09-2350

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

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

Plaintiffs-Appellants,

—v.—

GOOGLE INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR DEFENDANT-APPELLEE
GOOGLE INC.

TONIA OUELLETTE KLAUSNER, ESQ.
JOSHUA A. PLAUT, ESQ.
WILSON SONSINI GOODRICH
& ROSATI, P.C.
1301 Avenue of the Americas, 40th Floor
New York, New York 10019
(212) 497-7700

BRIAN P. FAGAN, ESQ.
KEEVICAN WEISS BAUERLE
& HIRSCH LLC
1001 Liberty Avenue, 11th Floor
Federated Investors Tower
Pittsburgh, Pennsylvania 15222
(412) 355-2600

Attorneys for Defendant-Appellee
Google Inc.

September 24, 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CASE NO. 09-2350

AARON C. BORING and CHRISTINE BORING

Appellants

v.

GOOGLE INC.

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLEE

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Third Circuit LAR 26.1, Appellee Google Inc. ("Google"), states that it has no parent corporation. No publicly held corporation holds 10% or more of Google's stock. No publicly held corporation that is not a party to this appeal has a financial interest in the outcome of the proceeding.

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES

PAGE

TABLE OF CITATIONS
(continued)

PAGE

TABLE OF CITATIONS
(continued)

PAGE

TABLE OF CITATIONS
(continued)

PAGE

TABLE OF CITATIONS
(continued)

PAGE

TABLE OF CITATIONS
(continued)

PAGE

TABLE OF CITATIONS
(continued)

PAGE

TABLE OF CITATIONS
(continued)

PAGE

STATUTES AND RULES

TABLE OF CITATIONS
(continued)

OTHER AUTHORITY

PRELIMINARY STATEMENT

"Street View" is an innovative feature that Appellee Google Inc. ("Google") offers in connection with the Google Maps service on its website. Street View makes it easy for people to learn what an area looks like without having to go there. People shopping for real estate can view the neighborhood. People researching vacations can explore possible destinations online. And people driving to an unfamiliar place can obtain a photographic view of a particular address in addition to directions and traditional maps. Street View has even been used to locate a missing child. Google created the Street View tool by sending drivers to cities across America with digital cameras mounted on the roofs of their cars, automatically recording the view that anyone would see while driving on the streets.

According to Appellants Aaron C. Boring and Christine Boring (the "Borings"), although Street View is designed for public roads, Google's driver went down a private road, turned around in the their driveway, took unremarkable photos of the exterior of their home, and Google then made those photographs available through the Street View service. Although numerous other photos of the Borings' property already were available on the Internet, and although the Borings chose not to use the simple option Google affords for removing images from Street View, they sued Google for invasion of privacy, trespass, negligence and

conversion, claiming they experienced mental suffering and that the value of their property had been diminished as a result of the availability of the image of their home as part of a map of Pittsburgh on Street View. In the face of a Motion to Dismiss filed by Google for failure to state a claim, the Borings filed an Amended Complaint substituting unjust enrichment for conversion and adding an allegation that at the top of the Borings' street is a sign clearly marked "Private Road No Trespassing." Notably, the Borings did not add any factual allegation of harm from the alleged brief entry upon their driveway, nor did they add any factual allegations of a fence, gate, or anything else that would keep any person approaching their home for any reason from seeing the same view seen and photographed by the Street View driver. Google again moved to dismiss for failure to state a claim, and the District Court granted the motion. The Borings appeal all but the dismissal of their negligence claim.

The heart of the Borings' argument on appeal is that their Amended Complaint only needs to put Google on notice of the nature of their claims and does not need to either recite factual allegations supporting their claims or specify all of the relief they seek, including nominal damages. *See, e.g.*, Appellants' Br. at 13 ("Google is on fair notice to frame a defense."). They argue that they are entitled to discovery and expert assessment before pleading factual allegations of actual damages. *See, e.g., id.* at 14, 15. They argue that factual matters not alleged

should have been inferred. *See, e.g., id.* at 4 n.1, 7-8. And they rely throughout their brief on factual assertions found nowhere in the Amended Complaint. *See, e.g., id.* at 4, 5, 7-9. Indeed, they spend fewer than thirteen of their thirty-six-page brief actually addressing arguments as to why they believe their Amended Complaint should not have been dismissed, and they devote the bulk of their brief to matters far beyond anything contained within their pleading.

The Borings' position on appeal is directly rebuffed by federal pleading requirements. *First*, in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the United States Supreme Court clarified that in addressing a motion to dismiss for failure to state a claim, a court must disregard recitations of the elements of a claim and determine whether the well-pled factual allegations alone, if proven, would entitle the plaintiff to relief. *See id.* at 1949-50. A court may not speculate as to whether facts might be adduced in discovery that would support the elements of a claim, and a court may not consider factual allegations outside of the four corners of the complaint. *Second*, Federal Rule of Civil Procedure 8(a)(3) requires a demand for the relief sought, and numerous courts have concluded that a plaintiff waives the right to seek a nominal damages award when nominal damages are not specifically requested. It is for this reason that the Borings' cries that an affirmance of the dismissal of their trespass claim would allow Google and other commercial enterprises to trespass with impunity are unfounded. The Borings admit they did

not request nominal damages, and in the year plus that they have been aware of Google's request to dismiss their trespass claim *in toto* because the Amended Complaint does not request nominal damages, they have not sought leave to further amend their complaint.

The District Court properly limited its consideration to only the factual matters alleged and the relief sought in the Amended Complaint, and matters of public record, which are appropriately considered on a motion to dismiss. Based on this information, the District Court properly concluded that the Amended Complaint, as drafted, fails to state a claim.

STATEMENT OF CASE

On April 2, 2008, the Borings filed a complaint against Google in Allegheny County, Pennsylvania. A-23 (docket no. 1) (*see* Notice of Removal Exhibit A). This original Complaint asserted counts for invasion of privacy, trespass, injunction, negligence and conversion. It sought compensatory damages in excess of $25,000 on each count other than that for an injunction, plus punitive damages and attorney fees. *See id.*

Google timely removed the action to the United States District Court for the Western District of Pennsylvania and filed a motion to dismiss. A-23 (docket nos. 1, 8). The Borings filed an Amended Complaint. A-24 (docket nos. 17, 18). The Amended Complaint substituted a claim for unjust enrichment for the conversion claim and added a handful of factual allegations. The Borings continued to seek compensatory and punitive damages, as well as attorneys' fees. A-30–A-35. On August 14, 2008, Google again moved to dismiss for failure to state a claim. A-24 (docket no. 22).

The District Court granted Google's motion. A-26 (docket nos. 42, 43). It dismissed the privacy claim because Google's alleged conduct could not be construed as substantial and highly offensive to a reasonable person, and because the Amended Complaint otherwise failed to properly allege invasion of privacy. A-6–A-9, *Boring v. Google Inc.*, 598 F. Supp. 2d 695, 699-700 (W.D. Pa. 2009).

It dismissed the negligence claim because, *inter alia*, Google owed no duty to the Borings. A-9–A-10, 598 F. Supp. 2d at 701. It dismissed the trespass claim because the only compensatory damages sought were not proximately caused by the alleged trespass and because the Borings failed to request nominal damages despite ample opportunity to do so. A-9–A-11, 598 F. Supp. 2d at 702. It dismissed the unjust enrichment claim because there were no allegations of a quasi-contractual relationship between the parties, nor any allegation that the Borings had conferred any benefit on Google. A-12–A-14, 598 F. Supp. 2d at 702-04. It dismissed the request for punitive damages because Google's alleged conduct could not be construed as outrageous as a matter of law. A-10, 598 F. Supp. 2d at 701 n.3. Lastly, it dismissed the claim for an injunction because no claim had been stated and because the allegations failed to satisfy Pennsylvania's standard for injunctive relief. A-14, 598 F. Supp. 2d at 704.

The Borings moved for reconsideration, asserting that the trespass and unjust enrichment claims, and the request for punitive damages should not have been dismissed. A-26 (docket no. 45). The District Court denied the motion. A-27 (docket nos. 49, 50). In the Reconsideration Opinion, the District Court addressed the Borings' trespass argument "in order to eliminate any possibility" that the Opinion could be construed as requiring damages as part of a prima facie claim for trespass. A-18, *Boring v. Google*, Civil Action No. 08-694, 2009 WL 931181, at

*1 (W.D. Pa. Apr. 6, 2009). It clarified that the trespass claim was subject to dismissal because the Borings had failed to allege actual damages suffered as a result of Google's alleged trespass, and they had failed to seek nominal damages. A-18–A-19, 2009 WL 931181, at *1. It then stood by the conclusion that the allegations in the Amended Complaint failed to state a plausible claim for punitive damages. A-19–A-20, 2009 WL 931181, at *2. It declined to reconsider the dismissal of the Borings' unjust enrichment claim because the Borings failed to provide any argument to support reinstatement of the claim. A-20, 2009 WL 931181, at *2.

On May 4, 2009, the Borings filed a notice of appeal. A-27 (docket no. 51).

STATEMENT OF FACTS[1]

Appellants Aaron C. Boring and Christine Boring are individuals residing on a private road in Pittsburgh, Pennsylvania. A-29 (Am. Compl. ¶ 1). At the time they filed their Amended Complaint, detailed information regarding the Borings' property, including a photograph of the exterior, was available on the website of the Office of Property Assessments for Allegheny County, Pennsylvania. SA-5–SA-12 (Exhibit B to the Declaration of Tonia Ouellette Klausner in Support of Google Inc.'s Motion to Dismiss Amended Complaint (the "Klausner Decl.")) (docket nos. 22-3, 22-5). Several aerial images of the Borings' property and home also were available on various websites.[2] SA-13–SA-16 (*Id.* ¶¶ 5-7 & Exs. C-E) (docket nos. 22-6–22-8). These images, as well as the Street View images at issue, reflect that there is no gate, fence or sign preventing people from driving up the

[1] This statement is based upon the allegations of the Amended Complaint, the images upon which Plaintiffs' claims are based, *see In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997), and publicly available information that is subject to judicial notice, *see Anspach ex rel. Anspach v. City of Philadelphia, Dep't of Public Health*, 503 F.3d 256, 273 n.11 (3d Cir. 2007).

[2] The Court may take judicial notice that these websites included aerial images of property associated with the Borings' address, which fact can be readily determined by examination of the websites themselves. Fed. R. Evid. 201 (2009); *see, e.g., Gordon v. Lewistown Hosp.*, 272 F. Supp. 2d 393, 429 (M.D. Pa. 2003), *aff'd*, 423 F.3d 184 (3d Cir. 2005); *McLaughlin v. Volkswagen of Am., Inc.*, No. Civ. A. 00-3295, 2000 WL 1793071, at *3 n.3 (E.D. Pa. Dec. 6, 2000).

right of way the Borings use as a driveway, and that the Borings' yard is visible from the air. SA-13–SA-16, SA-21–SA-26 (*Id.* ¶¶ 5-7, 9, & Exs. C-E, G) (docket nos. 22-6–22-8, 22-10). The plot for the Borings' property and the aerial photos of the street reflect that several properties share Oakridge Lane. SA-13–SA-20 (*Id.* ¶¶ 5-8 & Exs. C-F) (docket nos. 22-6–22-9). The Borings allege that "[a]t the beginning of Oakridge Lane, there is a clearly marked 'Private Road No Trespassing' sign." A-30 (Am. Compl. ¶ 6). The Borings do not dispute that several houses share the road on which they live, or that photos and detailed information about their property already was available on the Internet at the time they filed their action against Google.

Appellee Google Inc. operates a well-known Internet search engine. Google's mission is to organize the world's information and make it universally accessible and useful. To this end, Google develops products that let its users more quickly and easily find, create, organize and share information. Google maintains the world's largest and most comprehensive index of web sites and other online content. Google makes the information it organizes freely available to anyone with an Internet connection.

Google Maps is a service that permits users to access map information. Google Maps gives users the ability to look up addresses, search for businesses, and get point-to-point driving directions—all plotted on interactive street maps or

satellite or aerial images. *See* http://maps.google.com. Consistent with its mission, in around May 2007, Google launched Google "Street View," a feature on Google Maps that offers panoramic street-level navigable views of streets and roads in major cities in the United States. A-30 (Am. Compl. ¶ 7). The scope of Street View is public roads. *Id.* In order to create the Street View feature, drivers with panoramic digital cameras on the roofs of passenger cars drove around cities automatically filming continuous footage of the view from the streets. A-30–A-31 (Am Compl. ¶¶ 7, 8). Out of respect for individuals' preferences, Google makes it simple to request the automatic removal of any image available on Street View, whether it is entitled to privacy protection under the law or not. *See* SA-27–SA-31 (Klausner Decl. ¶ 10 & Ex. H) (docket nos. 22-3, 22-11).

The Borings allege that a Google driver, while gathering images for the Google Street View map of Pittsburgh, drove down their street and in their driveway, and that photos of the view of their property from their driveway subsequently were made available on the Google Maps website. A-31 (Am. Compl. ¶¶ 9, 11, 13). Rather than follow the simple removal procedures provided by Google, upon learning that photos of the exterior of their house were available on Street View, the Borings sued Google, seeking in excess of $25,000 on each count other than injunction, plus punitive damages and attorney fees. A-23, A-24 (docket nos. 1, 18).

STANDARD OF REVIEW

This Court reviews *de novo* the grant of a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008).

A complaint challenged under Rule 12(b)(6) should be dismissed where it fails to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553-56, 570 (2007). The Court must disregard labels, conclusions, and "formulaic recitation of the elements of a cause of action." *Id*. at 555. The well-pled factual allegations must demonstrate that the plaintiff's right to relief is more than "speculative." *Id.*; *see Phillips*, 515 F.3d at 232 (interpreting *Twombly* to require sufficient factual allegations to show the grounds on which the plaintiff's claim rests).

As recently clarified by the Supreme Court, "Rule 8 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." *Iqbal*, 129 S. Ct. at 1950. Hence, a Court addressing a motion to dismiss for failure to state a claim should conduct a two-part inquiry. *Fowler v. UPMC Shadyside*, --- F.3d ---, No. 07-4285, 2009 WL 2501662, at *5 (3d Cir. Aug. 18, 2009) (citing *Iqbal*, 129 S. Ct. at 1949). First, the factual and legal elements of a claim should be separated, and all legal conclusions should be

disregarded. *Id.* Second, the Court should determine whether the factual allegations of the complaint are sufficient to "show" an entitlement to relief if the facts alleged are proven. *See id.* "Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show [n]'—'that the pleader is entitled to relief.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1949) (alteration in original). In other words, factual allegations consistent with the possibility that the defendant might be liable depending upon what other facts are learned during discovery are insufficient to survive a motion to dismiss; the facts alleged standing alone if proven must be sufficient to entitle the plaintiff to relief. *See Iqbal*, 129 S. Ct. at 1949.

Contrary to the Borings' suggestion throughout their brief that this Court may consider facts that are found nowhere in the Amended Complaint (*see, e.g.*, Appellants' Br. at 4-5 & nn.1, 2, 7-8 & 9), under the Rule 8 standard, facts not alleged in the complaint may not be "inferred." *See Phillips*, 515 F.3d at 232 (interpreting *Twombly* to preclude judges from speculating about facts not actually alleged in complaint). Nor may the Borings rely upon discovery, as they also suggest (*see, e.g.*, Appellants' Br. at 28-29), to substantiate their claims. *See Iqbal*, 129 S. Ct. at 1953-54.

Based upon the factual allegations found within the four corners of the Amended Complaint, the District Court properly concluded that the Borings have not shown they are entitled to the relief they have sought.

SUMMARY OF ARGUMENT

This Court should affirm the dismissal of the Amended Complaint because it fails to state a claim.

While privacy is an important interest, and Google takes numerous steps to protect it through its Street View service, that interest simply is not implicated here. To state an intrusion upon seclusion claim under Pennsylvania law, the complaint must allege an intrusion that would cause a reasonable person of ordinary sensibilities to suffer shame, humiliation or otherwise be "highly offended." Similarly, to state a claim for publicity given to private life, the matter publicized must be of a kind that its publication would be "highly offensive" to a reasonable person. No reasonable person of ordinary sensibilities would be highly offended by the conduct alleged in the Amended Complaint. Moreover, a claim for intrusion into seclusion must be supported by allegations of a substantial intrusion into a place where the plaintiff had a reasonable expectation of privacy, and publicity given to private life requires allegations of publicity to truly private facts. Based on the allegations in the Amended Complaint and matters of public record, the Borings have not shown that the view of the exterior of their home from

their driveway is private for purposes of an invasion of privacy claim. The same view can be seen by anyone driving up the Borings' driveway for any reason—guests, tax collectors, repairmen, deliverymen, neighbors, friends of neighbors, police, lost drivers, etc. Although the Borings live on a privately-maintained road, the road is shared by several neighbors and there is nothing around their home intended to prevent the occasional entry onto their driveway. There is no allegation of a gate or "keep out" sign at the beginning of the driveway. There is no fence surrounding the property, nor is it located where the yard cannot be seen by satellite or low-flying aircraft. Indeed, numerous images of the Borings' property were already publicly accessible online through their county assessors' office and several map sites. Thus, although they live on a "private road," the view about which the Borings complain simply cannot support an invasion of privacy claim.

The allegations in the Amended Complaint also fail to state a claim for trespass. Although the Borings allege an unauthorized entry onto a private driveway, the only compensatory damages are specifically alleged to have been caused by the publication of the image of the Borings' residence on Street View, and not by the entry on their driveway or any conduct allegedly committed during the course of the entry. While Pennsylvania law does permit nominal damages to

be recovered in connection with a trespass claim, the Borings did not request nominal damages.

