the children becomes President of the United States, which creates interest for a specific archived picture, which could yield a lot of money in certain markets.[29]**

The point is that the pictures are subject to continued misuse and mischief, and there should be a right to *claim* an equitable injunction or-

[29] *See, e.g.,* http://googlesightseeing.com/2009/03/24/naked-people-on-google-street-view.

der for destruction under penalty of law. Removal from public view is not a solution. Google must endure the destruction of the poison fruit of the tree. The greater the destruction burden, the more the admission of wide-spread distribution. Google could eliminate the risk and cost of a destruction order by electing an "opt-in" program, but it purposefully does not do so. [Borings' Br., at 7]

If removal from public view is the formula for relief, then the injured party whose picture exists has no further remedy. How does removing from public view solve the risk: the pictures are replicated and archived. It might be that the Panel holds, through the creation of a new implied element for *claiming* equity, that the picture must be human being as a matter of law, but what if the pictures look like a winter-wonderland scene with a holiday card scene? What exactly must be *pleaded* to have a pre-evidentiary hearing injunction *claim* survive when the conduct of trespass and publication virtually admitted?

II. PANEL FAILS TO ADDRESS PROPRIETY OF EX PARTE "GOOGLING" BY THE MAGISTRATE JUDGE

1. Error in Failure to Properly Address Googling.

The Magistrate Judge was *ex parte* "googling."[30] The undersigned respectfully submit that the action prejudiced the Magistrate Judge's determination on the merits, and that prejudice appears to have ascended to the Panel, notwithstanding a *de novo* review.

Either: a) the act of *ex parte* googling is improper; b) *ex parte* googling is proper; or c) is immaterial and condoned by this Court when the *ex parte* googling is sequentially stated in an opinion after a purported conclusion.[31] The Panel stated:

[30] Mag. Opinion, at 4-5, A7-8.
[31] Panel Opinion, at 10 (compounded use of defendant's own services not

> **The Borings also suggest that the Court erred in expressing skepticism about whether the Borings were actually offended by Google's conduct in light of the Borings' public filing of the present lawsuit. However, the District Court's comments came after the Court had already concluded that Google's conduct would not be highly offensive....** [Panel Opinion, at 10]

First, the use of the term "skepticism" is a minimizing characterization for a highly serious issue of *ex parte* research. Second, the Panel appears to purposefully avoid the clarity of situation: the Magistrate Judge was "googling." The reference merely to the public filing statement is neither accurate nor complete as stated. It is "especially true" that the Magistrate Judge's "googling" underpinned multiple errors.[32]

Third, we know the methodology of decision-making is not necessarily – if ever – sequential; it is circular, drawing forward, backward and around until a conclusion is derived on a rational basis of consideration, contemplation and reflection. Grammatical structure must necessarily put sentences into a sequence. In no way does it follow that the fact that sentences are necessarily in a sequence reflects the deliberative process underpinning the *ex parte* substantive conduct of a trial judge. Even so, the location of the "googling" language in the first privacy section sequentially preceded the second part of the same privacy count which addresses viability and other comments by the Magistrate Judge.

2. Ascension of Googling Prejudice.

The undersigned believes that the "googling" error ascended to the Panel. For example, on the trespass claim, for which serious error was determined, the Panel nevertheless frames the error in a coddle, to wit:

---

addressed). *See,* www.abanet.org/judicialethics/ABA_MCJC_approved.pdf (ABA Model Code of Judicial Conduct); Ind. Code of Judicial Conduct Rule 2.9(C) (no independent investigation in any medium, including electronic).

[32] See Borings Br., at 5; Hays Opinion, at 4, A5 ("This is especially true").

> **<u>While the District Court's evident skepticism about the claim may be understandable</u>, its decision to dismiss it under Rule 12(b)(6) was erroneous.** [Panel Op., at 12.]

Why understandable? What is the pre-evidentiary basis for the Panel statement? What is the purpose of a predicate that gives the appearance of a favor to an seriously errant lower court or a strictly liable defendant? The framing predicate is injurious, superfluous, unnecessary and prejudicial.

