

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ERICH SPECHT, et al.,

Plaintiffs,

vs.

GOOGLE, INC., et al.,

Defendants.

No. 09 C 2572

Chicago, Illinois
December 17, 2009
9:30 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS - MOTION
BEFORE THE HONORABLE HARRY D. LEINENWEBER

APPEARANCES:

For the Plaintiff:

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For the Defendant:

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Court Reporter:

FEDERAL OFFICIAL COURT REPORTER
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1 THE CLERK: 09 C 2572, Specht versus Google.

2 MR. SHONKWILER: Good morning, your Honor. John
3 Shonkwiler for the plaintiff.

4 MR. FINN: Good morning, your Honor. Herbert Finn on
5 behalf of Google.

6 MR. SHONKWILER: Your Honor, we have briefed a
7 protective order motion that Google filed several weeks ago
8 and I believe both parties, unless the Court has questions,
9 would like to have answered. Specifically, both parties at
10 this point are of the view that the matter is briefed.

11 THE COURT: All right.

12 So, you just need an order to --

13 MR. FINN: Your Honor, I'm sorry to interrupt.

14 Just for the record, though, I want to pose an
15 objection to the cross motion as not being properly before the
16 Court under Federal Rules 26 and 37.

17 I understand that the Court may take it any ways, and
18 we do consider everything briefed.

19 THE COURT: I will rule on it. I have just been
20 presented I think with your reply this morning though.

21 We will rule in January.

22 MR. FINN: I believe there is already a January 20th
23 ruling date, your Honor.

24 THE COURT: Oh, okay.

25 THE CLERK: Okay.

1 MR. SHONKWILER: And because we are here, there is
2 one small matter I would like to bring up that may be just as
3 important going forward as the substance of our protective
4 order.

5 Just so that we have an understanding going forward,
6 our efforts to compromise discovery issues before discovery
7 motions are filed, my understanding is that those ought to be
8 kept out of the litigant's briefs in the event that briefs are
9 filed, as they have been here.

10 THE COURT: Say that again.

11 MR. SHONKWILER: Google's briefs on this issue
12 include various accounts of what plaintiffs did or said during
13 the course of the parties' efforts to resolve and negotiate
14 and compromise this issue, as the Rules require.

15 My understanding has always been that just as the
16 Federal Rules forbid you from using that sort of evidence in a
17 trial or in a summary judgment brief, so to they forbid this
18 sort of use of that information to impeach a party.

19 The way it is used in the briefs is to paint
20 plaintiffs as being disingenuous or inconsistent in the
21 positions they are talking now.

22 If I am wrong, and it is my understanding that that
23 information cannot be used the way Google has used it here, I
24 would like to know certainly before we engage in any future
25 efforts to compromise and settle a dispute.

1 MR. FINN: Your Honor, I am not precisely sure what
2 counsel is referring to, but to the extent he is referring to,
3 you know, evidentiary Rule 408 that speaks to offers of
4 settlement do not determine liability, that is clear.

5 Whether a party in the throws of a Rule 37 discussion
6 takes one position and changes it along the way, I think that
7 is history of the case that the Court is entitled to know,
8 and that is what I believe counsel is referring to in his
9 motions.

10 MR. SHONKWILER: That is exactly what I am referring
11 to, your Honor.

12 And of course, we wouldn't characterize it as
13 charactering our position. What I did is what I do in every
14 effort to settle something, and that is I compromise or at
15 least try to --

16 THE COURT: Well, we are not talking about liability
17 though.

18 MR. SHONKWILER: That is right. We are not. That is
19 right.

20 THE COURT: I am not sure that -- and I don't think I
21 have had that argument presented before, that positions taken
22 in briefs and so forth, that they are different than positions
23 you take when you are trying to settle a case.

24 So, I will bear that in mind, your concern, but I am
25 not sure it is applicable.

1 MR. SHONKWILER: Thank you, Judge.

2 MR. FINN: Thank you, your Honor.

3 (Proceedings concluded.)
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8 C E R T I F I C A T E
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10 I certify that the foregoing is a correct transcript
11 from the record of proceedings in the above-entitled matter.
12

13 /s/Krista Burgeson, CSR, RMR, CRR
14 Federal Official Court Reporter

December 17, 2009
Date
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