The Borings' other claims fare no better. The Borings waived their appeal of the unjust enrichment claim. But even if they had not, the Amended Complaint fails to state a claim for unjust enrichment because there are no allegations from which a quasi-contractual relationship could be inferred, and unjust enrichment is not a stand-alone tort. Moreover, even if a tort-based unjust enrichment claim were recognized under Pennsylvania law, the Amended Complaint alleges neither a benefit conferred by the Borings on Google, nor any factual allegations to support the conclusory assertion that Google profited from the inclusion of the image at issue in Street View. The request for punitive damages was properly dismissed because the conduct alleged—a Street View driver's single mistaken drive on a private road and up the Borings' un-gated driveway in the course of making an online map of Pittsburgh—does not amount to the extreme, outrageous and exceptional conduct for which punitive damages are reserved. The Borings waived their request for injunctive relief, and, in any event, injunctive relief may not be awarded absent a viable cause of action. Even if the Amended Complaint stated a viable cause of action, the Amended Complaint does not allege any facts to show that the Borings would be injured absent injunctive relief, let alone that such

injury would be greater than the injury to Google from implementing the requested injunctive relief—required showings for injunctive relief.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED THE INVASION OF PRIVACY CLAIM

Pennsylvania recognizes four distinct torts, collectively referred to as "invasion of privacy": (1) intrusion upon seclusion; (2) appropriation of name or likeness; (3) publicity given to private life; and (4) publicity placing the person in a false light. *Burger v. Blair Med. Assocs., Inc*., 964 A.2d 374, 378 (Pa. 2009) (citing with approval *Restatement (Second) of Torts* §§ 652 A-D (1977)). The Borings do not challenge the treatment of their privacy count as asserting claims for both intrusion upon seclusion and publicity to private life. *See* A-7–A-9, 598 F. Supp. 2d at 699-700. As explained below, the District Court properly held that the Amended Complaint fails to state either claim.

A. The Conduct Alleged Does Not Amount To An Intrusion Upon Seclusion

Even accepting the Borings' allegations as true as required on a motion to dismiss, their claim for intrusion upon seclusion fails as a matter of law. In order to state a claim for intrusion upon seclusion, a complaint must allege conduct from which it could be found that "there was an intentional intrusion on 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, 248 (Pa. 2002); *see Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 620 (3d Cir. 1992). Publication is not an element of a claim for intrusion upon seclusion; recovery is for harm caused by the intrusion itself, which must have been substantial. *See Borse*, 963 F.2d at 621; *Harris by Harris v. Easton Publ'g Co.*, 483 A.2d 1377, 1383-84 (Pa. Super. Ct. 1984).

As explained below, the District Court properly concluded that the Borings had not stated a claim for intrusion upon seclusion because the conduct alleged would not have been highly offensive to an ordinary, reasonable person. *See* A-7, 598 F. Supp. 2d at 699-700. Although the Court commented about attention the Borings brought upon themselves by publicly filing this action with their full address in the complaint and failing to remove the images at issue from Street View before filing, this was merely *dicta*, and had no bearing on the Court's proper application of the objective "highly offensive" standard. Moreover, although the District Court did not address the argument, dismissal of the intrusion upon seclusion claim independently was proper because the Borings' driveway is not a "private place" for purposes of an invasion of privacy claim, and any intrusion was not substantial.

1. The conduct alleged would not be highly offensive to the ordinary reasonable person.

The District Court properly held that the Amended Complaint fails to state a claim for intrusion upon seclusion because the conduct alleged would not be highly offensive to the ordinary reasonable person. *See* A-7, 598 F. Supp. 2d at 699-700. The "highly offensive" standard is "a difficult standard to satisfy." *Tucker v. Merck & Co.*, No. Civ. A. 02-2421, 2003 WL 25592785, at *13 (E.D. Pa. May 2, 2003), *aff'd*, 102 Fed. Appx. 247 (3d Cir. 2004). Conduct that would make an ordinary person feel uncomfortable is insufficient. *Id.* Rather, the intrusion upon the plaintiff's seclusion must be so severe that it "would have caused mental suffering, shame or humiliation to a person of ordinary sensibilities." *Pro Golf*, 809 A.2d at 248; *see also DeAngelo v. Fortney*, 515 A.2d 594, 595 (Pa. Super. Ct. 1986).

Here, no person of ordinary sensibilities who lived on a shared, privately-maintained road would be shamed, humiliated or otherwise suffer mentally because of the alleged intrusion—a commercial driver briefly drove on their ungated driveway while indiscriminately photographing the view in the course of

making a map of their town.[3] The *Restatement* cites knocking on the door of a private residence as the prime example of conduct that would not be highly offensive to the ordinary reasonable person. *See Restatement (Second) of Torts* § 652B cmt. d. If it would not have been highly offensive for the Google driver to have knocked on the Borings' door, it could hardly be highly offensive for the driver to merely have turned around in the Borings' driveway without ever exiting the car.

Moreover, the Borings' "private affairs" allegedly intruded upon were merely the external view of their house, garage and pool that can be seen from their driveway. A-31 (Am. Compl. ¶ 11). This is the same view that would be seen by any visitor, delivery person, neighbor or anyone else approaching the Borings' house. It also is nearly identical to the view of the Borings' property that was available on the County's website. *See* SA-10 (Klausner Decl. ¶ 4 & Ex. B) (docket nos. 22-3, 22-5). There is no allegation that the driver left the car, peeked in windows, or even saw the Borings themselves at all. *Compare Pappa v. Unum Life Ins. Co. of Am.*, No. 3:07-CV-0708, 2008 WL 744820, at **2, 20 (M.D. Pa. Mar. 18, 2008) (denying motion to dismiss intrusion upon seclusion claim based

[3] The subsequent publication of the images on the Internet is not pertinent to an intrusion upon seclusion claim. *See, e.g., Borse*, 963 F.2d at 621*; Restatement (Second) of Torts* § 652B, cmt. a (1977).

on allegations that defendants conducted video surveillance through plaintiff's bedroom and bathroom windows). No reasonable person of ordinary sensibilities would suffer mental distress, shame or humiliation, just because a Google driver saw and photographed in connection with the making of a virtual map, the view anyone would see driving up their driveway. *See GTE Mobilnet of S. Texas Ltd. P'ship v. Pascouet*, 61 S.W.3d 599, 618 (Tex. App. 2001) (evidence that workers looked into adjoining yard alone not highly offensive); *Streisand v. Adelman*, No. SC 077 257, at pp. 35-36 (Super. Ct. Los Angeles Co. Dec. 31, 2003) (slip op.) (photographing plaintiff's backyard including improvements and swimming pool as part of Internet ecological history project not highly offensive to reasonable person as a matter of law) (Addendum).

Notably, the Borings do not allege that they themselves were viewed inside of their home, which is significant for an intrusion upon seclusion claim. In *Pacitti v. Durr*, No. Civ. A. 05-317, 2008 WL 793875 (W.D. Pa. Mar. 24, 2008), *aff'd*, 310 Fed. Appx. 526 (3d Cir. 2009), the District Court addressed an intrusion into seclusion claim based on the defendant's unauthorized brief entry into the plaintiff's condominium unit to speak with a third party when the plaintiff was not there. *See id.* 2008 WL 793875, at **25-26. The court emphasized that the plaintiff was not in the unit at the time of the entry in holding that no reasonable finder of fact could conclude that the conduct at issue was highly offensive. *Id.* at

*26. A panel of this Court affirmed, stating that the District Court had "correctly analyzed" the invasion of privacy claim. 310 Fed. Appx. at 529. Here, as in *Pacitti*, the Borings were not seen in their home during the brief "intrusion." Moreover, any alleged intrusion by the Google driver was even less severe than that at issue in *Pacitti* given that there is no allegation that the driver left the car, let alone entered the Borings' home.

For the same reasons, the intrusion alleged in the Amended Complaint is vastly different than those at issue in the only two cases the Borings' rely upon in their privacy argument. *See* Appellants' Br. at 21-22. In *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971), the defendant's employees obtained entry through a locked gate into the plaintiff's home by subterfuge and then secretly photographed him conducting a medical examination (including while touching a woman's breast), and recorded the conversation without permission. *See id.* at 246. *Brunette v. Humane Soc'y of Ventura County*, 40 Fed. Appx. 594 (9th Cir. 2002), involved the defendants' entering the plaintiffs' entirely fenced-in property through a locked gate, in the course of the execution of an invalid search warrant throughout the property, including all rooms of the residence, outbuildings and vehicles. *See Brunette v. Humane Soc'y of Ventura County*, 294 F.3d 1205, 1208

(9th Cir. 2002).[4] Here, the Amended Complaint addressed an alleged brief entry by a driver who remained in the car upon an open driveway. There are no allegations of deception to enter the property. There are no allegations that the driver left the car, let alone entered the house, or secretly photographed the Borings in an embarrassing pose. And there are no allegations that the driver went behind a fence, through a locked gate, or into the Borings' house or any outbuildings or vehicle. The facts that made the intrusions at issue in *Dietemann* and *Brunette* substantial and offensive simply are not present here.

The Borings suggest (without citing any authority) that it was improper for the District Court to have decided the "highly offensive" prong at the pleading stage. Appellants' Br. at 20. But courts regularly decide this issue as a matter of law. *See, e.g., Diaz v. D.L. Recovery Corp.*, 486 F. Supp. 2d 474, 480 (E.D. Pa. 2007); *Tucker*, 2003 WL 25592785, at *12; *Woodside v. New Jersey Higher Educ. Assistance Auth.*, No. Civ. A. 92-4581, 1993 WL 56020, at *6 (E.D. Pa. Mar. 2, 1993); *DeAngelo*, 515 A.2d at 595.

The Borings also argue that the dismissal should be reversed because the District Court expressed skepticism that the Borings truly were highly offended upon learning that a Street View driver had driven in their driveway in light of

[4] The facts of the case are described in this companion opinion.

their subsequent conduct. *See* Appellants' Br. at 20-21. However, the District Court's statements were made after its conclusion that the conduct alleged would not be highly offensive to a reasonable person of ordinary sensibilities. A-7, 598 F. Supp. 2d at 699-700 (concluding that only "the most exquisitely sensitive" would be highly offended by conduct alleged). The Court properly applied an objective standard in determining whether the conduct alleged was highly offensive. *See, e.g.*, *Wolfson v. Lewis*, 924 F. Supp. 1413, 1421 (E.D. Pa. 1996) ("The right of privacy is relative to the customs of the time and place, and it is determined by the norm of the ordinary man. The protection afforded by the law to the right must be restricted to 'ordinary sensibilities,' and cannot extend to supersensitiveness or agoraphobia.") (quoting *Cason v. Baskin*, 20 So. 2d 243, 251 (Fla. 1944)). Accordingly, whether the Borings themselves were highly offended is irrelevant to the legal issue, and the Court's statements regarding the Borings themselves were *dicta*. In any event, this Court's review is *de novo*, and for the reasons set forth above, the Amended Complaint fails to state a claim for intrusion upon seclusion because the conduct alleged in the Amended Complaint would not be highly offensive to a reasonable person.

2. The Borings' driveway is not a private place for purposes of a privacy claim.

The Borings' intrusion into seclusion claim independently fails to state a claim because the place intruded upon—the Borings' driveway—is not a private place. To state a claim for intrusion upon seclusion, the facts alleged must show that the defendant either "has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs." *Harris by Harris*, 483 A.2d at 1383 (citing *Restatement (Second) of Torts* § 652B cmt. c)). An intrusion upon seclusion claim may be based on conduct that occurs on property not owned by the plaintiff. *See, e.g., Benitez v. KFC Nat'l. Mgmt. Co.*, 714 N.E.2d 1002, 1004 (Ill. App. Ct. 1999) (women's restroom); *see generally Restatement (Second) of Torts* § 652B cmt. c. The corollary also is true—not all privately owned property is a private or secluded place for purposes of an intrusion upon seclusion claim. *See Mulligan v. United Parcel Service, Inc.*, Civ. A. 95-1922, 1995 WL 695097, at *2 (E.D. Pa. Nov. 16, 1995) (walkway in front of private house not private place for invasion of seclusion claim); *Schiller v. Mitchell*, 828 N.E.2d 323, 327-29 (Ill. App. Ct. 2005) (privately owned garage, driveway, side-door area and backyard not private place for invasion of seclusion claim). As explained by the United States Supreme Court, "the common law of trespass furthers a range of interests that have nothing to do with privacy . . . ."

Oliver v. United States, 466 U.S. 170, 183 n.15 (1984). Thus, whether a place is "private" for purposes of an intrusion upon seclusion does not depend upon whether the place at issue is privately or publicly owned. Rather, whether the place at issue is private for purposes of an intrusion upon seclusion claim depends upon whether the plaintiff had a reasonable expectation of privacy in the place intruded upon. *Kline v. Security Guards, Inc.*, 386 F.3d 246, 260 (3d Cir. 2004); *Konopka v. Borough of Wyoming*, 383 F. Supp. 2d 666, 684 (M.D. Pa. 2005).

In determining whether a plaintiff had a reasonable expectation of privacy for purposes of an invasion of privacy claim, Pennsylvania courts have considered cases deciding whether a reasonable expectation of privacy existed for purposes of the Fourth Amendment. *See Konopka*, 383 F. Supp. 2d at 677-79, 684; *DeBlasio v. Pignoli*, 918 A.2d 822, 825 (Pa. Commw. Ct. 2007). It is well-settled in the Fourth Amendment context that there is no reasonable expectation of privacy in a driveway, or any other route that a visitor would use to approach a residence. *See, e.g., United States v. Ventling*, 678 F.2d 63, 66 (8th Cir. 1982) (no reasonable expectation of privacy in what could be seen from driveway despite "no trespassing" sign).[5] There also is no reasonable expectation of privacy in the

[5] *Accord, e.g., Johnson v. Weaver*, 248 Fed. Appx. 694, 696 (6th Cir. 2007); *United States v. Evans*, 27 F.3d 1219, 1228 (7th Cir. 1994); *State v. Domicz*, 907 (continued...)

exterior view of one's home that can be seen by any low-flying aircraft. *See California v. Ciraolo*, 476 U.S. 207, 215 (1986) (no reasonable expectation of privacy in view of fenced-in yard from fixed-wing aircraft); *Commonwealth v. Robbins*, 647 A.2d 555, 558-60 (Pa. Super. Ct. 1994) (no reasonable expectation of privacy in view of yard from helicopter even though home situated on secluded lane in wooded area).

Similarly, in the context of intrusion upon seclusion claims, numerous courts have found no intrusion into seclusion based upon the view that can be seen from the outside of a home. *See, e.g.*, *Mulligan*, 1995 WL 695097, at *2 (view of plaintiff on walkway in front of yard); *I.C.U. Investigations, Inc. v. Jones*, 780 So. 2d 685, 689-90 (Ala. 2000) (view of plaintiff in front yard); *Vaughn v. Drennon*, 202 S.W.3d 308, 320 (Tex. App. 2006) (view of plaintiff in house through large window with blinds open); *Streisand v. Adelman*, No. SC 077-257, at 32 (Super. Ct. Los Angeles Co. Dec. 31, 2003) (slip op.) (view of plaintiff's backyard from helicopter) (Addendum).

For example, in *Schiller v. Mitchell*, 828 N.E.2d 323 (Ill. App. Ct. 2005), the Appellate Court of Illinois affirmed the dismissal of an intrusion into seclusion

---

(...continued from previous page)
A.2d 395, 405 (N.J. 2006); *State v. Chaussee*, 866 P.2d 643, 647 (Wash. Ct. App. 1994).

claim based upon the twenty-four-hour videotaping by a neighbor of the view of the plaintiffs' garage, driveway and side-door area, for the purpose of making frivolous and trivial charges against the plaintiffs. *Id.* at 326. The plaintiffs alleged that they had sought to protect their privacy by planting large trees and bushes in their yard and that the defendants' "all-hours personal surveillance" violated their right of privacy. *Id.* at 326-27. The court held that the complaint failed to state a claim for intrusion upon seclusion "because the areas photographed by the camera were not private." *Id.* at 327. It explained that, in contrast to an intrusion into a restroom or medical examination room, "the complaint alleged merely that the camera was aimed at plaintiffs' garage, driveway, side-door area, and backyard." It found significant that the complaint did not contain any allegations to suggest that "a passerby on the street or a roofer or a tree trimmer could not see what the camera saw, only from a different angle." *Id.* at 329.

As in *Schiller* and the other cases cited above, the Borings allege an intrusion based upon a view that is plainly visible to anyone approaching their house, and in which they therefore had no reasonable expectation of privacy. Although the Amended Complaint alleges that the Borings live on a privately owned road marked with a "No Trespassing" sign, A-30–A-31 (Am. Compl. ¶¶ 5-6, 10, 11), as in *Schiller*, there are no allegations of a fence, gate, or anything else that would keep anyone approaching their home by their driveway from seeing the

view at issue. Any delivery person, meter reader, telephone wire repair person, or guest of a neighbor who got lost and turned around in the Borings' driveway would see the same view as in the Street View images. The Borings added to their Amended Complaint a conclusory allegation that their home "is not visible to the public eye." A-30 (Am. Compl. ¶ 5). However, the Street View images reflect that anyone who drove in the Borings' driveway for any purpose would see the same view upon which this action is based. *See* SA-21–SA-26 (Klausner Decl. ¶ 9 & Ex. G) (docket nos. 22-3, 22-10).[6] *See Brightwell v. Lehman*, No. Civ.A. 03-205J, 2006 WL 931702, at *3 (W.D. Pa. Apr. 10, 2006) (on motion to dismiss court need not accept allegation that is contradicted by document referred to in complaint).

Moreover, the intrusion claimed by the Borings is significantly less severe than the conduct the *Schiller* court concluded was not an intrusion into seclusion as a matter of law. The Amended Complaint alleges a single brief entry by a car upon the Borings' driveway while photographing the 360 degree view for purposes of creating a map of the Borings' town. A-30–A-31 (Am. Compl. ¶¶ 7-9). This

[6] Aerial photographs readily available on the Internet at the time this suit was filed also reflect that the Borings' home is visible to anyone driving on their driveway, as well as anyone in a low flying aircraft. *See* SA-13–SA-16 (Klausner Decl. ¶¶ 5-7 & Exs. C-E) (docket nos. 22-3, 22-6–22-8).

minor intrusion stands in stark contrast to the twenty-four-hour video surveillance conducted for purposes of harassment in *Schiller*, which was insufficient to amount to an intrusion upon seclusion. In short, the intrusion that forms the basis of the Borings' claim is far from the substantial intrusion into the Borings' private concerns required to state a claim for intrusion upon seclusion. *See Shorter v. Retail Credit Co.*, 251 F. Supp. 329, 329, 331 (D.S.C. 1966) (ignoring "Keep Out" and "Private Drive Keep Out" signs, approaching residence on single occasion and obtaining information about plaintiffs through questions at door for purposes of investigating insurance claim did not substantially intrude on plaintiffs' private affairs).