1) Liability and damage are the basis of a "claim." 2) The "skepticism" means doubt on the claim, which is doubt to liability and/or damage. 3) For trespass, damage is not part of the prima facie claim, so it cannot be skepticism as to the pleading of damage. So, it must be, therefore, skepticism as to liability. But, strict liability is admitted by the Panel. So, it cannot be on that point either. 4) That leaves one thing: prejudice as to the final adjudication of the claim. If the Panel is asserting doubt on damages for the "claim" as would be ultimately determined after trial, then it is an admission of prejudice, as well as terribly wrong, since some damage is always presumed in trespass by operation of law. Accordingly, the Borings seek rehearing en banc.

Date: February 11, 2010

/s/Gregg R. Zegarelli/
Gregg R. Zegarelli
PA I.D. #52717
mailroom.grz@zegarelli.com
412.765.0401

/s/Dennis M. Moskal/
Dennis M. Moskal, Esq.
PA I.D. #80106
mailroom.dmm@zegarelli.com
412.765.0405

Counsel for Appellants
Aaron and Christine Boring

Z E G A R E L L I
Technology & Entrepreneurial
Ventures Law Group, P.C.
Allegheny Building, 12th Floor
Pittsburgh, PA 15219-1616
412.765.0400

STATEMENT OF COUNSEL PURSUANT TO L.A.R. 35.1

I, the undersigned, make the following representation, in accordance with 3rd Cir. L.A.R. 35.1 (2008):

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit and the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court in *Borse v. Piece Goods Shop, Inc.,* 963 F.2d 611 (3d Cir. 1992) and the Supreme Court in *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007) and *Ashcroft v. Iqbal,* 129 S. Ct. 1937 (2009), and that this appeal involves a question of exceptional importance as it summarily denies the right to a trial.

Furthermore, I express a belief the "googling" of trial judge "so far departed from the accepted and usual course of judicial proceedings" that this court's supervisory power is called for and the Panel did not acknowledge the act, as such, for a determination of propriety.

Date: February 11, 2010

/s/Gregg R. Zegarelli/
Gregg R. Zegarelli
PA I.D. #52717
mailroom.grz@zegarelli.com
412.765.0401

/s/Dennis M. Moskal/
Dennis M. Moskal, Esq.
PA I.D. #80106
mailroom.dmm@zegarelli.com
412.765.0405

Counsel for Appellants
Aaron and Christine Boring

Z E G A R E L L I
Technology & Entrepreneurial
Ventures Law Group, P.C.
Allegheny Building, 12th Floor
Pittsburgh, PA 15219-1616
412.765.0400

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **PETITION FOR REHEARING EN BANC** was filed electronically with the Court on the 11th day of February, 2010, and I believe that notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system, including the following counsel of record for Appellee:

Darlyn J. Durie, Esq.
Durie Tangri, LLP
332 Pine Street, Suite 200
San Francisco, CA 94104, USA
ddurie@durietangri.com

Brian P. Fagan, Esq.
Keevican Weiss Bauerle & Hirsch LLC
11th Floor Federated Investors Tower
1001 Liberty Avenue, Pittsburgh, PA 15222, USA
bfagan@kwbhlaw.com

Tonia Ouellette Klausner, Esq.
Wilson Sonsini Goodrich & Rosati PC
1301 Avenue of the Americas, New York, New York 10019, USA
tklausner@wsgr.com

Date: February 11, 2010

/s/Gregg R. Zegarelli/
Gregg R. Zegarelli
PA I.D. #52717
mailroom.grz@zegarelli.com
412.765.0401

Dennis M. Moskal
Dennis M. Moskal, Esq.
PA I.D. #80106
mailroom.dmm@zegarelli.com
412.765.0405

Counsel for Appellants
Aaron and Christine Boring

Z E G A R E L L I
Technology & Entrepreneurial
Ventures Law Group, P.C.
Allegheny Building, 12th Floor
Pittsburgh, PA 15219-1616
412.765.0400

OFFICE OF THE CLERK

MARCIA M. WALDRON
CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: www.ca3.uscourts.gov

TELEPHONE
215-597-2995

January 28, 2010

Daralyn J. Durie, Esq.
Durie Tangri
332 Pine StreetSuite 200
San Francisco, CA 94104

Brian P. Fagan, Esq.
Keevican, Weiss, Bauerle & Hirsch
1001 Liberty Avenue11th Floor, Federated Investors Tower
Pittsburgh, PA 15222

Tonia O. Klausner, Esq.
Wilson, Sonsini, Goodrich & Rosati
1301 Avenue of the Americas40th Floor
New York, NY 10019

Dennis M. Moskal, Esq.
TEV Law Group
429 Forbes AvenueSuite 1212
Pittsburgh, PA 15219

Gregg R. Zegarelli, Esq.
TEV Law Group
429 Forbes AvenueSuite 1212
Pittsburgh, PA 15219

RE: Aaron Boring, et al v. Google Inc
Case Number: 09-2350
District Case Number: 2-08-cv-00694

ENTRY OF JUDGMENT

Today, **January 28, 2010** the Court entered its judgment in the above-captioned matter pursuant to Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Page Limits:
15 pages

Attachments:
A copy of the panel's opinion and judgment only. No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. If separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to a combined 15 page limit. If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

A party who is entitled to costs pursuant to Fed.R.App.P. 39 must file an itemized and verified bill of costs within 14 days from the entry of judgment. The bill of costs must be submitted on the proper form which is available on the court's website.

A mandate will be issued at the appropriate time in accordance with the Fed.R.App.P. 41.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,

Marcia M. Waldron

Marcia M. Waldron, Clerk

By:/s/Aina/MLR
Case Manager
267-299-4937

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

No. 09-2350

_____

AARON C. BORING; CHRISTINE BORING,
husband and wife respectively,
Appellants

v.

GOOGLE. Inc.

_____

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 08-cv-00694)
Magistrate Judge: Honorable Amy Reynolds Hay

_____

Submitted Under Third Circuit LAR 34.1(a)
January 25, 2010

Before: RENDELL and JORDAN, *Circuit Judges*,
and PADOVA,* *Senior District Judge.*

_____

JUDGMENT

_____

*Honorable John R. Padova, United States District Court Senior Judge for the Eastern District of Pennsylvania, sitting by designation.

This cause came on to be considered on the record from the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on January 25, 2010. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the order entered by the District Court on February 17, 2009 and April 6, 2009 is AFFIRMED in part and REVERSED in part, in accordance with the opinion of this Court. Each party to bear its own costs.

ATTEST:

/s/Marcia M. Waldron,
Clerk

Date: January 28, 2010

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

No. 09-2350

_____

AARON C. BORING; CHRISTINE BORING,
husband and wife respectively,
Appellants

v.

GOOGLE INC.

_____

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 08-cv-00694)
Magistrate Judge: Honorable Amy Reynolds Hay

_____

Submitted Under Third Circuit LAR 34.1(a)
January 25, 2010

Before: RENDELL and JORDAN, *Circuit Judges*,
and PADOVA,* *Senior District Judge.*

(Filed: January 28, 2010)

_____

OPINION OF THE COURT

_____

*Honorable John R. Padova, United States District Court Senior Judge for the Eastern District of Pennsylvania, sitting by designation.

JORDAN, *Circuit Judge*.

Aaron C. Boring and Christine Boring appeal from an order of the United States District Court for the Western District of Pennsylvania dismissing their complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons that follow, we affirm in part and reverse in part.

I. Background

On April 2, 2008, the Borings commenced an action in the Court of Common Pleas of Allegheny County, Pennsylvania against Google, Inc., asserting claims for invasion of privacy, trespass, injunctive relief, negligence, and conversion. The Borings sought compensatory, incidental, and consequential damages in excess of $25,000 for each claim, plus punitive damages and attorney's fees.

The Borings' claims arise from Google's "Street View" program, a feature on Google Maps[1] that offers free access on the Internet to panoramic, navigable views of streets in and around major cities across the United States. To create the Street View program, representatives of Google attach panoramic digital cameras to passenger cars and drive around cities photographing the areas along the street. According to Google, "[t]he scope of Street View is public roads." (Appellee's Ans. Br. at 10.) Google allows

[1]Google Maps is a service offered by Google that "gives users the ability to look up addresses, search for businesses, and get point-to-point driving directions – all plotted on interactive street maps ... ." (App. at A5.)

individuals to report and request the removal of inappropriate images that they find on Street View.

The Borings, who live on a private road in Pittsburgh, discovered that Google had taken "colored imagery of their residence, including the swimming pool, from a vehicle in their residence driveway months earlier without obtaining any privacy waiver or authorization." (App. at A31.) They allege that their road is clearly marked with a "Private Road, No Trespassing" sign (Appellants' Op. Br. at 11), and they contend that, in driving up their road to take photographs for Street View and in making those photographs available to the public, Google "disregarded [their] privacy interest." (*Id.*)

On May 21, 2008, Google invoked diversity jurisdiction, removed the action to the United States District Court for the Western District of Pennsylvania, and filed a motion to dismiss. The Borings then filed an amended complaint, substituting a claim for unjust enrichment for their earlier conversion claim.[2] On August 14, 2008, Google again moved to dismiss the Borings' complaint for failure to state a claim.