Furthermore, the view of the exterior of the Borings' house as well as other detailed information about the property was already publicly available on the Internet at the time the Google driver saw and photographed the view. The County Assessor's website contained a photo of the front of the house, and numerous aerial photos of the Borings' property already were available on other websites. *See* SA-5–SA-16 (Klausner Decl. ¶¶ 4-7 & Exs. B-E) (docket nos. 22-3, 22-5–22-8). Thus, the "private affairs" allegedly intruded upon are not private for purposes of an intrusion into seclusion claim. *See Wolfson*, 924 F. Supp. at 1419; *Shorter*, 251 F. Supp. at 331 ("there can be no right of privacy with respect to things which

are matters of public record"); *Harris by Harris*, 483 A.2d at 1383; *see generally Restatement (Second) of Torts* § 652B cmt. c.

In sum, because the Borings could have no reasonable expectation of privacy in the view of their house and surrounding areas from their driveway as a matter of law, their allegations of intrusion into seclusion fail to state a claim. *See, e.g., Frankel v. Warwick Hotel*, 881 F. Supp. 183, 188 (E.D. Pa. 1995) (dismissing intrusion into seclusion claim where facts alleged, even if proven, would not establish an intrusion into a person's zone of seclusion); *DeBlasio*, 918 A.2d. at 825-26 (affirming dismissal where plaintiff had no reasonable expectation of privacy); *Schiller*, 828 N.E.2d at 327 (same).

B. The Conduct Alleged Does Not Amount To Publicity Given To Private Life

The District Court also properly held that the Amended Complaint fails to state a claim for publicity given to private life. To state a claim for publicity given to private life, the Amended Complaint must allege facts from which it can be inferred that Google gave publicity to private facts concerning the life of the Borings and the matter publicized is of a kind that "(a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." *Harris by Harris*, 483 A.2d at 1384 (quoting *Restatement (Second) of Torts* § 652D). The District Court properly concluded that the Amended Complaint fails to state a

claim for publicity given to private life both because the view of the Borings' property is not a private fact, and disclosure of that view would not be highly offensive to a reasonable person.

First, as the District Court concluded, the facts revealed in the Street View images were not private. A9, 598 F. Supp. 2d at 700 n.1. A "private fact" is one that has not already been made public. *Harris by Harris*, 483 A.2d at 1384. A photo of the Borings' house and detailed information about the property already was available for public viewing on the County's website, and numerous aerial-view photos of the property had already appeared on the Internet. *See* SA-5–SA-16 (Klausner Decl. ¶¶ 4-7 & Exs. B-E) (docket nos. 22-3, 22-5–22-8); A9, 598 F. Supp. 2d at 700 n.1. This is a point the Borings do not dispute. Because the facts concerning the exterior of the Borings' house already were matters of public record, the same information as reflected in the Street View imagery cannot be a private fact. *Strickland v. University of Scranton*, 700 A.2d 979, 987 (Pa. Super. Ct. 1997) (matters of public record are not private facts). Giving further publicity to the same information that is already public does not give rise to liability. *See, e.g., Jenkins v. Bolla*, 600 A.2d 1293, 1296 (Pa. Super. Ct. 1992) (citing *Restatement (Second) of Torts* § 652D cmt. b).

Moreover, the disclosure by Google was merely to give information, *i.e.*, a virtual map. As noted by the District Court, under the *Restatement*, private facts

"have been disclosed 'when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern. The limitations, in other words, are those of common decency. . . .'" A-9, 598 F. Supp. 2d at 700 n.1 (quoting *Restatement (Second) of Torts* § 652D cmt. h); *see also Kelleher v. City of Reading*, No. Civ. A. 01-3386, 2002 WL 1067442, at *9 (E.D. Pa. May 29, 2002). Many members of the public would have a legitimate interest in the view of the Borings' property, including potential homebuyers of properties on the street, and anyone who was trying to locate the property in order to get there—friends, relatives, delivery people, etc. There is no morbid sense of prying in photos of the exterior of a house that are publicized as part of a map, and the Amended Complaint contains no facts from which it could be inferred otherwise. *See Restatement (Second) of Torts* § 652D cmt. d ("When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy.").

Second, as the District Court also concluded, the matter publicized is not of a kind that would be highly offensive to a reasonable person. A-8, 598 F. Supp. 2d at 700. For this type of invasion of privacy claim, it is the nature of the facts disclosed, and not the disclosure itself that must be highly offensive in order to

meet this element. *Wells v. Thomas*, 569 F. Supp. 426, 437 n.14 (E.D. Pa. 1983).[7] The publicizing of images of the view from the Borings' driveway as part of a continuous set of images of the Borings' entire town for purposes of an Internet map would not be highly offensive to a reasonable person of ordinary sensibilities. The Street View image at issue merely permitted others to see (in the context of a map) the same view of the Borings' property that would be seen by any visitor, delivery person, neighbor or anyone else pulling in the Borings' driveway. There are no intimate details of the Borings' lives revealed in the images, and photos of the Borings' home already were available on the Internet. Publishing additional images of the same property is in no way highly offensive or "'beyond the limits of decency.'" *Harris by Harris*, 483 A.2d. at 1385 (quoting *Aquino v. Bulletin Co.*, 154 A.2d 422, 426 (Pa. Super. Ct. 1959)). Therefore, the District Court properly dismissed the Borings' claim for publicity given to private life. *See, e.g., Jones v. WTXF-Fox 29*, 26 Phila. Co. Rptr. 291, 294-95 (C.P. Philadelphia Aug. 13, 1993) (dismissing with prejudice publicity to private life claim where facts given publicity not highly offensive to reasonable person), *aff'd*, 644 A.2d 813 (Pa. Super. Ct. 1994).

[7] In contrast, an intrusion upon seclusion claim considers whether the intrusion was highly offensive. *See supra* at 18-20.

The District Court's comments about a seeming lack of requests to Google to remove images, lack of lawsuits over virtual mapping, and the publicity drawn by the Borings to themselves in connection with this suit (A-8–A-9, 598 F. Supp. 2d at 700-01) do not affect this result. Again, the Court's statements were made in *dicta* following a proper holding. And again, this Court must determine *de novo* whether the Amended Complaint states a claim for publicity given to private life, which, for the reasons set forth above, it does not.

II. THE DISTRICT COURT PROPERLY DISMISSED THE TRESPASS CLAIM

The District Court dismissed the trespass claim on the grounds that (1) the compensatory damages sought in the Amended Complaint were not proximately caused by the alleged trespass as a matter of law, and (2) while nominal damages generally are available in connection with a trespass claim, the Borings did not seek nominal damages. It was correct in both respects.

First, compensatory damages in connection with a trespass claim are permitted only for injuries that are the natural and proximate result of the trespass. *See, e.g.*, *Kopka v. Bell Tel. Co. of Pa.*, 91 A.2d 232, 236 (Pa. 1952) (quoting with approval *Restatement (First) of Torts* § 380 (1934)); *C & K Coal Co. v. United Mine Workers of Am.*, 537 F. Supp. 480, 511 (W.D. Pa. 1982) ("Plaintiffs bear the burden of proving that the trespass was the legal cause, i.e., a substantial factor in

brining about actual harm or damage in order to recover . . . ."), *aff'd in part, rev'd in part on other grounds*, 704 F.2d 690 (3d Cir. 1983). Although consequential and indirect damages are recoverable, there still must be a causal nexus between the trespass and any such damages. *In re One Meridian Plaza Fire Litig.*, 820 F. Supp. 1460, 1483 (E.D. Pa.), *rev'd on other grounds*, 12 F.3d 1270 (3d Cir. 1993); *see Restatement (First) of Torts* § 380 (trespasser liable for harm caused "during the continuance of his trespass").

Here, the only factual allegation of damages anywhere in the Amended Complaint is found under the "Invasion of Privacy" count and provides: "*Revealing this information* has caused Plaintiffs[] mental suffering and diminished the value of their property." A-31 (Am. Compl. ¶ 14) (emphasis added). The Borings admit there was no harm caused to their property. A-26 (Pls.' Br. in Support of Reconsideration at 2) (docket no. 45). More importantly, the Amended Complaint does not allege any damage caused by the alleged entry upon the Borings' driveway itself, or any conduct engaged in by the driver while on the Borings' property. *See* A-32 (Am. Compl. ¶¶ 16-19). Because the only injury asserted by the Borings allegedly was caused by the subsequent publication of the images and not by the alleged entry onto their property itself, any such damages cannot be recovered under their trespass claim. *See, e.g., In re One Meridian Plaza Fire Litig.*, 820 F. Supp. at 1483 (plaintiffs not entitled to recover

economic losses on trespass claim where such losses not causally related to trespass); *Costlow v. Cusimano*, 34 A.D.2d 196, 201 (N.Y. App. Div. 4th Dep't 1970) (trespass claim arising out of photos taken of accident at plaintiff's home, which photos were subsequently published, should have been dismissed where alleged injury to reputation and for emotional distress resulted from publication after trespass, and not trespass itself).[8]

Second, the District Court properly dismissed the Borings' trespass claim in its entirety even though nominal damages generally are available, because the Borings did not request nominal damages. The Borings' argument that damages are not an element of a claim for trespass under Pennsylvania law, *see* Appellants' Br. at 24-26, misconstrues the basis for the District Court's decision. The District Court was clear that it was not requiring an allegation of compensatory damages caused by the alleged trespass to sustain the claim: "The Court considers this

---

[8] Although *Costlow* is not binding authority, it is persuasive given the similarities in the issues presented in connection with the trespass claim, *i.e.*, whether harm allegedly suffered because of publication of photographs taken during alleged trespass is caused by trespass. Contrary to the Borings' assertion, the outcome in *Costlow* was not based on New York's pleading standard. *See* Appellants' Br. at 26 n.18. Rather, the *Costlow* court decided the issue of causation as a matter of New York common law of trespass, which follows the *Restatement (Second) of Torts*. *See Costlow*, 34 A.D.2d at 201 (citing *Restatement (Second) Torts* § 162). Section 162 of the *Restatement (Second) of Torts* is substantively the same as Section 380 of the *Restatement (First) of Torts*, adopted in Pennsylvania. *See Restatement (Second) Torts* § 162 Reporter's Note (1965).

argument in order to eliminate any possibility that the language of its Memorandum Opinion addressing the Defendants' Motion to Dismiss might be read to suggest that damages are part of a prima facie claim for trespass. Clearly under Pennsylvania law, they are not." A-18, 2009 WL 931181, at *1. Rather, the District Court did not allow the Borings to proceed on a nominal damages trespass claim because the Borings did not request nominal damages in their Amended Complaint and did not seek leave to further amend. *Id.*

The District Court's decision was consistent with the rule recognized by Pennsylvania courts that failure to make a timely request waives any claim to nominal damages. *See Cohen v. Resolution Trust*, 107 Fed. Appx. 287, 289-90 (3d Cir. 2004) (under Pennsylvania law district court did not err in refusing to award nominal damages where plaintiffs only sought compensatory and punitive damages in their amended complaint and did not seek leave to amend); *Bastian v. Marienville Glass Co.*, 126 A. 798, 800 (Pa. 1924) (plaintiff not entitled to nominal damages absent a request for them); *Thorsen v. Iron and Glass Bank*, 476 A.2d 928, 931 (Pa. Super. Ct. 1984) (affirming trial court's grant of summary judgment

where plaintiff failed to request nominal damages and failed to show any harm resulting from allegations).[9]

The Borings do not dispute that they have not requested nominal damages. Indeed, in their Brief in Opposition to Google's Motion to Dismiss, the Borings expressly declined to request nominal damages: "Plaintiffs *could* seek nominal damages . . . in relation to a trespass action. . . . to the extent Defendant asserts that nominal damages have not been properly pled, Plaintiffs *could* amend the complaint." A-82 (Pls.' Opp. Br. at 19) (emphasis added). The Borings have been aware of Google's position that nominal damages must be requested for over a year, yet they have chosen, for tactical reasons or otherwise, not to request nominal damages. Even in their brief on appeal, the Borings take the position that they do not need to request nominal damages in their complaint. While challenging the District Court's reliance on *Cohen v. Resolution Trust*, 107 Fed. Appx. 287 (3d Cir. 2004), for the proposition that a plaintiff must affirmatively request nominal damages, the Borings argue that *Cohen* may apply only "if the Borings cannot sustain a claim for compensatory damages after full and fair discovery, and if the Borings do not seek leave to amend for nominal damages." Appellants' Br. at 24.

---

[9] *See also Scott v. Mahlmeister*, 319 Fed. Appx. 160, 162 (3d Cir. 2009) (failure to make timely request for nominal damages in civil rights action waived claim); *Alexander v. Riga*, 208 F.3d 419, 429 (3d Cir. 2000) (same).

The Borings' argument misses the point—nominal damages must be sought before a district court decides a dispositive motion addressed at a claim for which nominal damages might be available. *See, e.g., Alexander*, 208 F.3d at 429 ("it is incumbent upon the plaintiff to make a timely request for nominal damages").

The Borings suggest a different outcome is warranted here than in the Pennsylvania cases cited above because of the liberal pleading standards permitted under Federal Rule of Civil Procedure 8. Appellants' Br. at 19, 22, 23, 27. However, in numerous cases decided under the federal pleading standard, federal courts deciding dispositive motions have refused to allow a plaintiff to proceed on a nominal damages theory when the plaintiff failed to request nominal damages in the complaint. *See, e.g., Mayfield v. Texas Dep't of Criminal Justice*, 529 F.3d 599, 606 (5th Cir. 2008) (affirming grant of summary judgment where no basis for compensatory damages and plaintiff had not sought nominal damages in complaint); *Lovell v. Keller*, 232 F.3d 895, 2000 WL 1028705, at *1 (9th Cir. July 24, 2000) (Table) (declining to consider whether nominal damages were available in connection with appeal of grant of summary judgment where plaintiff had not sought nominal damages in complaint or at any time before district court); *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998) (affirming dismissal of complaint even though nominal damages were available in connection with claim because plaintiff did not seek them); *cf. Allah v. Al-Hafeez*, 226 F.3d 247, 251 (3d

Cir. 2000) (under less stringent pleading standard applied to *pro se* plaintiffs, plaintiff should have been permitted to proceed on nominal damages theory in connection with claim for punitive damages, where nominal damages were consistent with complaint).[10]

Moreover, while Rule 8 requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), it also requires "a demand for the relief sought, which may include relief in the alternative

---

[10] The Third Circuit in *Allah* relied upon the less stringent pleading standard applied in *pro se* actions. Under this standard, the Court read the *pro se* plaintiff's complaint as seeking nominal damages because they were not inconsistent with the complaint and the plaintiff specifically requested them in his brief. *Allah*, 226 F.3d at 251. The Court in *Allah* also concluded that the plaintiff could proceed with his claim for both nominal and punitive damages. *Id.* at 252-53; *accord Mitchell v. Horn*, 318 F.3d 523, 533 n.8 (3d Cir. 2003). Here, the Borings are represented by counsel, so they are not entitled to the less stringent pleading standard reserved for *pro se* litigants. Moreover, as set forth above, the Borings do not dispute that they have not sought nominal damages. Accordingly, there is no basis to construe their Amended Complaint as seeking such a recovery.

Basista v. Weir, 340 F.2d 74 (3d Cir. 1965), cited by the *Allah* Court for its statement in *dicta* that nominal damages need not be plead, is inapposite. *Basista* stands for the proposition that, as a matter of federal common law, a civil rights plaintiff may recover punitive damages without proving actual damages or having pled nominal damages. 340 F.2d at 86-88 (allowing jury award of punitive but no compensatory damages to stand where plaintiff had not sought nominal damages). Neither *Allah* nor *Basista* considered whether a court must imply that a plaintiff always seeks nominal damages and allow an action to survive a motion directed at the pleadings where the complaint fails to provide a basis to recover either compensatory or punitive damages and does not request nominal damages.

or different types of relief," *id.* Rule 8(a)(3). On a motion to dismiss for failure to state a claim, a district court must determine whether the complaint satisfies Rule 8(a)(2) not in the abstract, but based on the relief sought in accordance with Rule 8(a)(3). Here, the District Court properly concluded that although the Amended Complaint sufficiently alleged a trespass, from the facts alleged the Borings were not entitled as a matter of law to the only relief sought—compensatory and punitive damages—and therefore dismissed the trespass claim in its entirety. A-18, 2009 WL 931181, at **1-2. Adoption of the Borings' position that a request for nominal damages is "subsumed within other damages" claimed in a complaint (Appellants' Br. at 27), would render Rule 8(a)(3) meaningless.

The Borings' position also would place a tremendous burden on district courts addressing dispositive motions. If the Borings are correct, then a district court deciding a motion to dismiss (or any other dispositive motion) must always conduct independent research to determine whether additional relief that the plaintiff could have, but did not request in the complaint, would be available. If a complaint sought only compensatory damages, but the claim asserted could support punitive damages or injunctive relief, the court would have to determine whether the facts alleged could support such relief, even though the relief had not been sought in the complaint. Such a requirement would fly in the face of the well-established rule that on a motion to dismiss the court must limit its inquiry to

the four corners of the complaint, documents that form the basis of the claim, and matters of public record. *See Lum v. Bank of Am.*, 361 F.3d 217, 222 n.3 (3d Cir. 2004); *In re Burlington Coat Factory Sec. Lit.*, 114 F.3d at 1424-25. Notably, the Borings cite no authority for their novel position.

The Borings, with all their rhetoric about the end of private property and implied servitudes on land, seem to now recognize that at heart, this action is a nominal damages trespass claim. But they refuse to recognize that to proceed with such a claim, they must request nominal damages as the relief sought pursuant to Rule 8(a)(3). Affirming the District Court's dismissal of the trespass claim in its entirety will not give corporate America license to trespass without consequence. It will only ensure that plaintiffs and their counsel make clear in their complaint the relief they seek, a simple step that the Borings repeatedly have chosen not to take.