On February 17, 2009, the District Court granted Google's motion to dismiss as to all of the Borings' claims. The Court dismissed the invasion of privacy claim because the Borings were unable to show that Google's conduct was highly offensive to a person of ordinary sensibilities. *Boring v. Google, Inc.*, 598 F. Supp. 2d 695, 699-700 (W.D. Pa. 2009). The Court dismissed the negligence claim because it found that Google did not

[2]For ease of reference, the amended complaint is referred to herein simply as the "complaint."

owe a duty to the Borings. *Id.* at 701. In dismissing the trespass claim, the Court held that "the Borings have not alleged facts sufficient to establish that they suffered any damages caused by the alleged trespass." *Id.* at 702. The Court found the unjust enrichment claim wanting because the parties had no relationship that could be construed as contractual and the Borings did not confer anything of value upon Google. *Id.* at 703. The Court also held that the Borings had failed to plead a plausible claim for injunctive relief under Pennsylvania's "demanding" standard for a mandatory injunction, and dismissed the punitive damages claim because the Borings failed to "allege facts sufficient to support the contention that Google engaged in outrageous conduct." *Id.* at 701 n.3, 704. In sum, the Court concluded that the Borings "failed to state a claim under any count" and that "any attempted amendment would be futile." *Id.* at 698, 704 n.8.

The Borings moved for reconsideration, asserting that it was error to dismiss their trespass and unjust enrichment claims, as well as their request for punitive damages. The District Court denied the motion. *Boring v. Google*, Civ. A. No. 08-694, 2009 WL 931181 (W.D. Pa. Apr. 6, 2009). The Court again said that the Borings had failed to allege conduct necessary to support a punitive damages award. 2009 WL 931181, at *2. It also declined to reconsider the dismissal of the unjust enrichment claim because the Borings did not point to any flaw in the Court's disposition of that claim. *Id.* Finally, the Court addressed the Borings' trespass claim only to "eliminate any possibility that the language in [its opinion] might be read to suggest that damages are part of a prima facie

case for trespass." *Id.*, at *1. To clarify, the Court explained that it had dismissed the trespass claim because the Borings had "failed to allege facts sufficient to support a plausible claim that they suffered any damage as a result of the trespass" and because they failed to request nominal damages in their complaint. *Id.*, at *1.

The Borings filed a timely notice of appeal from both the District Court's order granting the motion to dismiss and the subsequent denial of their motion for reconsideration.

II. Discussion[3]

A. *Standard of Review*

We conduct a *de novo* review of a Rule 12(b)(6) dismissal of a complaint. *See Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008). The Federal Rules of Civil Procedure require that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). To avoid dismissal, the complaint must set forth facts that raise a "plausible inference" that the defendant inflicted a legally cognizable harm upon the plaintiff. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1952 (2009); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (explaining that a plaintiff must "identify[] facts that are suggestive enough to render [his

[3]Google timely removed the action to the District Court pursuant to 29 U.S.C. §§ 1441 and 1446. The District Court exercised diversity jurisdiction under 28 U.S.C. § 1332. We have appellate jurisdiction over the final orders of the District Court under 28 U.S.C. § 1291.

claim] plausible"); *Phillips*, 515 F.3d at 234 (stating that "a plaintiff must 'nudge [his or her] claims across the line from conceivable to plausible' in order to survive a motion to dismiss") (citations omitted). Conclusory allegations of liability do not suffice. *See Iqbal*, 129 S. Ct. at 1950 (opining that the federal pleading standard "marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions"). We must disregard "formulaic recitation of the elements of a cause of action ... ." *Twombly*, 550 U.S. at 555.

A court confronted with a Rule 12(b)(6) motion must accept the truth of all factual allegations in the complaint and must draw all reasonable inferences in favor of the non-movant. *Gross v. German Found. Indus. Initiative*, 549 F.3d 605, 610 (3d Cir. 2008). Legal conclusions receive no such deference, and the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1886) (*cited with approval in Twombly*, 550 U.S. at 555 (citations omitted)). Although a plaintiff may use legal conclusions to provide the structure for the complaint, the pleading's factual content must independently "permit the court to infer more than the mere possibility of misconduct." *Iqbal*, 129 S. Ct. at 1950. In short, when the well-pleaded complaint does not permit us "to infer more than the mere possibility of misconduct," the pleader is not entitled to relief. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) (quoting *Iqbal*, 129 S.Ct. at 1949).

On appeal, the Borings contend that the District Court erred in dismissing their invasion of privacy, trespass, unjust enrichment, and punitive damages claims, as well as their request for injunctive relief. We address each claim in turn.

B. *Invasion of Privacy*

Pennsylvania law recognizes four torts under the umbrella of invasion of privacy: " [1] unreasonable intrusion upon the seclusion of another; [2] appropriation of another's name or likeness; [3] unreasonable publicity given to another's private life; and [4] publicity that unreasonably places the other in a false light before the public." *See Burger v. Blair Med. Assocs., Inc.*, 964 A.2d 374, 376-77 (Pa. 2009) (citing RESTATEMENT (SECOND) OF TORTS §§ 652B-E (1977)). The District Court treated the Borings' complaint as asserting claims for both intrusion upon seclusion and publicity to private life, and it held that the complaint failed to state a claim for either, focusing on the lack of facts in the complaint to support a conclusion that the Street View images would be highly offensive to a reasonable person. The Borings contend that the District Court was wrong to decide, on a 12(b)(6) motion to dismiss, that "a reasonable person would not be highly offended" after having discovered, as the Borings did, that someone "entered onto secluded private property [and] took 360 [degree] pictures … ." (Appellants' Op Br. at 19.)

i. *Intrusion upon Seclusion*

To state a claim for intrusion upon seclusion, plaintiffs must allege conduct demonstrating "an intentional intrusion upon the seclusion of their private concerns which was substantial and highly offensive to a reasonable person, and aver sufficient facts to establish that the information disclosed would have caused mental suffering, shame or humiliation to a person of ordinary sensibilities." *Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co.*, 809 A.2d 243, 247 (Pa. 2002) (citations omitted). Publication is not an element of the claim, and thus we must examine the harm caused by the intrusion itself. *See Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 621 (3d Cir. 1992).

No person of ordinary sensibilities would be shamed, humiliated, or have suffered mentally as a result of a vehicle entering into his or her ungated driveway and photographing the view from there. The Restatement cites knocking on the door of a private residence as an example of conduct that would not be highly offensive to a person of ordinary sensibilities. *See* RESTATEMENT (SECOND) OF TORTS, § 652B cmt. d. The Borings' claim is pinned to an arguably less intrusive event than a door knock. Indeed, the privacy allegedly intruded upon was the external view of the Borings' house, garage, and pool – a view that would be seen by any person who entered onto their driveway, including a visitor or a delivery man. Thus, what really seems to be at the heart of the complaint is not Google's fleeting presence in the driveway, but the photographic image

captured at that time. The existence of that image, though, does not in itself rise to the level of an intrusion that could reasonably be called highly offensive.[4]

Significantly, the Borings do not allege that they themselves were viewed inside their home, which is a relevant factor in analyzing intrusion upon seclusion claims. *See, e.g.*, *Pacitti v. Durr*, Civ. A. No. 05-317, 2008 WL 793875, at *26 (W.D. Pa. Mar. 24, 2008) (holding that no reasonable person would find the fact that defendant entered into plaintiff's condominium to speak with a third party highly offensive because plaintiff was not in the condominium at the time), *aff'd*, 310 F. App'x 526 (3d Cir. 2009); *GTE Mobilnet of S. Texas Ltd. P'ship v. Pascouet*, 61 S.W.3d 599, 618 (Tex. App. 2001) (finding that "the mere fact that maintenance workers ... look[ed] over into the adjoining yard is legally insufficient evidence of highly offensive conduct.").