Finally, even if this Court concludes that it was error for the District Court to hold that nominal damages are not available in this case because they were not requested, the action still should not be remanded to proceed with only a nominal damages trespass claim. In order to protect the resources of both the parties and the judiciary, Pennsylvania Courts have refused to remand an action for a determination solely on the issue of nominal damages. *See, e.g., Bastian*, 126 A. at 800; *Allen v. Sawyer*, 2 Pen. & W. 325, 1831 WL 3336, at **4-5 (Pa. 1831);

Thorsen, 476 A.2d at 931 (affirming summary judgment for defendant even though nominal damages might have been available where plaintiff did not request nominal damages). Although we have found no case applying this rule in the context of an appeal from a grant of a motion to dismiss, the reasoning of these cases applies with equal force here. Both parties have already expended significant resources on two complaints, two motions to dismiss, a motion for reconsideration, and this appeal. A remand to allow the case to proceed solely on a nominal damages trespass claim would only compound the expense of litigation for both parties and not further the interests of justice. *See Allen*, 1831 WL 3336, at *5 ("Suits are not to be encouraged for the purpose of gratifying a mere litigious disposition; but to promote justice by restoring parties to the enjoyment of those rights of which they have been deprived, and redressing those real injuries which they shall have sustained. . . .").[11]

---

[11] Similarly, the action should not be remanded to proceed solely on a nominal damages trespass claim because at most the Amended Complaint alleges a *de minimis* violation that has resulted in no actual damages. *Suppan v. DaDonna*, 203 F.3d 228, 235 (3d Cir. 2000); *Bailey v. Zoning Bd. of Adjustment of the City of Philadelphia*, 801 A.2d 492, 504 n. 20 (Pa. 2002). The *de minimis* doctrine has been applied where a complaint alleges a technical violation of the law that was inadvertent and which has not caused any actual harm. *Bates v. Provident Consumer Discount Co.*, 493 F. Supp. 605, 607 (E.D. Pa. 1979), *aff'd*, 631 F.2d 725 (3d Cir. 1980). And it has been applied in the context of trespass claims. *See, e.g., Northern Pa. R.R. Co. v. Rehman*, 49 Pa. 101, 1865 WL 4408, at *4 (Pa. 1865); *Yeakel v. Driscoll*, 467 A.2d 1342, 1344 (Pa. Super. Ct. 1983); *see also*

(continued...)

III. THE DISTRICT COURT PROPERLY DISMISSED THE UNJUST ENRICHMENT CLAIM

The District Court dismissed the Borings' unjust enrichment claim based on its determinations that (1) the Borings had not alleged any relationship between the parties that would justify implying a quasi-contract, and (2) Pennsylvania does not recognize unjust enrichment as a stand-alone tort. A-12–A-14, 598 F. Supp. 2d at 702-03. The District Court once again was correct.

A. The Borings Have Waived Their Challenge To Dismissal Of The Unjust Enrichment Claim

The Borings suggest they challenge both grounds for the District Court's dismissal of their unjust enrichment claim. Appellants' Br. at 3. However, their entire discussion of unjust enrichment consists of nothing other than a quotation

---

(...continued from previous page)
Palmieri v. Lynch, 392 F.3d 73, 75 (2d Cir. 2004) (action alleging brief, albeit trespassory, entry upon plaintiff's property that caused no harm would have properly justified dismissal under maxim of *de minimis non curat lex*, but because entrants were state actors, court constrained to undertake constitutional analysis). Here, the Borings admit there was no damage to their grass or driveway because of the alleged trespass. A-65 (Pls.' Opp. Br. at 2). And they concede that any entry by the Street View driver was a "mistake." Appellants' Br. at 8. The Borings, by attempting to turn an action worth at most $1.00 literally into a federal case by asserting unsupportable claims and seeking substantial yet non-recoverable damages, have already expended significant judicial resources and subjected Google to significant defense costs. There is no legitimate reason to exhaust any more judicial resources on what is at most a technical violation of the law that resulted in no harm, particularly where the Borings have never framed this action as one for nominal damages.

from the District Court's opinion, a quotation from a tentative draft of the *Restatement (Third) of Restitution and Unjust Enrichment*, a recitation of the elements of unjust enrichment and two conclusory assertions unsupported by any case law. *Id.* at 27-28. This falls far short of the requirement that an appellant "substantively argue[]" an issue on appeal to avoid waiver. *Mitchell v. Cellone*, 389 F.3d 86, 92 (3d Cir. 2004). "[P]assing reference" to an issue is not enough. *See Gorum v. Sessoms*, 561 F.3d 179, 185 n.4 (3d Cir. 2009). Nor is it enough for the Borings to rely on cursory, under-developed arguments. *See Gladysiewski v. Allegheny Energy Service Corp.*, 282 Fed. Appx. 979, 980-81 (3d Cir. 2008) (citing Fed. R. App. P. 28(a)(9)(A) and Third Circuit authority). The Borings therefore have waived their challenge to the dismissal of the unjust enrichment claim.

B. The Amended Complaint Does Not Allege A Quasi-Contractual Relationship

In any event, the District Court properly dismissed the unjust enrichment claim. Under Pennsylvania law, the doctrine of unjust enrichment exists principally for the narrow purpose of restoring to its *ex ante* position a party who: (1) has provided a benefit pursuant to an unconsummated or void contract; and (2) has been denied compensation from the other party for the provision of such benefit. *Steamfitters Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d

912, 936 (3d Cir. 1999). In such circumstances, Pennsylvania implies a quasi-contract that requires the party that received the benefit to make restitution to the other party in *quantum meruit*. *See Hershey Foods Corp. v. Ralph Chapek, Inc.*, 828 F.2d 989, 998 (3d Cir. 1987); *AmeriPro Search, Inc. v. Fleming Steel Co.*, 787 A.2d 988, 991 (Pa. Super. Ct. 2001). The fact that the defendant has benefited from the conduct at issue will not, on its own, support a claim for unjust enrichment. *See Sovereign Bank v. BJ's Wholesale Club, Inc.*, Nos. 06-3392, 06-3405, 2008 WL 2745939, at *16 (3d Cir. July 16, 2008). It is only under circumstances where it would be appropriate to impose a quasi-contractual obligation that the courts will permit a claim for unjust enrichment. *See, e.g.*, *Commerce Bank/Pennsylvania v. First Union Nat'l Bank*, 911 A.2d 133, 143 (Pa. Super. Ct. 2006); *Styer v. Hugo*, 619 A.2d 347, 350 (Pa. Super. Ct. 1993), *aff'd*, 637 A.2d 276 (Pa. 1994). In situations where the plaintiff had no expectation of being paid, the retention of any benefit is not unjust, and a quasi-contract claim will not stand. *See, e.g., Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 447 (3d Cir. 2000) (retention of benefit conferred not unjust because no reasonable expectation of payment from defendant; district court properly dismissed unjust enrichment claim).

Here, the facts alleged in the Amended Complaint provide no basis to imply a contract between the Borings and Google. The Amended Complaint does not

allege a void or unconsummated contract, and it does not allege that the Borings voluntarily conferred a benefit on Google under circumstances where they reasonably expected to be paid. To the contrary, and as observed by the District Court, the "entire thrust" of the Amended Complaint is that Google obtained the photographs at issue without the Borings' consent. A-12–A-13, 598 F. Supp. 2d at 702-03. As explained by the Pennsylvania Court of Common Pleas, 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 defendants." *Romy v. Burke*, No. 1236, 2003 WL 21205975, at *5 (C.P. Philadelphia May 2, 2003) (mem.) (dismissing unjust enrichment claim in suit alleging unauthorized use of plaintiffs' business plan and assets).

C. Unjust Enrichment Is Not An Independent Tort

The Borings state without citation to any case law that unjust enrichment is an "appropriate claim" if the dismissal of their trespass claim is affirmed. Appellants' Br. at 27. In support of their position, the Borings cite to Section 40 of Tentative Draft No. 4 of the *Restatement (Third) of Restitution and Unjust Enrichment* (the "Draft *Restatement*"), which provides, in pertinent part, that "a person who obtains a benefit by an act of trespass or conversion is accountable to the victim of the wrong for the benefit so obtained." *Restatement (Third) of Restitution and Unjust Enrichment* § 40(1) (Tentative Draft No. 4, 2005).

However, the Borings do not provide any basis to conclude that Section 40 has been (or will be) adopted in Pennsylvania. We have been unable to locate a single decision from a Pennsylvania court or a federal court applying Pennsylvania law that has so much as discussed Section 40. Indeed, we found only two cases from *any* jurisdiction that discuss Section 40 of the Draft *Restatement*, and neither case adopts it. *See Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 755 (8th Cir. 2006) (dissent); *Young v. Appalachian Power Co.*, No. Civ. A. 2:07-479, 2008 WL 4571819, at *12 (S.D. W. Va. Oct. 10, 2008) (plaintiffs not entitled to disgorgement of defendant's profits allegedly derived from defendant's trespass).

Moreover, the Borings' position is flatly contrary to this Court's decision in *Steamfitters Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999), which concluded that an unjust enrichment claim could not proceed once it was determined that the tort claims properly had been dismissed. *See id.* at 937; *see also Allegheny Gen. Hosp.*, 228 F.3d at 446-47 (interpreting *Steamfitters* to require dismissal of unjust enrichment claim in action sounding in tort where all tort claims properly dismissed). As explained by the *Steamfitters* Court, "[i]n the tort setting, an unjust enrichment claim is essentially another way of stating a traditional tort claim." 171 F.3d at 936-37.

Following *Steamfitters*, courts in this Circuit have concluded that an unjust enrichment claim should be dismissed where the action sounds in tort and the

claim is based on the same conduct giving rise to a traditional tort cause of action. *See, e.g.*, *Gray v. Bayer Corp.*, No. Civ. A. 08-4716 (JLL), 2009 WL 1617930, at *3 (D.N.J. June 9, 2009) (dismissing with prejudice unjust enrichment claim where action sounded in tort); *Pourzal v. Marriott Int'l, Inc.*, Civ. No. 2001-140, 2006 WL 2471695, at *3 (D.V.I. Aug. 17, 2006) (dismissing unjust enrichment claim as subsumed by trespass claim); *Blystra v. Fiber Tech Group*, *Inc.*, 407 F. Supp. 2d 636, 644 n.11 (D.N.J. 2005) (treating unjust enrichment claim as subsumed by other tort claims). *But see Flood v. Makowski*, No. Civ. A. 3:CV-03-1803, 2004 WL 1908221, at *37 n.26 (M.D. Pa. Aug. 24, 2004) (stating that unjust enrichment can be an equitable stand-alone claim).[12] This reading of *Steamfitters* is consistent with the *Restatement (Second) of Torts*, which does not recognize unjust enrichment as an independent tort. *See Blystra*, 407 F. Supp. 2d at 644 n.11.

Because the Borings' Amended Complaint sounds in tort and the unjust enrichment claim is based on the same conduct giving rise to the tort claims, the District Court properly dismissed the claim for unjust enrichment. *See Steamfitters*, 171 F.3d at 937; *Allegheny Gen. Hosp.*, 228 F.3d at 446-47.

---

[12] The *Flood* court gave no reasoning for its statement. Additionally, the case is factually distinguishable because it involved a claim in the context of entities who had significant and prolonged financial relationships with each other. *See Flood*, 2004 WL 1908221, at *2. These financial relationships (many of which were

(continued...)

D. The Amended Complaint's Allegations Do Not Satisfy The Elements Of Unjust Enrichment

Even if an unjust enrichment claim could proceed as a stand alone tort, the District Court still correctly dismissed the Borings' claim because the facts set forth in the Amended Complaint do no satisfy the elements of unjust enrichment.

To state a claim for unjust enrichment, a complaint must contain facts showing (1) that the plaintiff conferred a benefit on the defendant, (2) that the defendant appreciated the benefit, and (3) that the defendant accepted and retained the benefit under circumstances making it inequitable to avoid payment for the benefit's value. *Styer*, 619 A.2d at 350.

Here, and as noted above, the gist of the Amended Complaint is that Google took photographs of the Borings' property without their consent, not that they gave Google the photos with the expectation that they would be compensated for their use in connection with Street View. *See Allegheny Gen. Hosp.*, 228 F.3d at 447 (no unjust enrichment where plaintiff lacked reasonable expectation of payment from defendant) (citing *Aloe Coal Co. v. Dep't of Transp.*, 643 A.2d 757, 767 (Pa. Commw. Ct. 1994)). Moreover, any expenses Google saved by the alleged failure to implement adequate policies to prevent driving on private roads, *see* A-35 (Am.

(...continued from previous page)
based on enforceable contracts) arguably created a basis for the application of
(continued...)

Compl. ¶ 28), is not a benefit conferred by the Borings, and therefore it cannot support a claim for unjust enrichment. *See, e.g.*, *Commerce Bank/Pennsylvania*, 911 A.2d at 144 (district court properly dismissed unjust enrichment claim based on alleged amounts saved by failing to take adequate actions); *Doe v. Texaco, Inc.*, No. C 06-02820 (WHA), 2006 WL 2053504, at *2 (N.D. Cal. July 21, 2006) (dismissing unjust enrichment claim where any benefits to defendants from failing to implement protective measures "were not conferred upon them by plaintiffs"). Finally, there are no factual allegations to support the bald assertion that Google made a profit by including the image of the Borings' residence on Street View. *See* A-35 (Am. Compl. ¶ 27). The Amended Complaint does not allege that the Street View image at issue contained any advertising, or suggest any other manner in which Google could possibly have earned profits from the inclusion of the single image as part of an on-line map of Pittsburgh. Because the allegations in the Amended Complaint do not show that the Borings would be entitled to relief on their unjust enrichment claim, the District Court's dismissal of the claim should be affirmed.

(...continued from previous page)
Pennsylvania's traditional quasi-contract doctrine.

IV. THE DISTRICT COURT PROPERLY DISMISSED THE REQUEST FOR PUNITIVE DAMAGES[13]

Punitive damages are reserved to punish the most extreme and exceptional conduct. *Phillips v. Cricket Lighters*, 883 A.2d 439, 445 (Pa. 2005). They are justified only in "rare instances" involving "egregious behavior." *Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1096 (Pa. 1985). Conduct that is merely negligent or even grossly negligent is insufficient to support punitive damages. *Phillips*, 883 A.2d at 445. Rather, the defendant must have engaged in "'conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.'" *Martin*, 494 A.2d at 1096 (quoting *Restatement (Second) of Torts* § 908(2) (1979)). The conduct "must be intentional, reckless or malicious." *Feld v. Merriam*, 485 A.2d 742, 747-48 (Pa. 1984). Because punitive damages seek to punish and deter only the most egregious behavior, they are only available where the conduct at issue was more serious than the underlying tort. *See Franklin Music Co. v. American Broad. Cos.*, 616 F.2d 528, 542 (3d Cir. 1979); *Chambers v. Montgomery*, 192 A.2d 355, 358 (Pa. 1963).

---

[13] To the extent the Court affirms the dismissal of the Borings' claims, it need not address whether the conduct alleged in the Amended Complaint would support an award of punitive damages because punitive damages cannot stand without an actionable claim. *See Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800, 802 (Pa. 1989).

Here, none of the alleged conduct is extreme, outrageous, or in any way exceptional. The Amended Complaint concedes that the scope of Google's Street View service is public roads. A-30 (Am. Comp. ¶ 7.). Thus, at most, the Borings have alleged an unintentional trespass in the course of taking photos for use in an Internet map. There are no allegations that Google purposely sent Street View drivers onto private property, that Google was aware its drivers were purposefully driving on private property, or anything else from which it could be found that Google acted with an "evil motive" or reckless indifference of the rights of others. Indeed, the allegation that Google limited Street View to public roads, would be inconsistent with a finding that Google intentionally disregarded the Borings' rights. Because the conduct alleged is no more serious than commission of the underlying torts, the District Court properly concluded that punitive damages were not available to the Borings based on their allegations in the Amended Complaint.

The Borings argue that the issue of punitive damages must always be determined by a jury, after discovery. Appellants' Br. at 28-29. However, the case they rely upon—*Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800 (Pa. 1989)—stands for no such proposition. *Kirkbride* addressed whether an award of punitive damages must bear a reasonable relationship to the compensatory award. *Id.* at 801. It did not address whether a complaint must allege conduct that is outrageous and more serious than the underlying tort to proceed on a punitive damages theory.

Moreover, courts routinely dismiss claims for punitive damages in advance of trial. *See, e.g.*, *Phillips*, 883 A.2d at 446-47; *McCann v. Wal-Mart Stores, Inc.*, 210 F.3d 51, 55-56 (1st Cir. 2000); *Smith v. Brown*, 423 A.2d 743, 745-46 (Pa. Super. Ct. 1980); *McDaniel v. Merck, Sharp & Dohme*, 533 A.2d 436, 447-48 (Pa. Super. Ct. 1987); *see also Feld*, 485 A.2d at 748 (submission of punitive damages issue to jury was error). Indeed, the Pennsylvania Supreme Court specifically has recognized the obligation of judges to keep the issue of punitive damages from going to a jury where the conduct at issue is not sufficiently extreme or outrageous. *Martin*, 494 A.2d at 1098.

The Borings' reliance upon *Jacque v. Steenberg Homes, Inc.* 563 N.W.2d 154 (Wis. 1997), is equally misplaced. *Jacque* addressed an issue that has not been raised here—whether punitive damages may be awarded in connection with a trespass claim where nominal damages have been awarded and the trespass was overtly intentional. *See id.* at 156. The court in *Jacque* followed the *Restatement (Second) of Torts* § 908 cmt. c (1979), which states that punitive damages may be awarded where a trespass has been committed "for an outrageous purpose but no significant harm has resulted." 563 N.W.2d at 161. The *Jacque* court did not hold, as the Borings suggest, that the issue of punitive damages must always go to a jury in connection with a trespass claim resulting in no compensatory damages. Rather, punitive damages were appropriate because of the "egregious," "brazen," and

"shocking" nature of the defendants' conduct—plowing a path through plaintiffs' snow-covered field and conveying a mobile home across that path despite plaintiffs' adamant and repeated refusals to grant defendant access to their land. *Id*. at 165-66. The Amended Complaint here does not allege facts from which intentional conduct could be inferred, let alone conduct that could be characterized as egregious, brazen or shocking.

V. THE DISTRICT COURT PROPERLY DISMISSED THE REQUEST FOR INJUNCTIVE RELIEF

As a threshold matter, the Borings have waived the right to challenge dismissal of their injunctive relief claim. They failed to oppose the portion of Google's Rule 12(b)(6) motion addressed at that claim, which waives the claim on appeal.[14] *See, e.g.*, *Beightler v. Office of the Essex County Prosecutor*, No. 09-1122, 2009 WL 2562717, at *2 n.1 (3d Cir. Aug. 20, 2009); *accord In re Ins. Brokerage Antitrust Litig.*, --- F.3d ---, 2009 WL 2855855, at *13 (3d Cir. Sept. 8, 2009). They also failed to address the issue in any substantive way in their brief on appeal. *See* Appellants' Br. at 31; *Gorum*, 561 F.3d at 185 n.4; *Gladysiewski*, 282 Fed. Appx. at 980-81; *Mitchell*, 389 F.3d at 92.

[14] Google's motion to dismiss the Amended Complaint sought, *inter alia*, dismissal of the request for injunctive relief. *See* A-59–A-60. The Borings' opposition brief did not address this argument. *See* A-64–A-90.

In any event, the District Court properly dismissed the injunctive relief claim once it determined that the Amended Complaint had failed to otherwise state a claim upon which relief could be granted. *See Wolk v. United States*, No. Civ. A. 00-CV-6394, 2001 WL 1735258, at *8 (E.D. Pa. Oct. 25, 2001), *aff'd sub nom. Wolk v. Nat'l Transp. Safety Bd.*, 45 Fed. Appx. 188 (3d Cir. 2002).

Moreover, the allegations in the Amended Complaint, which concern no more than a single, brief and unintentional entry on the Borings' property, A-31 (Am. Compl. ¶ 9), do not show: "'[1] that [their] right to relief is clear, [2] that an injunction is necessary to avoid an injury that cannot be compensated by damages, and [3] 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). The Borings do not allege any facts to suggest any injury to them from Google's retention of the image at issue, let alone greater injury to the Borings than the cost of requiring Google to destroy all copies of the image that has long since been removed from Street View.

VI. THE DISTRICT COURT PROPERLY DISMISSED WITH PREJUDICE

Because the Borings did not seek leave to further amend and did not provide the District Court with a proposed second amended complaint, the District Court properly dismissed with prejudice. *See, e.g., Fletcher-Harlee Corp. v. Pote*

Concrete Contractors, Inc., 482 F.3d 247, 253 (3d Cir. 2007) ("we hold that in ordinary civil litigation it is hardly error for a district court to enter final judgment after granting a Rule 12(b)(6) motion to dismiss when the plaintiff has not properly requested leave to amend its complaint").

CONCLUSION

For the forgoing reasons, Google Inc. respectfully requests that the Court AFFIRM the decision of the District Court and grant such further and other relief as the Court deems just and proper.

Respectfully submitted,

Dated: September 24, 2009

WILSON SONSINI GOODRICH & ROSATI
PROFESSIONAL CORPORATION

By: s/ Tonia Ouellette Klausner

Tonia Ouellette Klausner
1301 Avenue of the Americas
New York, New York 10019
Phone: 212-497-7700
Fax: 212-999-5899

Brian P. Fagan
KEEVICAN WEISS BAUERLE & HIRSCH LLC
1001 Liberty Avenue
Pittsburgh, Pennsylvania 15222
Phone: 412-355-2600

Counsel for Appellee Google Inc.

CERTIFICATE OF COUNSEL

I, Tonia Ouellette Klausner, hereby certify that:

1. I am a member of the bar of this court;

2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,731 words, including parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii);

3. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman (14 point font);

4. The electronic version of this brief is identical to the text version in the paper copies filed with the court. This document was scanned using CA Software Anti-Virus Release 8.3.02 (with updated definition file as of September 24, 2009) and no viruses were detected;

5. On this date, ten (10) hard copies of the foregoing Brief For Appellee Google Inc. were sent to the Clerk's Office. Pursuant to Local Appellate Rules 31.1(d) and 113.4(a), I caused the foregoing Brief For Appellee Google Inc. to be served on counsel for Appellants via the Notice of Docket Activity generated by the Court's electronic filing system (i.e., CM/ECF) and via electronic mail.

Dated: September 24, 2009
New York, New York

/s/ Tonia Ouellette Klausner
Counsel for Defendant-Appellee

ADDENDUM

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
WEST DISTRICT

BARBARA STREISAND,
Plaintiff,
vs.
KENNETH ADELMAN, et al,
Defendants.

CASE NO. SC 077 257

STATEMENT OF DECISION

This matter having been argued and submitted, and the Court having filed its Tentative Decision and Proposed Statement of Decision, pursuant to Rule 232, California Rules of Court, and *DuPont Merck Pharmaceutical Co. v. Superior* Court (2000) 78 Cal.App.4th 562, 564, and the time for any objections to the Proposed Statement of Decision having expired without any objections having been filed, the Court now adopts is Proposed Statement of Decision as its Statement of Decision in this matter, as follows:

RULINGS ON SUBMITTED EVIDENTIARY MATTERS

At the time of the hearing of this matter the Court was asked to resolve several objections to particular exhibits offered by the parties. While certain of those objections were the subject of memoranda, the Court heard oral objections as well. Those evidentiary matters not resolved on the record at the hearing were taken under submission and are the subject of this section of this ruling.

Matters Related to the Anti-SLAPP Motion

1. Exhibit M to the Declaration of Laura Seigle, filed June 23, 2003 - objection overruled.

2. Exhibit 4 to the Declaration on Jonathan Stern, filed July 3, 2003, and to paragraph 5 of that declaration - objections sustained.

Matters Related to the Motion for Preliminary Injunction

1. Paragraphs 2 through 6 and the accompanying Exhibits 1 through 5 to Declaration of John M. Gatti, filed June 23 - objections overruled.

2. Paragraphs 17 and 18 of that declaration - objections sustained.

3. Paragraph 21 of that declaration - objection sustained.

4. Paragraphs 2 through 8 of the Declaration of Rex Glensy, filed July 9, 2003 together with Exhibits 20 through 26 - objections sustained.

5. In footnote 9 at page 10 of the memorandum in support of plaintiff's motion for preliminary injunction, plaintiff makes reference to additional declarations concerning plaintiff's security concerns and indicates that she desires to file such documents *in camera*. The request to file additional declarations is denied because the request for submission of additional factual matters at that stage in the proceedings was untimely. For this reason, the Court does not reach the question whether those declarations would be properly received *in camera*, noting only that no substantive showing was timely made to support any such request. See, e.g., Rule 243.2, California Rules of Court.

Application of Evidence to Both Matters

The Court included in its written Tentative Ruling for the first hearing, and asked counsel at that hearing, if the parties had any objection to having all admitted evidence considered as to each of the two motions on calendar. Counsel for plaintiff objected. (Transcript, July 14, page 10, line 24 through page 11, line 10) Nevertheless, in briefing and arguing the Motion to Strike, counsel for defendants did not object to references by counsel for plaintiff to evidence offered in connection with the Motion for Preliminary Injunction and both sides argued the matters as if the evidence offered as to one matter was to be considered as to both. Accordingly, the Court will analyze the legal arguments in the context of the evidence admitted with respect to both motions.

STATEMENT OF FACTS

Plaintiff is a world-renowned singer, actress, movie director, composer and producer, winner of Academy Awards and other public honors. As a consequence of her celebrity, plaintiff has been adored by her fans, followed by the curious, and stalked by the obsessed. She has been annoyed by photographers seeking uninvited "candid" pictures, and she has been the recipient of threats to her personal safety. Plaintiff's heightened concern for her safety has led her to take steps to shield her private affairs from public view.

To enable her to reside out of public view and to prevent the public from observing her while she is at home, plaintiff selected a residence located on a secluded parcel of land within the City of Malibu. From the street and from other locations in which persons may lawfully stand, it is not possible to see the interior of the parcel except from the front gate. When standing at that location one may see only a largely obstructed view of a portion of the front driveway and front exterior of the residence. The location of the property on a bluff above the Pacific Ocean makes it impossible for a person to see or approach the property by land from that direction. Other properties adjoin plaintiff's parcel on either side, but vegetation planted along those common property lines prevents viewing the interior of plaintiff's parcel from either adjoining

property.

Plaintiff also maintains an unlisted telephone number and has sought to deter those who would search the real property records for her residence address by not listing it in her stage name. [These efforts have been ineffective as described below.]

While taking these steps to dissuade unwanted visitors, plaintiff has also invited guests to her home; granted reporters interviews in her home; permitted photographers to take — and a national magazine to publish — pictures of her, of her and her husband, and of the interior of her home and of its adjoining grounds; and opened her home to invited guests.

Defendant Kenneth Adelman [Adelman] is the creator of the California Coastal Records Project which posts on an Internet website maintained by defendant Layer42.net [Layer42] digital image taken by Adelman. Adelman takes these images from a helicopter flying seaward of the coastline of the Pacific Ocean at a distance of about 2000 feet and at an altitude of between 150 and 2000 feet. Adelman has taken digital images of "almost the entire California coastline" in this manner, totaling in excess of 12,200 images. Each photograph, including the image of the plaintiff's house which is a central subject in this litigation, was taken with a digital camera with a 28-70 mm f/2.8 ED-IF AF-S Zoom-Nikon lens. The lens used to take these images produces photographs of lesser resolution than those produced by what is described as a "standard" 35 mm lens. The lens used does not extend past 70 mm and there is no evidence that the lens can function as a telephoto lense.

The stated purpose of the California Coastal Records Project is the taking of digital photographs of the entire coastline of California and making those photographs available free of charge to state and local governmental entities, university researchers, news organizations, conservation organizations, and others. It is also possible for anyone to download these images free of charge or to purchase better quality prints of the images contained on the website from defendant Pictopia.com [Pictopia] upon

payment of a fee and giving consent to the copyright license agreement which is contained on the same website. The download function has been available since February 14, 2003.

In late 2002 and in the course of the project, Adelman took a digital image of the coast which included plaintiff's property. At the time he took this image he was unaware that it included plaintiff's property. That image is posted on the California Coastal Records Project website as Image 3850. It was taken at a distance of approximately 2700 feet from the plaintiff's residence using the camera described above. Nothing on the California Coastal Records Project website lists the address of plaintiff's residence or the longitude and latitude of specific buildings on her property. Because the longitude and latitude of the location from which each of the images is taken are recorded and also posted on the website, it is possible to calculate the coordinates for plaintiff's parcel by application of the appropriate mathematical principles or by accessing a third party's website which can make those calculations. Image 3850 carries a label or "tag", but only as it is displayed on the California Coastal Records Project website: "Streisand Estate, Malibu". Once a person has gained access to the California Coastal Records Project site, it is possible to search by that tag to reach a screen which displays Image 3850. A general Internet search for the tag, using a search engine such as Google or Yahoo, will not direct a searcher to the image posted on defendants' site. Once access to the Image is obtained, it is possible to enlarge the image, to download it to the user's computer and to print the enlarged image. The image can be enlarged to specified sizes up to 36" x 24". [Plaintiff's memorandum states [page 4, l. 26] that the size of the exhibit which it printed from the website [Exhibit 11] is 40" x 24". However, the actual size of the image is 36 x 24 on paper of the stated dimension when borders are included.]

Image 3850 is taken from above the ocean, a vantage point clearly accessible only to persons flying or gliding overhead. There is no location from which anyone on

the ground would have access to the view contained in this image, whether at the front gate or at any other point on the perimeter of the property. Also, there is no evidence that there is any such observation point on or from any coastal hill, for example.

Image 3850 depicts a landward view, showing the coastline [the ocean, the breaking waves, the beach and the upland bluffs are all visible] and many residential structures in the area, including the residence of plaintiff, as well as the neighborhood streets and foliage; no street signs or cars are visible. Whether individuals can be seen in the image is open to interpretation. Adelman concedes in his moving papers [Motion, page 5, ll. 1-2] that the fact that there are individuals [described as tiny and indistinct figures] on the beach can be discerned from image 3850. See Exhibit A. Inspection of Exhibit 16, the largest print obtainable from the website, shows that such individuals can be discerned at the right margin of the photograph; however, they are all too small to be identifiable. With respect to plaintiff's real property, Image 3850 clearly shows the presence and configuration of improvements such as the rear elevation of the house, as well as the rear deck, swimming pool and deck chairs, tables and umbrellas — all things not observable from any location on the ground outside the boundaries of plaintiff's property. The interior of plaintiff's residence is not visible in the image, nor can it be discerned to any extent by enlargement of the image.

The fact that Image 3850 is "posted" on the Internet means that it is available to anyone with Internet access. As mentioned, it is also possible to order a high quality photograph of the image, in varying sizes by payment of from $50 to $120.00. Examples of such photographs are Exhibits A, 11 and 16.[1]

---

[1] Exhibit 16 is a print from the website at the maximum enlargement offered. There is no evidence as to the precise number of times which a person can enlarge Image 3850. Exhibit I is an enlargement of the image an unstated number of times. That image shows what appears to be a row of windows, but the image has been enlarged to the point that nothing more than the geometry of the windows can be discerned; viz., at this degree of enlargement, nothing else in the image is recognizable. It is of significance that nothing within the residence can be observed.

From February 14, 2003 through May 30, 2003, there were 14,418 downloads without charge from the website. Image 3850 was downloaded six times, twice to the Internet address of counsel for plaintiff. Orders for prints were placed by plaintiff's counsel and by plaintiff's neighbor.[2] Proceeds from the sale of prints of images are donated to the California Coastal Protection Network. Adelman does not earn any profit from the website or the photographs, but he does reimburse himself for the costs associated with taking the photographs and all website expenses.

Other photographs depicting plaintiff's residence have previously been published. On March 9, 1998, People magazine published an article concerning plaintiff's relationship with James Brolin; their pictures are the front cover of the magazine. The article includes both text which, *inter alia*, describes aspects of plaintiff's personal relationship with Brolin, and photographs of each of them with members of their respective families. At page 80 of that issue [Exhibit K, page 31 of the June 23 filing in this Court] there is an aerial photograph of the residence taken from the ocean [approximate dimension 2" x 3"]; it is a closer view of a portion of what is depicted in Image 3850 [Exhibit A to the Declaration of Laura Seigle] and reveals some details not readily observable in Image 3850 as the latter image appears before enlargement; see, e.g., Exh. A. Once enlarged, the detail observable for the same subject area does not materially differ between the two images. [Comparing Exhibit K, page 31 with Exhibits 11 and 16]

Other photographs of the plaintiff's residence have been published by news organizations, with the permission of plaintiff, viz., (a) photographs of her being interviewed in an interior setting [Exhibit L, page 37], (b) aerial photographs of the residence taken from a point over the Pacific Ocean [Exhibit L, page 35 (four views)],

---

[2] Plaintiff and her husband have applied for a permit from the City of Malibu in connection with the redevelopment of a portion of their real property. It is reasonable to infer that the neighbor ordered the print to assist him or her with respect to that matter.

and (c) two photos taken from the rear yard and showing (1) the rear deck, pool and a portion of the rear elevation of the house and (2) the swimming pool area and garden with a view toward the ocean [Exhibit L, page 36]. Another photograph is of a bathroom counter in a residence of the plaintiff. [Exhibit L, page 37]. Exhibit L is a printout from the Internet site barbratimeless.com. [There is no evidence that this site is sanctioned by plaintiff.] The plaintiff herself utilizes the Internet to put her views before the public. She has a website [the address of which is barbarastreisand.com] on which she posts her views on various subjects. [Exhibit Q].

Information about the residence is available in the public record. Agenda item 4.D of the City of Malibu Planning Commission May 19, 2003 public meeting, consisting of 10 pages, is available on the website for the City of Malibu. It identifies plaintiff and her husband by name as owners of the residence and lists the addresses of plaintiff's residence and other property owned by plaintiff and her husband at the location at issue [Exhibit U]. Page 1 of Exhibit V, also available from the City of Malibu website, lists plaintiff's residence address. Pages 2 and 3 of that exhibit are topographic maps of the area, including plaintiff's residence. Fan websites list the address of the residence depicted in Image 3850 and of other, former residences [Exhibit M].

LEGAL ISSUES AND ANALYSIS

MOTION UNDER CODE OF CIVIL PROCEDURE SECTION 425.16

A. *Defendants' Burden - First Prong Analysis*

Code of Civil Procedure section 425.16[3] [sometimes referred to as the anti-SLAPP statute] provides for early judicial review and potential dismissal of litigation that improperly infringes on constitutionally protected activity. A defendant moving to strike a complaint under section 425.16 bears the initial burden to establish that the plaintiff's complaint arises from defendant's exercise of his, her or its First Amendment rights in

[3] All subsequent statutory references are to the Code of Civil Procedure unless the text or context indicates otherwise.

connection with a public issue. Section 425.16(b)(1); *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88, 89; *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61; *Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 745 [initial burden is on the defendant to establish that his or her conduct arises from a matter of public concern]. The moving defendant's initial burden is to establish a prima facie showing of the matters as required by the statute (*Chavez v. Mendoza* [2001] 94 Cal.App.4th 1083, 1087). When that threshold burden is met, the burden shifts to the plaintiff to establish by admissible evidence a probability of prevailing on the merits of the litigation. Section 425.16(b)(1); *Navellier, supra*, at 88; *Equilon Enterprises, supra,* at 67. The plaintiff's burden is met by stating and substantiating a legally sufficient claim. *Wilson v. Parker, Covert, et al* (2002) 28 Cal.4th 811, 821; *Briggs v. Eden Council* (1999) 19 Cal.4th 1106, 1123.

The reason for the statute is set out in the legislative findings contained in section 425.16(a): "The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly."

The evidence presented in this case, including that summarized in the next several paragraphs, establishes that defendants' conduct of which plaintiff complains consists of acts in furtherance of Adelman's rights of petition or free speech under the United States and California Constitutions in connection with a public issue.

Protection of the California coastline is a matter of great public interest, spanning the history of the state, from its admission to the federal Union 153 years ago to the present. Indeed, the right of the people to ownership of, or access to, tidelands originated in Roman law (see discussion in *City of Berkeley v. Superior Court* ([980] 26 Cal.3d 515, 521). The citizens of each state acquired coastal ownership and access rights upon statehood (*Martin v. Waddell* [1841] 41 U.S. 367, 410); California acquired

ownership of coastal lands upon its admission to the Union in 1850 (*Borax Ltd. v. Los Angeles* [1935] 296 U.S. 10), and holds those lands in trust for the people (*City of Long Beach v. Mansell* [1970] 3 Cal.3d 462). Land along the California coastline is subject to both federal and state regulation (e.g., by the federal Coastal Zone Management Act [16 U.S.C.A. secs. 1451 et seq.]) and by the California Coastal Act of 1976 (Public Resources Code secs. 3000 et seq.; sometimes referred to as the "Coastal Act") which is itself the successor statutory scheme to the California Coastal Zone Conservation Act of 1972 which was adopted by the voters of this state as an initiative statute at the 1972 General Election.

The Legislature's findings made in connection with enactment of the Coastal Act in 1976 include the following declarations of legislative purpose:

"(a) That the California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people and exists as a delicately balanced ecosystem.