The Borings suggest that the District Court erred in determining what would be highly offensive to a person of ordinary sensibilities at the pleading stage, but they do not cite to any authority for this proposition. Courts do in fact, decide the "highly offensive" issue as a matter of law at the pleading stage when appropriate. *See, e.g.*, *Diaz v. D.L. Recovery Corp.*, 486 F.Supp. 2d 474, 475-480 (E.D. Pa. 2007) (denying defendant's motion to dismiss as to plaintiff's invasion of privacy claim because allegations that debt

[4]Though not pertinent to our decision, we note Google's assertion, which is not seriously contested by the Borings, that the Street View photograph is similar to a view of the Borings' house that was once publicly available online through the County Assessor's website.

collector called debtor at her home stating he would "repossess all of her household belongings and even her car" stated a claim for invasion of privacy). The Borings also suggest that the Court erred in expressing skepticism about whether the Borings were actually offended by Google's conduct in light of the Borings' public filing of the present lawsuit. However, the District Court's comments came after the Court had already concluded that Google's conduct would not be highly offensive to a person of ordinary sensibilities. Thus, the Court properly applied an objective standard in deciding whether the conduct was highly offensive.[5]

In sum, accepting the Borings' allegations as true, their claim for intrusion upon seclusion fails as a matter of law, because the alleged conduct would not be highly offensive to a person of ordinary sensibilities.

ii. *Publicity Given to Private Life*

To state a claim for publicity given to private life, a plaintiff must allege that the matter publicized is "(1) publicity, given to (2) private facts, (3) which would be highly offensive to a reasonable person, and (4) is not of legitimate concern to the public." *Harris by Harris v. Eastern Pub. Co.*, 483 A.2d 1377, 1384 (Pa. Super. Ct. 1984) (citing

[5]Google spends much time arguing that the Borings' driveway was not actually a private place sufficient to sustain an invasion of privacy claim. It notes that numerous courts have found no intrusion upon seclusion based upon a view that can be seen from the outside of the home, and points to the fact that images of the Borings' home were already available on the Internet. Because we conclude that the alleged conduct would not be highly offensive to a person of ordinary sensibilities, we need not decide whether the Borings' driveway was a "private place" for purposes of an invasion of privacy claim.

RESTATEMENT (SECOND) OF TORTS § 652D). For the reasons just described with respect to the intrusion upon seclusion claim, we agree with the District Court that the Borings have failed to allege facts sufficient to establish the third element of a publicity to private life claim, i.e., that the publicity would be highly offensive to a reasonable person. It is therefore unnecessary to address the other three prongs.[6]

In conclusion, accepting the Borings' allegations as true, their claim for publicity given to private life fails as a matter of law, because the alleged conduct would not be highly offensive to a person of ordinary sensibilities.

C. *Trespass*

The District Court dismissed the Borings' trespass claim, holding that trespass was not the proximate cause of any compensatory damages sought in the complaint and that, while nominal damages are generally available in a trespass claim, the Borings did not seek nominal damages in their complaint. While the District Court's evident skepticism about the claim may be understandable, its decision to dismiss it under Rule 12(b)(6) was erroneous.

Trespass is a strict liability tort, "both exceptionally simple and exceptionally rigorous." *Prosser on Torts* at 63 (West, 4th ed. 1971). Under Pennsylvania law, it is

[6]We note, however, that the facts revealed may not actually be "private facts," as required by prong 2, because the Borings' property allegedly is or recently was available to public view by virtue of tax records and maps on other Internet sites. *See Strickland v. Univ. of Scranton*, 700 A.2d 979, 987 (Pa. Super. Ct. 1997) (explaining that "a matter which was of public record [was] not a private fact").

defined as an "unprivileged, intentional intrusion upon land in possession of another." *Graham Oil Co. v. BP Oil Co.*, 885 F. Supp. 716, 725 (W.D. Pa. 1994) (citing *Kopka v. Bell Tel. Co.*, 91 A.2d 232, 235 (Pa. 1952)). Though claiming not to have done so, it appears that the District Court effectively made damages an element of the claim, and that is problematic, since "[o]ne who intentionally enters land in the possession of another is subject to liability to the possessor for a trespass, although his presence on the land causes no harm to the land, its possessor, or to any thing or person in whose security the possessor has a legally protected interest." RESTATEMENT (SECOND) TORTS § 163; *see also Corr. Med. Care, Inc. v. Gray*, Civ. A. No. 07-2840, 2008 WL 248977, *11 (E.D. Pa. Jan. 30, 2008) (holding that a complaint alleging that defendants entered into plaintiffs' home on specified dates was "sufficient to survive a motion to dismiss under Pennsylvania trespass law.").