(b) That the permanent protection of the state's natural and scenic resources is a paramount concern to present and future residents of the state and nation.

(c) That to promote the public safety, health, and welfare, and to protect public and private property, wildlife, marine fisheries, and other ocean resources, and the natural environment, it is necessary to protect the ecological balance of the coastal zone and prevent its deterioration and destruction.

(d) That existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state and especially to working persons employed within the coastal zone."

See also Public Resources Code sections 30006 and 30012. The latter section exhorts individuals to become involved in the protection of the coast:

"The Legislature finds than an educated and informed citizenry is essential to

the well-being of a participatory democracy and is necessary to protect California's finite natural resources.... The Legislature further finds that through education, individuals can be made aware of and encouraged to accept their share of the responsibility for protecting and improving the natural environment."

Section 425.16(e) specifically defines activities protected by the anti-SLAPP statute to include:

" ...

(2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

A portion of the site depicted in the image which is the focus of this litigation is the subject of a zoning proceeding before an agency of the City of Malibu. The application of the Coastal Act to law within the City of Malibu is the subject of not less than 10 lawsuits [now consolidated into one] on file in this Department (*City of Malibu v. California Coastal Commission, et al.* No. SS011355). The constitutionality of the Coastal Act is now pending hearing before the California Supreme Court in *Marine Forests Society v. California Coastal Commission* (2002), *reprinted for tracking purposes at* 104 Cal.App.4th 1202. In January 2003 the Governor convened an Extraordinary Session of the Legislature to respond to the defects perceived in the Coastal Act by the Third District Court of Appeal in the decision cited, *ante*.

Plaintiff herself opined on her website about environmental concerns on December 10, 2002. (Exhibit Q, page 65.)

The image at issue here is one of over 12,200 images of the California coastline

which defendants publish in a public forum -- the internet. The coastline depicted in Image 3850, and in the 12,200 images, has been a subject and geographic area of intense public interest for scores of years.

This controversy substantiates the aphorism that a picture is worth a thousand words: The particular image at issue is a visual description of an area that includes the subject of the zoning matter now pending before a public agency and which, more generally, is part of an on-going public debate and controversy over (1) the proper scope of regulation of the California coastline, (2) the degree of compliance with governmental regulations affecting this geographic area and subject matter and (3) the proper scope of governmental regulation of this geographic area. The issues extend beyond Image 3850; it is only one of the 12,200 images which Adelman has taken and posted on the website as part of his own interest in this region of the state and in the issues outlined above.

The published image clearly meets the requirements of section 425.16(e)(2)[4]; undisputably addresses issues of long-standing and current public interest; is posted in a public forum (section 425.16(e)(3)); and represents the exercise of Adelman's First Amendment rights in connection with a public issue and an issue of public interest. *Id.* The purpose and function of the photography and its publication on the California Coastal Records Project website are examples of speech protected by the state and federal constitutions. *See, e.g., ComputerXpress Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 100 [Internet posting as public forum].

Defendants have made a prima facie case that their conduct is within the scope of activities protected by section 425.16(b)(1). A contrary conclusion would be inconsistent with both the language of the statute and the express legislative

---

[4] Under this prong, there is no need to separately demonstrate that the writing concerns an issue of public significance. *Briggs v. Eden Council, supra*, 19 Cal.4th at 1109 [issues being considered in an official proceeding have public significance *per se*].

declaration that the statute shall be construed broadly to protect freedom of speech and the right to petition government and to discuss issues of public interest. Section 415.16(a).[5]

There are several interrelated consequences of the facts of this case. The geographic location of the residences depicted in Image 3850 and the use of that real property are matters of public interest in connection with the management of coastal zone resources and the application of the Coastal Act. That a residence in Image 3850 is owned by an environmentally concerned, internationally known personage is relevant in the public discussion of coastal zone issues. *E.g.*, *Dora v. Frontline Video* (1993) 15 Cal.App.4th 536, 546. Plaintiff's proposed modified use of the land is also a matter of public interest "in connection with an issue of public interest" . See *Montana v. San Jose Mercury News, Inc.* (1995) 34 Cal.App.4th 790, 792, 797 [professional football player]; *Dora v. Frontline Video, supra,* [surfer].

B. *Plaintiff's Burden - Second Prong Analysis*

That defendants' activities are within the first prong of section 425.16 does not end the inquiry. Rather, the burden shifts to plaintiff to state and substantiate a legally sufficient claim (*Equilon Enterprises LLC v. Consumer Cause, Inc., supra,* 29 Cal.4th at 67), viz., that plaintiff's claims for relief are legally sufficient and supported by competent, admissible evidence (*Dupont Merck Pharmaceutical Co. v. Superior Court, supra*, 78 Cal.App.4th 562, 568). Thus, plaintiff in this action must establish that her claim is supported by a prima facie showing of facts that is sufficient to sustain a

---

[5] The fact that Image 3850 is available for sale may be relevant to the second prong of the analysis, but not to the first. Newspapers are available for sale in most instances, yet no one would contend that a suit to enjoin publication of an arguably "offensive" [e.g., defamatory] article would fail the first prong anti-SLAPP test because the idea expressed was available for sale at a price.

A motion under section 425.16 may be proper even when the defendant seeks a financial advantage. *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 15 [development of mall with environmental consequences is matter of pubic interest subject to anti-SLAPP statute].

favorable judgment if the evidence submitted by plaintiff is credited. *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821; see *Navellier v. Sletten, supra*, 29 Cal.4th at 87. The test which plaintiff must meet has been characterized as that applicable to motions for summary judgment, viz., the plaintiff's burden in opposing a SLAPP motion is to make a prima facie showing of facts that would support a judgment in plaintiff's favor. *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 907. In making this determination, the court considers the pleadings and evidence submitted by the parties, but does not weigh credibility or comparative strength of that evidence. The defendant's evidence is considered in the context of determining if it overcomes that of the plaintiff as a matter of law. *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 906.

1. *Invasion of Privacy Claims*[6]

a. *Plaintiff's Contentions*

Plaintiff's first and second causes of action allege violations of her right to privacy under the California Constitution and the common law by the taking and publication of Image 3850 on defendants' website, alleging that such conduct constituted an intrusion into plaintiff's seclusion (First Cause of Action, Complaint, pars. 28-37) and the publication of private facts (Second Cause of Action, Complaint, pars. 38-47). Plaintiff also alleges that her general right of privacy under Article I, section 1 of the California Constitution was violated by defendants' conduct (Third Cause of Action, Complaint, pars. 48-57).

The factual predicate for these claims is the taking of Image 3850 which plaintiff alleges to be "high resolution pictures of areas of her residence that are not visible to the naked eye" (Complaint, pars. 32 and 42), identifying the property as belonging to plaintiff, showing the location of the property through longitudinal and latitudinal coordinates, and pinpointing the location of the residence on a map. Plaintiff claims a

---

[6] Plaintiff does not contend that her claim for relief is founded on the federal Constitution. For this reason, discussion of federal cases is limited.

protectable privacy interest in the location of her property and in images of the secluded areas of her home. (Complaint, pars. 29, 39 and 49)

b. *The California Constitutional Right of Privacy*

(1) *Case law development of a right of privacy under California law.*

What is now commonly referred to as the right of privacy was given modern voice in an 1890 Harvard Law Review article by Samuel D Warren and Louis D. Brandeis entitled *The Right to Privacy* (4 Harvard Law Review 193), in which the authors called for judicial creation of a remedy in tort for invasion of privacy. Decrying the publication of "idle gossip" and criticizing the press for "overstepping in every direction the obvious bounds of propriety and of decency", their article eventually resulted in recognition in California [and in other states and federally] of a right to privacy.[7]

California first recognized a right to privacy in 1931 in *Melvin v. Reid,* 112 Cal.App. 285 [known as The Red Kimono case in reference to the movie of that name[8]]. After taking note that other jurisdictions had set out no uniform rationale for their decisions either recognizing or refusing to recognize such a right, the court of appeal held:

"We find ... that the fundamental law of our state contains provisions which, we believe, permit us to recognize the right to pursue and obtain safety and happiness

---

[7] The right to privacy is not recognized in every state, nor is there uniformity in the manner or extent to which this right is recognized among states or under the "penumbra" of the First Amendment to the United States Constitution. Its scope under California law is more extensive than under federal law. For that reason, reference to federal court decisions is not sufficient to resolution of the issues presented in this case.

[8] The movie "The Red Kimono" was a reenactment of the life of a former prostitute who had been tried for murder seven years earlier, and acquitted. Having become rehabilitated, the plaintiff had married and was leading "an exemplary life". She alleged that use of her true name in the movie had ruined her new life by revealing her past to her otherwise unaware new friends and associates.

without improper infringement thereon by others.

"Section 1 of article I of the Constitution of California provides as follows: "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness.

"The right to pursue and obtain happiness is guaranteed to all by the fundamental law of our state. This right by its very nature includes the right to live free from the unwarranted attack of others upon one's liberty, property, and reputation." *Id.*, at 291.

In sustaining plaintiff Melvin's right to sue for violation of her right to privacy, the court found that her claim must rest solely on the tort cause of action pleaded; at the same time the court also sustained general demurrers to the other causes of action [for violation of asserted property rights].

Thus the *Melvin* court held that Article I, section 1 as it then existed[9] was the necessary predicate to assertion of a cause of action in tort for violation of the constitutional right to privacy. The court distinguished use of the incidents in plaintiff's past – which it found not subject to the privacy claim, because those incidents were matters of public record – from use of her name in the movie – which it found actionable as an invasion of her right of privacy. *Id.*, at 292.[10] The Court premised its holding that there was a remedy in tort upon the text of then Article I, section 1, even though there was no need to say more than that the common law — as distinct from the state Constitution — recognized a right to sue in tort for a violation of the right of privacy.

---

[9] The section has been amended to make only one substantive change in the intervening years, by addition of a concluding clause in 1972 consisting of the words "and privacy". See discussion in the text, *post*.

[10] Whether the holding itself would be good law today is not relevant to the discussion of the source and scope of the right of privacy. *C.f., e.g., Cox Broadcasting v. Cohn* (1975) 420 U.S. 469, 494-495 [privilege to publish criminal history information contained in the public records, including names].

The *Melvin* court's conclusion that the right to sue for violation of the right of privacy is found in or sanctioned by Article I, section 1 of our state Constitution has not been uniformly articulated by later cases. The first recognition of the right of privacy by our state supreme court was in *Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273 [*Gill I*]. The plaintiffs in *Gill I* had filed suit over the use of their photograph [man (actually, husband) kissing woman (in fact, wife) on the cheek in a public place (Farmers Market, Los Angeles], arguing that publication of their photograph violated their right of privacy because it portrayed them in a false light.[11] In overturing the trial court's order sustaining the demurrer to the complaint and returning the case to the lower court for trial, our supreme court reasoned:

"We believe the reasons in favor of the right [of privacy] are persuasive, especially in the light of the declaration by this court that 'concepts of the sanctity of personal rights are specifically protected by the Constitutions, both state and federal, and the courts have properly given them a place of high dignity, and worthy of especial protection.' (Orloff v. Los Angeles Turf Club, 30 Cal.2d 110, 117 [180 P.2d 321, 171 A.L.R. 913]." *Gill I, supra,* 38 Cal.2d 273, 278.[12] See also *Gill v. Hearst Publishing Co.* (1953) 40 Cal.2d 224 [*Gill II*] [that plaintiffs' photograph was taken in a public place precluded the claim made in that case premised on invasion of plaintiffs' privacy rights, apparently under Article I, section 1]. In reaching its conclusion, our supreme court

---

[11] California recognizes four theories of common law privacy rights; they are intrusion, public disclosure of private facts, false light, and appropriation of image and personality. Prosser, *Privacy* (1960) 48 Cal. L. Rev. 381, discussed, e.g., in *Kapellas v. Kofman* (1969) 1 Cal.3d 20, 35 fn. 16. See discussion in the text, *post*.

[12] The cited case concerned a claim of violation of the false light prong of the right to privacy. The next year, in *Gill v. Hearst Publishing Co., supra*, 40 Cal.2d 224 [*Gill II*], discussed in the text, our supreme court held that the same plaintiffs suing a different defendant over the same photograph could not prevail under the invasion of privacy prong of the right to privacy as they had kissed in a public market, a place in which they had no reasonable expectation of privacy.

relied also on *Melvin v. Reid, supra*, 112 Cal.App. 285, suggesting approval of that court's determinations that the *constitutional right* of privacy would be enforced through the tort system. It is not entirely clear from the opinions in *Gill I* and *Gill II*, however, that plaintiffs' complaints alleged a violation of the state Constitution; rather, it appears that each alleged a cause founded in tort. Thus, whether there was an cause of action based on Article I, section 1 of our state Constitution — *independent of* a tort claim, rather than permitting a tort cause of action *permitted by* Article I, section 1 — does not appear to have been presented or determined in either *Gill I, Gill II* or in *Melvin*.

In *Briscoe v. Readers Digest* (1971) 4 Cal.3d 529 our supreme court characterized the right of privacy as resting in the common law, not referring to the state constitutional source upon which the *Melvin* or *Gill* courts had predicated their recognition of that right. *Id.*, at 534.[13] While citing *Melvin* as the basis for its holding and for California's recognition of the right of privacy for 40 years, at the same time the *Briscoe* court predicated the assertion of a privacy right on common law rather than on Article I, section 1, thus calling into question whether the reasoning of *Melvin*, *Gill I* and *Gill II* (each of which had reached its holding, at least in part, on the authority of Article I, section 1) was being discredited, *sub silentio.*[14]

(2) *1972 amendment to the California Constitution*

Article I, section 1 of the California Constitution now provides:

"All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and

---

[13] The continued viability of *Briscoe* is before the state supreme court in *Gates v. Discovery Communications*, No. S115008, *reprinted for tracking purposes at* 106 Cal.App.4th 677 [review granted June 18, 2003].

[14] That the specific holding of *Briscoe v. Readers Digest, supra*, may have been overturned, e.g., in *Cox Broadcasting v. Cohen, supra,* does not detract from the court's discussion of the sources of claims to privacy under the California constitution or statutes.

privacy."

The text of this section has remained substantively the same since California was admitted to the Union in 1850 except for addition of the words "and privacy" by constitutional amendment adopted at the November 1972 General Election. [This revised clause is referred to as the "Privacy Clause" hereafter.] Compare Article I, section 1 as set out in Ex. Doc. No. 39, 31st Congress, 1st Session [Message from the President of the United States regarding California's admission to the Union], with the text of Proposition 11, set out at Part II, page 11, California Voters Pamphlet, November 7, 1972 General Election. The reasons for the addition of the Privacy Clause to our state Constitution are set out in Part I, at pages 26 through 28 of that Voters Pamphlet. The Detailed Analysis by the Legislative Counsel states that adoption of Proposition 11 would "add the right of privacy as one of the inalienable rights". It should be noted that the Constitution Revisions Commission had not recommended addition of the Privacy Clause.[15]

The statement of legislative purpose just quoted may not as broad as would first appear. The Argument in Favor of this proposed constitutional amendment additional states in part:

"The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our personalities, our freedom of communion, and our freedom to associate with the people we choose. It prevents government and business interests from collecting and stockpiling unnecessary

---

[15] While the working papers of the subcommittee of the California Constitution Revision Commission which addressed this article of the Constitution contain a suggestion that a formal statement of the right of privacy should be considered by the full Commission, no recommendation to that effect was contained in any report of the Constitution Revision Commission. See, e.g., California Constitution Revision Commission, Proposed Revision 3, Part 1, Introduction, 1970. The insertion of the words "and privacy" was made on the floor of the California Legislature in the course of its passage of the Legislative Constitutional Amendment which was then placed on the ballot and enacted by the electorate in 1972.

information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us. [Par.] Fundamental to our privacy is the ability to control circulation of personal information. This is essential to social relationships and personal freedom. The proliferation of government and business records over which we have no control limits our ability to control our personal lives....."[16] [Underscoring in original]

---

[16] The October 1969 Staff Report to the California Constitution Revision Commission contains the following brief statement of the right:

> "Rights of privacy have become quite important in modern American jurisprudence. Such rights are designed to protect the individual from an unwanted invasion of his [or her] private life. Section 1 [of the California Constitution] has been construed as assuring rights of privacy independent of common rights of property, contract, reputation and physical integrity. Rights of privacy, however, do not protect an individual from publication of matter which is of 'public or general concern.'" *Id.*, at 8 [footnotes omitted].

Among the "revision issues" specified in that report was:

> "2. Should additional rights be specified in Section 1, for example the right to privacy?" Staff Report, Article I, Declaration of Rights, Background Study 3, California Constitution Revision Commission, October, 1969, at 9.

At the time of this Report, Article I, Section 1 of the California Constitution provided:

> "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness."

It does not necessarily follow, however, that this staff report was the basis for the Legislative Constitutional Amendment proposed, or for its adoption. It is quoted to indicate the uncertainty extant at the time of adoption of the Privacy Clause.

The Commission's proposal to revise this section of the Constitution did not include addition of the words "and privacy". That addition was made by the Legislature when it placed Proposition 11 on the 1972 General Election ballot. As proposed by the Commission, the section would have been amended to

It is established that ballot arguments may be useful in interpreting the intent of the electorate in enacting changes in the state Constitution. *E.g.*, *White v. Davis* (1975) 13 Cal.3d 757, 775; *Lundberg v. Superior Court* (1956) 46 Cal.2d 644, 652.

The ballot argument, however, mentions only in passing the individual's right to be left alone -- except in the context of collection and dissemination of personal information by governments and businesses. There is no language such as that quoted earlier from either cases or the Brandeis and Warren law review article articulating the need for a remedy to protect any privacy interest in the sense of protecting against the invasion of solitude.

(3) *Development of case law following addition of explicit privacy language*

In its first discussion of the right to privacy after the electorate adopted the Legislative Constitutional Amendment adding the words "and privacy" to Article I, section 1 of our Constitution, our supreme court applied the Privacy Clause to information gathering by a governmental agency, doing so as an additional, or secondary, basis for its holding. The court's primary holding was that undercover police surveillance and intelligence gathering significantly affected the free exchange of ideas

---

read as follows:

> "Every person is free and independent and has inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness." Proposed Revision of the California Constitution, 1971, Part 5, California Constitution Revision Commission.

As proposed by the Legislature and adopted by the voters, Section 1 was amended to read:

> " All people are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property; and pursuing and obtaining safety, happiness, and privacy."