Here, the Borings have alleged that Google entered upon their property without permission. If proven, that is a trespass, pure and simple. There is no requirement in Pennsylvania law that damages be pled, either nominal or consequential.[7] *Cf.* 1 STEIN ON

[7]The District Court cited to a single case from 1899 to support its claim that plaintiffs in a trespass case are required to plead nominal damages. However, the case it cited was not a trespass case. *See Morris & Essex Mut. Coal Co. v. Del., L. & W. R. Co.*, 42 A. 883, 884 (Pa. 1899). In fact, that case is expressly inapplicable to this case. *See id.* ("The whole proceeding was to recover damages based, not upon a wrongful invasion of plaintiff's [property] rights, but upon an act of assembly which authorized the taking of the property."). Similarly, none of the cases cited by Google in its brief are trespass cases. In fact, Google itself indicates the possibility that we may have to remand the case to proceed with a nominal damages trespass claim. While it may be true that for some claims, the failure to seek nominal damages waives a claim for nominal damages, that is

PERSONAL INJURY DAMAGES § 1.3 (3d ed. 2009) ("harm is not a prerequisite to a cause of action [for trespass,] and nominal damages can be awarded [even though] there has been and will be no substantial harm."); 75 AM. JUR. 2D *Trespass* § 112 (2009) ("[I]n the absence of proven or actual damages, plaintiffs are entitled to nominal damages in an action for trespass." (citations omitted)). It was thus improper for the District Court to dismiss the trespass claim for failure to state a claim. Of course, it may well be that, when it comes to proving damages from the alleged trespass, the Borings are left to collect one dollar and whatever sense of vindication that may bring, but that is for another day.[8] For now, it is enough to note that they "bear the burden of proving that the trespass was the legal cause, i.e., a substantial factor in bringing about actual harm or damage" *C & K Coal Co. v. United Mine Workers of Am.*, 537 F. Supp. 480, 511 (W.D. Pa. 1982), *rev'd in part on other grounds,* 704 F.2d 690, 699 (3d Cir. 1983), if they want more than a dollar.

D. *Unjust Enrichment*

To succeed on a claim of unjust enrichment, a plaintiff must allege facts sufficient to establish "benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value."

---

not the case with trespass claims.

[8]We imply nothing about whether the claim would survive summary judgment, either as to liability or damages, or about the limits on proof that may be appropriate.

Lackner v. Glosser, 892 A.2d 21, 34 (Pa. Super. Ct. 2006) (quotation omitted). Typically, with an unjust enrichment claim, a "plaintiff seeks to recover from defendant for a benefit conferred under an unconsummated or void contact," and the law then implies a quasi-contract which requires the defendant to compensate the plaintiff for the value of the benefit conferred. *See Steamfitters Local Union No. 420 Welfare Fund v. Phillip Morris, Inc.*, 171 F.3d 912, 936 (3d Cir. 1999) (citations omitted); *Hershey Foods Corp. v. Ralph Chapek, Inc.*, 828 F.2d 989, 998-99 (3d Cir. 1987).

The District Court dismissed the Borings' unjust enrichment claim after finding that they had not alleged any relationship between themselves and Google that could be construed as contractual, and because "it cannot be fairly said that the Borings conferred anything of value upon Google." (App. at A12-A13.) The Court further held that the unjust enrichment claim failed because the Borings had not adequately alleged any other tort, and Pennsylvania does not recognize unjust enrichment as a stand-alone tort.

We agree that the facts alleged by the Borings provide no basis for an unjust enrichment claim against Google. The complaint not only fails to allege a void or unconsummated contract, it does not allege any benefit conferred upon Google by the Borings, let alone a benefit for which the Borings could reasonably expect to be compensated. The complaint alleges that Google committed various torts when it took photographs of the Borings' property without their consent. The complaint does not allege, however, that the Borings gave or that Google took anything that would enrich

Google at the Borings' expense. An unjust enrichment "claim makes sense in cases involving a contract or a quasi-contract, but not, as here, where plaintiffs are claiming damages for torts committed against them by [the] defendant[]."[9] *Romy v. Burke*, No. 1236, 2003 WL 21205975, at *5 (Pa. Com. Pl. Philadelphia May 2, 2003).