The section was amended without substantive change in 1974.

in a university setting, constituting a prima facie violation of the First Amendment to the United States Constitution. On this basis the court reversed the trial court's sustaining of the defendant police chief's demurrer to a complaint that had challenged undercover police activity on a university campus. *White v. Davis, supra,* 13 Cal.3d 757. As an additional basis for its ruling the court held that the activity alleged in the complaint also violated Article I, section 1 as then recently modified. The court described the rights protected under Article I, section I as follows: "Although the general concept of privacy relates, of course, to an enormously broad and diverse field of personal action and belief, the moving force behind the new constitutional provision was a more focused privacy concern, relating to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society. The new provision's primary purpose is to afford individuals some measure of protection against this most modern threat to personal privacy." *White v. Davis, supra,* 13 Cal.3d 757 at 773 - 774 [footnote omitted]. Thus, the court confirmed that the focus of the Privacy Amendment was information gathering by government agencies, one of the matters expressly addresses in the Arguments in Favor in the ballot pamphlet for the 1972 General Election. No mention was made of any other reason for adoption of the amendment or of any broader scope of protection provided by the Privacy Clause.

The court also held that "... the amendment is intended to be self-executing, i.e., that the constitutional provision, in itself, "creates a legal and enforceable right of privacy for every Californian." *White v. Davis, supra*, at 775. Accordingly, the case stands for the proposition that there is a right outside of tort which may be enforced to the extent of the protection provided for in Article I, section 1 of our state Constitution. The case contains no citation to *Melvin v. Reid, supra*, or to either *Gill I* or *Gill II.*

The scope of this state constitutional right of privacy was addressed more recently and more directly in *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1 in which the Court confirmed that Article I, section 1 "creates a right of action

against private as well as governmental entities." *Id.*, at 20. The *Hill* court also had occasion to consider the scope of application of this constitutional provision, concluding that the Privacy Clause addressed two general classes of interests: (1) information privacy — an "interest in precluding the dissemination or misuse of sensitive and confidential information", and (2) autonomy privacy — an "interest in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference". *Id.*, at 35.[17] Describing informational privacy as "the core value" furthered by the Privacy Clause, the court reasoned that "a particular class of information is private when well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity." *Id.*, at 35. Autonomy privacy addresses the safeguarding of certain intimate and personal decisions from government interference; by reference to federal constitutional tradition these rights implicate medical treatment and private consensual conduct. *Id.*, at 31, 35.

Review of the cases which have considered privacy claims indicates both the current state of the law governing Privacy Clause claims and the circuitous route which lead to this status. As will be discussed, *post*, that path indicates that, while it is established that individuals may sue for relief not only in tort, but predicated upon allegations of violation of constitutionally created rights, and not just against governmental actions, but private conduct as well, the scope of claims which may be redressed by the Privacy Clause is not wide-reaching. This restriction on such claims

---

[17] In his dissent in *Hill*, the late Justice Stanley Mosk describes three rather than two types of privacy interests protected by the Privacy Clause:

1. Informational privacy, which addresses the right to prevent another from obtaining or publishing private information;
2. Autonomy privacy, which protects against interference with private conduct; and
3. Privacy in the sense of protecting against the invasion of solitude.

Hill v. NCAA, supra, at 90-91.

The majority in *Hill* does not address this third category.

will have specific application to the Third Cause of Action alleged in this case.

(4) *Elements of a Privacy Clause claim*

To prevail on a claim under the Privacy Clause a plaintiff must establish: (1) a legally protected privacy interest, (2) a reasonable expectation of privacy in the circumstances, and (3) conduct by the defendant constituting a serious invasion of that privacy interest. *Hill, supra,* at 39-40.

The legally protected privacy interest must be one protected by "established social norms" and determined by reference to "common law development, constitutional development, statutory enactment and the ballot arguments" surrounding adoption of the Privacy Clause. *Hill, supra*, at 36. These sources include the Restatement Second, Torts, discussed in the text, *post.*

The privacy interest to be protected must be reasonable; it "is not independent of the circumstances [citation omitted]. Even when a legally cognizable privacy interest is present, other factors may affect a person's reasonable expectation of privacy." *Id.*, at. 36. The invasion must be serious: "No community could function if every intrusion into the realm of private action, no matter how slight or trivial, gave rise to a cause of action for invasion of privacy. 'Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he [or she] is a part.'" *Id.*, at 37, quoting Rest.2d Torts, sec. 652D, comment c.

Whether the first requirement of this constitutionally sanctioned claim for relief is present is a question of law to be decided by the court. The second and third requirements are mixed questions of law and fact; if the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be determined as a matter of law. The *Hill* court also recognized certain defenses (and countervailing interests which the plaintiff may assert to offset those defenses). Either negating one of the three elements of the cause of

action, or establishing that the invasion is justified because it furthers a countervailing interest, defeats the plaintiff's claim. *Hill, supra*, at 35-36.

Finally, whether this constitutional privacy right has been violated is determined according to a balancing or weighing of applicable factors, rather than requiring the existence of a compelling interest. *Id.*, at 56 [see concurring opinion of Kennard, J] *Hill, supra*, at 34; *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 329, 331.

That a plaintiff alleging violation of her or his state constitutional right to privacy bears the burden of establishing these three "threshold elements" was reaffirmed in *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 893 [drug testing of newly hired employees not violative of Article I, section 1]. As explained by the court in *Loder*, "... the court in *Hill* determined that it was appropriate to articulate several threshold elements that may permit courts to weed out claims that involve so insignificant or de minimus an intrusion on a constitutionally protected privacy interest as not even to require an explanation or justification by the defendant." *Loder v. City of Glendale, supra*, 14 Cal.4th at 893.

Finally, as suggested by the case law discussion, *ante*, the scope of the constitutional right of privacy is not identical to the right of privacy which has developed under the common law. In *Shulman v. Group W. Productions, Inc.* (1998) 18 Cal.4th 200, the court discussed the relationship between the constitutional Privacy Clause and the common law, stating: "Nothing in *Hill* [or in more recent constitutional privacy cases] ... suggests that the conceptual framework developed for resolving privacy claims under the California Constitution was intended to supplant the common law tort analysis or preclude its independent development." *Id.* at 227. The court made this determination notwithstanding the common principles which are among the sources for explication of both constitutional and common law rights, i.e., established social norms, common law development and statutory enactments. *See Hill, supra,* at 36 - 37.

c. *The California Common Law Right of Privacy*

California common law recognizes four categories of the right of privacy. Dean Prosser has enumerated these categories as:

(1) intrusion

(2) public disclosure of private facts;

(3) false light in the public eye; and

(4) appropriation.

Prosser, Law of Torts 3rd Ed. 1964, pp. 829-851, cited in *Kapellas v. Kofman* (1969) 1 Cal.3d 20, 35, fn. 16.

Plaintiff's complaint alleges violations of the common law privacy interests of freedom from intrusion (First Cause of Action) and public disclosure of private facts (Second Cause of Action). The elements of these torts are discussed in the following paragraphs.

(1) *Intrusion into seclusion*

The tort of intrusion into seclusion recognizes both the right to control access to private places and that there should be a remedy for affronts to the right to be left alone.

Neither this right to be left alone, nor the wrong for which the tort principle provides a remedy, is absolute. Thus, proof of a claim for intrusion into seclusion requires proof of two elements: "(1) intrusion into a private place, conversation or matter (2) in a manner highly offensive to a reasonable person." *Sanders v. American Broadcasting Co., supra,* 20 Cal.4th 907, 914; *Shulman v. Group W Productions, supra,* (1998) 18 Cal.4th 200, 231.[18] The intrusion must be intentional (*Shulman, supra*, at

---

[18] Restatement Torts 2nd, section 652B provides:

> "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."

Our supreme court relied on the Restatement definition in both *Shulman*, and

231, citing *Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1483 at 1482) and the plaintiff must establish that the defendant "penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source." [citations omitted]. *Shulman v. Group W Productions, Inc.*, supra, 18 Cal.4th 200, 231-232.[19]

The tort is not automatically established or negated based on the location at which the allegedly offending conduct occurred. Even the fact that a location is public does not necessarily preclude a determination that a plaintiff's privacy had been violated. This point is illustrated by *Sanders v. American Broadcasting Companies, supra,* 20 Cal.4th 907, in which the plaintiff sued ABC and its reporter, alleging the defendants had surreptitiously eavesdropped on plaintiff and recorded assertedly confidential conversations held in plaintiff's workplace. It was alleged that the videotaping in which the defendants had engaged constituted the tort of invasion of privacy by intrusion. Our supreme court formulated the relevant question in the following language: "May a person who lacks a reasonable expectation of complete privacy in a conversation because it may be seen and overheard by coworkers (but not the general public) nevertheless have a claim for invasion of privacy by intrusion based

---

in *Sanders* [both discussed in the text, *ante*].

[19] In advocating the creation of a remedy for invasion of this interest, Warren and Brandeis wrote in their 1890 Harvard Law Review article:

"The common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?" 4 Harv. L. Rev. 220.

Even while so eloquently arguing for recognition of a cause of action for privacy, they placed several limitations on such claims, including when the publication is of matter of "public or general interest" and when the individual has consented to publication of such facts. 4 Harv L. Rev. 214, 218. Such limitations are discussed in the text, *post*.

on a television reporter's covertly videotaping of that conversation?" *Id.*, at 914. The court explained that the expectation of privacy need not be absolute or complete; rather, the question to be resolved is whether the activity "penetrated some zone of physical or sensory privacy surrounding [the plaintiff]. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place ...." *Id.*, at 914, quoting from *Miller v. National Broadcasting Co., supra*, 187 Cal.App.3d at 232.

"...[A] plaintiff ... could have a reasonable expectation of privacy in her communications even if some of them may have been overheard by [others] but not by the general public." *Sanders, supra*, at 915.

The determinations of [*a*] whether the place intruded upon is private and [*b*] whether the intrusion is in a manner highly offensive to a reasonable person may be made by the trial court in the context of answering the threshold question of law: Is there a cause of action for intrusion? E.g., *Sanchez-Scott v. Alza Pharmaceuticals* (2001) 86 Cal.App.4th 365, 376; *Wilkins v. National Broadcasting, supra*, 71 Cal.App.4th 1066, 1075-1076; *Miller v. National Broadcasting Co., supra*, 187 Cal.App.3d 1463, 1483-1484 [factors listed].[20]

(2) *Publication of private facts*

The tort of invasion of privacy by publication of private facts requires that the plaintiff establish all of the following elements: (1) there must be public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern. *Shulman v. Group W. Productions, Inc., supra*, 18 Cal.4th 200, 214; citing with approval *Diaz v. Oakland Tribune* (1983) 139 Cal.App.3d 118, 126. The absence of any of the four elements is sufficient to bar the claim. *Times-Mirror Co. v. Superior Court* (1988) 198 Cal.App.3d 1420, 1428.

---

[20] The rule that offensiveness is subject to a preliminary determination as a matter of law by the trial court was recently reaffirmed in *Marich v. MGM/UA Telecommunications, Inc.* (2003) ___ Cal.App.4th ___; 2003 WL 22708668 (November 18, 2003) [not yet final; this decision is not based on that case].

The Restatement, Second of Torts, at Sections 652A-652E, cited with approval in *Shulman, supra*, 18 Cal.4th at 215, articulates the applicable standard in the following language: "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that ...[a] would be highly offensive to a reasonable person and [b] is not of legitimate concern to the public..." Rest.2d, Torts, section 652D.

"... [T]he claim of a right of privacy is not '"so much one of total secrecy as it is of the right to define one's circle of intimacy - to choose who shall see beneath the quotidian mask."' *Hill v. National Collegiate Athletic Assn., supra,* 7 Cal.4th 1, 25, quoting *Briscoe v. Reader's Digest Association, Inc., supra,* 4 Cal.3d 529, 534. Information disclosed to a few people may remain private. *Times-Mirror Co. v. Superior Court, supra,* 198 Cal.App.3d 1420, 1427.

The fourth element of this tort incorporates the requirement that the plaintiff establish that the matter not be of legitimate public concern. "...[U]nder California common law the dissemination of truthful, newsworthy material is not actionable as a publication of private facts." [citations omitted] *Shulman v. Group W Productions, supra*, 18 Cal.4th at 215; *Diaz v. Oakland Tribune, Inc., supra,* 139 Cal.App.3d 118, 129-131.

While, generally, whether a matter is of legitimate public concern, whether it is newsworthy, is a question of fact (*Diaz v. Oakland Tribune, Inc.*, supra, at 133), the circumstances of the particular case may provide for this determination to be made as a matter of law. *E.g.*, *Wasser v. San Diego Union* (1987) 191 Cal.App.3d 1455. Material is newsworthy if it meets a three-part test which weighs (1) the social value of the facts published, (2) the depth of the intrusion into ostensibly private affairs, and (3) the extent to which the individual voluntarily acceded to a position of public notice. *Kapellas v. Kofman, supra*, 1 Cal.3d at 36. As our supreme court points out, "[i]f information reported has previously become part of the 'public domain' or the intrusion into an individual's private life is only slight, publication will be privileged even though the social

utility of the publication is minimal. (Citation omitted)." *Id.*

There are two types of public figures: "The first is the 'all purpose' public figure who has 'achieve[ed] such pervasive fame or notoriety that he [or she] becomes a public figure for all purposes and in all contexts.' The second category is that of the 'limited purpose' or 'vortex' public figure, an individual who 'voluntarily injects himself [or herself] or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.' " [Citation omitted] Thus, one who undertakes a voluntary act through which he [or she] seeks to influence the resolution of the public issues involved is a public figure." *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 253, *quoting Gertz v. Robert Welch, Inc.* (1984) 418 U.S. 323; *as quoted in Sipple v. Foundation For Nat. Progress* (1999) 71 Cal.App.4th 226, 247.

Plaintiff in this action is an "all purpose public figure"; she alleges as much in the first paragraph of the complaint. See also *Sipple v. Foundation for National Progress*, *supra*, 71 Cal.App.4th at 247-248; *Maheu v. CBS, Inc.* (1988) 201 Cal.App.3d 662, 675; *Carafano v. Metrosplash.com, Inc.* (C.D. Cal. 2002) 207 Fed.Supp.2d 1055, 1070-1072; *affd.* (9th Circ. 2003) 339 Fed.3d 1119.

d. *Application of relevant legal principles to the facts*

(1) *The claims in general*

Plaintiff's claims that her privacy has been violated present certain common issues, issues which overlap the allegations based on the California Constitution and on the common law. Both bases for relief are discussed in the next several sections in the context of, first, those bases applicable to the claims generally, and second, those bases applicable to particular claims.

(A) *Consent*

Consent may bar a plaintiff's privacy claim in the particular case whether the claim is based on the Privacy Clause or in tort. One who consents to an act is not wronged by it. *Sanchez-Scott v. Alza Pharmaceuticals* (2001) 86 Cal.App.4th 365, 37;

citing *Hill v. National Collegiate Athletic Assn., supra*, 7 Cal.4th at 26; Civ. Code §3515. To prevail on a claim of invasion of privacy a plaintiff must not have consented to the invasion. *Gill II, supra*, 40 Cal.2d at 230 [engaging in the alleged conduct in a public place]; *Aisenson v. American Broadcasting Co.* (1990) 220 Cal.App.3d 146, 162 [photograph of public figure taken on public street].

In this case plaintiff previously consented to publication of photographs of her property, including but not limited to the area depicted in Image 3850. Substantially similar views of the same rear yard were extant on the Internet and in other publications at the time Image 3850 was taken and posted on defendants' website; the images in the People magazine article having been available since spring 1989. These widely available images include interior as well as exterior photographs, all of a quality equal to or better than Image 3850, albeit smaller in size. Nor is there any basis in fact for the allegation that Image 3850 as displayed on defendants' website permits viewing the interior of plaintiff's residence, or that additional enlargement of this image will enable a person to see anything recognizable inside the residence.

The republication of something already made public is not actionable as an intrusion; the simple fact is that the 'bell cannot be unrung' in such circumstances: The right to withdraw consent terminates with [first] publication. *Virgil v. Time, Inc.* (9th Circ. 1975) 527 Fed.2d 1122, 1127 [withdrawal of consent to disclosure of private facts prior to publication]; nor is it actionable as the disclosure of a "private fact". *Faloona by Fredericson v. Hustler Magazine, Inc.* (5th Circ. 1986) 799 Fed.2d 1000, 1006.[21]

(B) *Objectively reasonable belief in the privacy interest to be protected*

Both constitutional and common law claims are founded on the objectively reasonable nature of the belief in the privacy of the interest alleged to have been violated. In the present case, this includes an objectively reasonable belief that the

---

[21] There is no meritorious allegation of any violation of plaintiff's right of publicity in Image 3850.

taking of the digital image invaded plaintiff's seclusion as well as that publication of Image 3850 breached objective, reasonably held, privacy standards.

No such objectively reasonable beliefs are presented on the facts of this case.

As the Restatement 2d, Torts, points out: "Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he [or she] is a part." Rest.2d Torts, sec. 652D, comment c. As discussed, *ante*, the principles articulated in the Restatement 2d, Torts, are implemented through California tort law and the Privacy Clause.

Occasional overflights are among those ordinary incidents of community life of which plaintiff is a part. The taking of photographs in picturesque, coastal areas is a similarly routine activity.

Nor is there merit in the contention that the image is objectionable because a person passing at street level could not see what is revealed in this image. Plaintiff has taken no steps to preclude persons passing by in airplanes from seeing into her back yard. As just indicated, aerial views are a common part of daily living; there is nothing offensive about the manner in which they occur, *nor in the manner in which this particular view was obtained.*

In support of her contention that she has the right to bar the uninvited from viewing her back yard from *any* vantage point, not just from ground level, and from disseminating Image 3850, plaintiff asks that the court apply the doctrine which protects a homeowner from trespass within the curtilage. The term "curtilage" defines the areas adjacent to the home "associated with the 'sanctity of [the] home and the privacies of life'" (*Oliver v. U.S.* (1984) 466 U.S. 170, 180, quoting *Boyd v. U.S.* (1886) 116 U.S. 616, 630) "where privacy rights are most heightened" (*California v. Ciraolo* (1986) 476 U.S. 207, 212) and is used in jurisprudential analysis of the reasonableness of governmental intrusions under the Fourth Amendment rather than privacy claims arising

under other laws. Although the law of trespass has "little or no relevance to the applicability of the Fourth Amendment" (*Oliver v. United States, supra,* 466 U.S. at 184), assuming, arguendo, application of federal Fourth Amendment principles to these state constitutional and common law questions[22], the doctrine does not support plaintiff's claim on these facts. In *California v. Ciraolo, supra*, the United States Supreme Court held to be objectively reasonable and constitutional the warrantless aerial search of the curtilage of the defendant's home, a rear yard surrounded by a 10 foot high fence, reasoning in part that the observations took place from navigable airspace at an altitude of 1,000 feet, while flying directly over the residence. Law enforcement personnel used both their unaided eyes and a 35 mm camera in the overflight.