E. *Injunctive Relief*

Pennsylvania law provides that in order to establish the right to injunctive relief, a plaintiff must "establish that his right to relief is clear, that an injunction is necessary to avoid an injury that cannot be compensated by damages, and that greater injury will result from refusing rather than granting the relief requested." *Kuznik v. Westmoreland County Bd. of Comm'rs*, 902 A.2d 476, 489 (Pa. 2006) (citing *Harding v. Stickman*, 823 A.2d 1110, 1111 (Pa. Commw. Ct. 2003)). An injunction is an extraordinary remedy. *See Ambrogi v. Reber*, 932 A.2d 969, 974 (Pa. Super. Ct. 2007).

The District Court held that the complaint failed to set out facts supporting a plausible claim of entitlement to injunctive relief. We agree that the Borings have not alleged any claim warranting injunctive relief. The complaint claims nothing more than a single, brief entry by Google onto the Borings' property. Importantly, the Borings do not

[9]Because we find that the Borings stated a claim for trespass (*see supra*, Section II.C.ii) and thus survived a 12(b)(6) motion to dismiss as to that claim, we need not address whether unjust enrichment is a stand-alone tort under Pennsylvania law. Instead, we hold that the Borings have failed to state a claim for unjust enrichment, regardless of whether it is a stand-alone tort, because they have failed to allege facts sufficient to establish a benefit conferred upon Google by the Borings. Thus, on remand, the Borings are not entitled to recover under their unjust enrichment claim.

allege any facts to suggest injury resulting from Google's retention of the photographs at issue, which is unsurprising since we are told that the allegedly offending images have long since been removed from the Street View program.

F. *Punitive Damages*

Pennsylvania law provides that a defendant must have engaged in "outrageous" or "intentional, reckless or malicious" conduct to sustain a claim for punitive damages. *Feld v. Merriam*, 485 A.2d 742, 747-48 (Pa. 1984). Indeed, "punitive damages cannot be based upon ordinary negligence." *Hutchinson ex rel. Hutchinson v. Luddy*, 946 A.2d 744, 747 (Pa. Super. Ct. 2008).

The Borrings' complaint fails to allege conduct that is outrageous or malicious. There is no allegation that Google intentionally sent its driver onto their property or that Google was even aware that its driver had entered onto the property. Moreover, there are no facts suggesting that Google acted maliciously or recklessly or that Google intentionally disregarded the Borings' rights.

The Borings argue that a claim for punitive damages must always be determined by a jury, after discovery. But courts do indeed dismiss claims for punitive damages in advance of trial. *See Phillips v. Cricket Lighters*, 883 A.2d 439, 445, 447 (Pa. 2005) (reversing a denial of summary judgment as to a punitive damages claim because "[a] showing of mere negligence, or even gross negligence, will not suffice to establish that punitive damages should be imposed"); *Feld*, 485 A.2d at 748 (holding that submission of

punitive damages issue to jury was error).[10] And, under the pleading standards we are bound to apply, there is simply no foundation in the complaint for a demand for punitive damages. *Cf. Iqbal*, 129 S. Ct. at 1950 (explaining that while a plaintiff may use legal conclusions to provide the structure for the complaint, the pleading's factual content must independently "permit the court to infer more than the mere possibility of misconduct"); *Twombly*, 550 U.S. at 556 (explaining that a plaintiff must "identify[] facts that are suggestive enough to render [his claim] plausible").

III. Conclusion

For the foregoing reasons, we will affirm the District Court's grant of Google's motion to dismiss the Borings' claims for invasion of privacy, unjust enrichment, injunctive relief, and punitive damages. We reverse, however, with respect to the trespass claim, and remand with instructions that the District Court permit that claim to go forward.

---

[10]Appellants rely on two cases to argue that punitive damages must always be determined by a jury after discovery: *Kirkbride v. Libson Contractors, Inc.*, 555 A.2d 800 (Pa. 1989), and *Jacque v. Steenberg Homes, Inc.*, 563 N.W. 2d 154 (Wis. 1997). *Kirkbride* addressed whether a punitive damages award must bear a reasonable relationship to the compensatory award, rather than addressing what kind of conduct must be alleged in order to survive a 12(b)(6) motion to dismiss on a punitive damages claim. 555 A.2d at 801. The *Jacque* case, in addition to having no binding authority on our Court, addressed whether a punitive damages claim may be awarded in connection with a trespass claim, where nominal damages had been awarded and the trespass was committed "for an outrageous purpose but no significant harm resulted." 563 N.W.2d at 161. Thus, that court did not hold that the issue of punitive damages must always go to the jury.