In finding that the search was objectively reasonable notwithstanding the purposeful and specific overflight and the use of a camera, and even though the defendant had fenced in the rear yard to a height above that at which a person could peer, unaided, into the curtilage of the residence, the court reasoned: "In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. The Fourth

---

[22] The application of federal Fourth Amendment principles to federal First Amendment or state Article I, section 1 privacy concerns need not be resolved as, even under cases applying those principles, plaintiff cannot meet her burden on the second prong of the section 425.16 analysis. It is interesting to note in this regard the analysis employed by the author of the lead opinion in *People v. Mayoff, supra*, 42 Cal.3d 130, as the facts presented there arose prior to adoption of Article I, section 28(d) of the state Constitution. (Enactment of that constitutional amendment would thereafter require application of federal Fourth Amendment analysis to state search and seizure cases.) Thus, as one of the final applications of the doctrine of independent state grounds to search and seizure cases, the lead opinion in *Mayoff* supports the conclusion reached in the text of this analysis, viz., that the "search" in this case was not unreasonable under the factual circumstances presented under the state Constitution.

Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye. *California v. Ciraolo, supra*, at 1813 - 1814. California state courts have upheld such aerial surveillances against Fourth Amendment claims in cases both pre- and post-dating *Ciraolo*. *E.g., People v. Romo* (1988) 198 Cal.App.3d 581 and *People v. Messervy (1985)* 175 Cal.App.3d 243, 254.

"The mere intonation of curtilage, however, does not end the inquiry.... 'What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection'; hence, views by the police of enclosed backyards from airplanes do not violate the Fourth Amendment because the yard is readily visible to anyone glancing down from an airplane. [Citation omitted.] The visibility of the yard to the public and the routine nature of air flights renders the expectation of privacy unreasonable." *U.S. v. Hedrick* (7th Circ. 1991) 922 Fed.3d 396, 399.

Neither party has cited a case applying the curtilage doctrine to civil trespass or to privacy claims.[23] Assuming the application of that doctrine in this case, its use would turn on principles similar to those articulated in the previously-referenced sections of the Restatement of Torts, 2d, and would bar relief to plaintiff.[24]

Reasonableness of belief in this context is dependent in significant part on the

---

[23] California has also repudiated the old common law doctrine of ownership of the sky. Flight is lawful if in compliance with federal height restrictions or unless the flight is at such a low height that it is dangerous. Civil Code section 659; Public Utilities Code sections 21402, 21403.

[24] Reliance should not be placed on other principles, such as the common law of trespass. "The law of trespass ... forbids intrusions upon land that the Fourth Amendment would not proscribe. For trespass law extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interest." [Footnotes omitted] *Oliver v. U.S., supra,* 466 U.S. 170 at pp.183-184. In Footnote 15 of that opinion, the court points out the invalidity of applying the law of trespass for the reason that "... the common law of trespass furthers a range of interests that have nothing to do with privacy...." *Id.*

offensiveness of the conduct in which the defendants engaged. For plaintiff to prevail on the second prong analysis she must also establish that the intrusion was made in a manner highly offensive to a reasonable person. *Shulman v. Group W Productions, Inc., supra*, 18 Cal. 4th at 231; see *Wilkins v. National Broadcasting Co.* (1999) 71 Cal.App.4th 1066, 1078. In analyzing the offensiveness of the intrusion the trier of fact must consider "the degree of the intrusion, the context, conduct and circumstances the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded." *Deteresa v. American Broadcasting Cos.* (9th Circ. 1997) 121 Fed.3d. 460, 465. "It is unreasonable for persons on the ground to expect that their curtilage would not be observed from [1,000 feet]." *Florida v. Riley* (1989) 488 U.S. 445, 452-453 (O'Connor, J., concurring).

In the instant case, there is insufficient evidence to present the case to a jury. Under the first required element, it is the character of the photograph which defines the nature of the intrusion. At its most detailed, the photograph at issue reveals no truly private place. While passers-by at street level cannot see into the back yard, the aerial view is distant, if not remote — Image 3850 is a depiction of the coastline with adjacent houses, yards, recreational facilities and streets — and not a peering into this plaintiff's private residence or private residential area; no persons can be recognized in the image even when the image is enlarged. Were persons recognizable, the matter might well deserve presentation to a jury. On these facts, it does not.

Nor are there are facts which support a finding that defendant Adelman acted in a manner "highly offensive to a reasonable person." It is undisputed that he was engaged in his avocation of photographing the California coastline for an ecological history project and did not take Image 3850 with any other purpose in mind. This activity does not meet the necessary threshold. The posting of Image 3850 on defendant Adelman's website was done with the same purpose; when it was done, it too was not done in a manner highly offensive to a reasonable person. As it is maintained,

it is protected by well-established principles discussed, *post*.

Plaintiff also contends that the presence of the label "Streisand Estate, Malibu" on Image 3850 is an independent basis for liability. This contention is without merit. The label is not searchable, except once a person has already reached the defendants' website and the evidence is that only 6 copies of Image 3850 had been sold, two to counsel for plaintiff and another to the possessor of the adjacent real property. This evidence indicates that the label merely states that which is widely known and what plaintiff herself previously permitted to be disseminated. The claim is de minimus and does not provide a sufficient basis for plaintiff to meet the test required of her at this stage of the litigation. *Hill v. National Collegiate Athletic Assn., supra*, 7 Cal.4th 1. It may be irritating to plaintiff, but no objective person can reasonably conclude that maintaining the label meets the requisite "highly offensive" standard. To the extent that a contrary result is suggested by the circumstances, the newsworthiness of the information far outweighs any claim of misappropriation. *Cf.* Civil Code section 3344(d), discussed, *post*.

The facts also establish that plaintiff consented to the publication in a national magazine of a similar photograph and others.[25] Thus, there is no likelihood that plaintiff could establish at trial that the publication was offensive to a reasonable person as plaintiff herself consented to another publication of a similar depiction. [A separate website (barabratimeless.com) contains other photographs of the same scene. Whether these images are posted with plaintiff's consent is not clear from the record.] This conclusion is supported by inspection of the material about which plaintiff objects: As a matter of law, there is nothing private or personal about Image 3850. *E.g.*,

---

[25] There is no specific fact in the record with respect to the nation-wide circulation of People magazine; the Court relies on Evidence Code sections 452 (g) and (h) for this factual inference.

Restatement, Torts 2d, sec. 652A.[26]

(C) *Summary*

Plaintiff's argument that the facts support a determination that plaintiff had an objectively reasonable belief that her privacy was invaded is without support in law or policy. This is not a circumstance in which a helicopter hovered over plaintiff's back yard in order to photograph her in that location — whether engaged in some familial activity or merely enjoying her surroundings; nor do the facts even suggest that the helicopter hovered to take close-ups, or any photographs, of plaintiff's yard during a social event, or perhaps when the yard was empty but under circumstances in which the manner of operation of the helicopter constituted a nuisance. Those factual patterns are not presented or even suggested by plaintiff.[27]

Any intrusion on these facts is de minimus; there is no objectively reasonable belief in protection from overflights, from Image 3850, or from the photographs in evidence.

e. Specific claims

(1) *Intrusion into seclusion*

The tort of intrusion into seclusion focuses on the fact that someone has intruded, and not on the publication of the results of that intrusion, whether the publication is in words, or in images as in this case. Plaintiff's allegations that

---

[26] The argument that there are directions on defendants' website is without support; there is only a generalized map of the area of Malibu in which plaintiff's residence is located. The evidence also establishes that her address is otherwise available in the public record and thus not actionable. E.g., *Carafano v. Metrosplash.com, Inc., supra,* 207 Fed.Supp.2d at 1070-1072; *affd.* (9th Circ. 2003) 339 Fed.3d 1119.

[27] That actionable facts are not presented in this case should not lead to the inference that plaintiff is without interim and permanent relief *on a different factual showing. E.g., Galella v. Onassis* (2d. Circ. 1973) 487 Fed.2d 986 [injunction issued against harassing photographer]; *Galella v. Onassis* (SDNY 1983) 533 Fed.Supp. 1076 [enforcement of prior injunction by contempt].

defendants intruded by (a) viewing and photographing plaintiff's back yard from the air and (b) publishing those images on the world wide web are without support in law or policy.

While defendants' conduct may be an intrusion in the broadest sense of the term, it is not an intrusion into a private place as that term is recognized under the legal principles discussed, *ante*. Nor was the intrusion made in a manner highly offensive to a reasonable person. Air travel is a commonplace of modern society and recreational or purposeful flights over the California coastline are commonplace events that people who chose to live in the area must accommodate. There was no serious invasion in this case; the complaint here is de minimus and fully discounted by the language of the Restatement: "No community could function if every intrusion into the realm of private action, no matter how slight or trivial, gave rise to a cause of action for invasion of privacy." Rest.2d, Torts, sec. 652D, comment c.

Nor can plaintiff establish any of the three elements which are conditions precedent for her to prevail under the Privacy Clause. On these facts, there is no legal basis upon which she can be protected from overflights; nor was this invasion serious; nor is there any expectation that the law would find reasonable protection against this overflight or the taking of Image 3850.

(2) *Publication of private facts*

While a person has a right to control access to his or her private matters, there is no basis in law for this plaintiff to make that claim with respect to the publication of Image 3850.

First, nothing recognized by law as private is disclosed. Image 3850 is no more than a picture of the California coastline taken from a passing aircraft. There is no human presence in the back yard of plaintiff's residence. The image reveals nothing more than a back yard, indeed, many back yards, some of which have swimming pools, others tennis courts, others expansive lawns — all things common to this area of Malibu

— and none worthy of more than a passing glance ... save public interest in the fact that this plaintiff's back yard is among those in this image.

Second, the fact that it is this plaintiff's back yard that is disclosed is newsworthy, precluding plaintiff from establishing the fourth element of the publication of private facts tort. While plaintiff justifiably asserts that there is something different about Image 3850 — that it contains an image of *plaintiff's* back yard and *plaintiff's* residence, it is the assertion of that contention which establishes additional reasons why her claim is without merit. The image clearly depicts the relationship of plaintiff's property to the California coastline, an area of intense public interest and concern. While that fact is obvious and thus not a private fact, it also is a significant fact when it is recalled that plaintiff is a voluntary public figure who speaks out on environmental issues and has a matter involving her coastal real property pending before a local planning agency.[28] The facts that this plaintiff lives where she does and how she conducts herself in relationship to her surroundings, are matters of public interest; they are newsworthy. In the community of ideas the public has the right to the information in Image 3850 as published on defendants' website in considering and evaluating this public figure's

---

[28] It is clear beyond any doubt that plaintiff is a current, voluntary public figure; she alleges this in the first paragraph of her complaint. She has not retired to a life of seclusion from which defendants' activities aroused her. Plaintiff is active in the field of entertainment and as a commentator on current political issues. At argument counsel referred to plaintiff using her residence as the site of a fundraiser for a President of the United States within the last few years. Her own website contains articles attributed to her in which she opines on the environment among other contemporary issues; her statement on the environment bears a date within the last year.

Any contention that this plaintiff may recede at will into anonymity and emerge at times she determines, each time with the protections afforded to a temporary public figure is without merit for reasons discussed in the text, *ante.*

public statements. These facts make Image 3850 newsworthy as a matter of law.[29]

The fact that the image is accompanied by a label or tag line "Streisand Estate, Malibu" does not alter this analysis. The identifying label is an element of the newsworthiness of the image and is equally subject to protection.

Privacy Clause claims share certain elements with those bottomed on the common law, as discussed, *ante*. Just as with the invasion claim made under the Privacy Clause, plaintiff cannot meet the threshold requirement to establish a likelihood that she will prevail on a publication of private facts claim based on Article I, section 1. For reasons discussed, *ante*, there is no basis on which the court may conclude that there is a legally protected privacy interest on the facts presented; nor can plaintiff have had a reasonable expectation that publication of Image 3850 is a serious invasion of her privacy or otherwise entitled to protection.

(C) *Constitutional claim - the third cause of action*

In her Third Cause of Action plaintiff alleges that the Privacy Clause itself is a basis upon which she can prevail. While it is a correct statement of law that the scope of the constitutional right of privacy is not identical to the right of privacy which has developed under the common law (*e.g., Shulman v. Group W. Productions, Inc., supra*, 18 Cal.4th at 227), it is equally clear that application of "established social norms" and references to "common law development, constitutional development, statutory enactment and the ballot arguments" (*Hill v. NCAA, supra*, 7 Cal.4th at 36) compel the conclusion that plaintiff cannot prevail at trial on her separate, Privacy Clause claim.

From *Melvin v. Reid* to contemporaneous cases, no court decision has extended

---

[29] The sole element of the private facts tort [set out, *ante*] which plaintiff can establish is that of public disclosure — actually, republication of images of areas previously disclosed in People magazine and elsewhere. Nor can plaintiff meet her burden of negating the public concern requirement. *E.g., Shulman v. Group W. Productions, Inc., supra*, 18 Cal.4th at 214; *Reader's Digest Assn. v. Superior Court, supra*, 37 Cal.3d at 253. The facts are not private and the disclosure is not offensive or objectionable to the reasonable person.

the shield of the Privacy Clause to facts similar to those presented in the instant case. Nor does the policy of the Privacy Clause or the history of its development suggest that a court should do so now. There is neither an informational interest nor an autonomy interest[30] presented on these facts; nothing in this case suggests that established social norms or the Privacy Clause ballot arguments sought to create a private right of action which would extend protection to the facts of this case. Further, any informational interest which is present is de minimus; to the extent it is greater, the disclosures made by defendants are protected as newsworthy with respect to this voluntary public figure. No appellate authority cited be either party or located by the court supports a cause of action predicated on the Privacy Clause and based on the conduct alleged in the

---

[30] As discussed in footnote 17, *ante*, autonomy privacy (also a concern of the 1972 constitutional amendment as well as the subject of pre-1972 development of our state constitutional doctrine, e.g., *Melvin v. Reid, supra*, 112 Cal.App. 285 and its progeny), "refer[s] to the federal constitutional tradition of safeguarding certain intimate and personal decisions from government interference in the form of penal and regulatory laws" (*Hill, supra*, at 36) as amplified by our more expansive constitutional provision (e.g., *Reynolds v. Superior Court* (1974) 12 Cal.3d. 834, 842 [authoritative construction of the California Constitution is a responsibility of our state supreme court which is to be "informed but untrammeled by the United States Supreme Court's reading of parallel federal provisions"].

Plaintiff does not allege the violation of any autonomy interest recognized under federal or state law. Such autonomy interests include restrictions on medical procedures (*Roe v. Wade* [1973] 410 U.S. 113; *American Academy of Pediatrics v. Lungren* [1997] 16 Cal.4th 307; *Conservatorship of Valerie N.* [1985] 40 Cal.3d 143, 164); restrictions on state funding of abortions (*Committee to Defend Reproductive Rights v. Myers* [1981] 29 Cal.3d 252); patient's privacy interest in psychotherapy (*People v. Stritzinger* [1983] 34 Cal.3d 505, 511); right to live in alternative family arrangements (*City of Santa Barbara v. Adamanson* [1980] 27 Cal.3d 123); right to familial privacy (*Schmidt v. Superior Court* [1989] 48 Cal.3d 370, 389-39); polygraph testing of government employees by city *(Long Beach City Employees Assn. v. City of Long Beach* [1986] 41 Cal.3d 937, 948); right to privacy of financial records (*Valley Bank of Nevada v. Superior Court* [1975] 15 Cal.3d 652, 656-57; *Doyle v. State Bar* [1982] 32 Cal.3d 12, 20). Nor does plaintiff establish any basis for expansion of those rights on the facts of this case.

complaint filed in this action. Different facts in different case may suggest further analysis, but, on the facts of this case, it is clear as a matter of law that plaintiff cannot prevail on this claim.

That Image 3850 is posted on the internet does not change this analysis. The image is unremarkable and ordinary. The fact that it is available worldwide does not change the character of the image. Plaintiff has not cited a case, and the court is not aware of any, that holds that newsworthiness is determined in part based on the circulation or readership of the medium or newspaper. Further, as plaintiff has no protectable interest in Image 3850, the breadth of publication of the image is not relevant. There is nothing in the record about the manner in which the image is posted or maintained that suggests that defendants' actions are deserving of sanction under our state constitution.[31]

2. *Civil Code section 3344*

Plaintiff contends that Adelman's facilitation of the sale of prints of Image 3850 constitutes an unauthorized use of an individual's "name, voice, signature, photograph or likeness, in any manner, on or in products, merchandise or goods" prohibited by Civil Code section 3344(a). In support of this contention plaintiff argues the facts that the website has permitted a caption to be placed adjacent to Image 3850 and that prints of that Image are available for sale — and had done so without plaintiff's consent — constitute violations of this statute.

The text and context of Image 3850 are clear — it is an aerial view of a section of the California coastline which includes accurate aerial depiction of plaintiff's residence, including the yard layout and the arrangement of the pool furniture. Enlargements [in the same size; one apparently downloaded by "self-help" and the other purchased

---

[31] Although plaintiff has asserted a potential breach of her security by publication of Image 3850, the image does not reveal anything other than a backyard, foliage and fences. If this were a photograph of a military base, revealing defensive fortifications, the analysis might well be different.

through Pictopia.com] of Image 3850 appear as Exhibits 11 and 16. On defendants' website the image is labeled Streisand Estate, Malibu.

Subsection (d) of section 3344 provides:

"For the purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a)."

Adelman took Image 3850 as one of the more than 12,200 images which he collected for publication to document the current condition of the California coastline. That area has been the subject of public interest and a matter of "public affairs" from the date of California's admission to the Union, and particularly so since the enactment of the Coastal Zone Protection Act of 1972 by the electorate. That public interest continues to this date. Adelman's taking of the photograph, its labeling with plaintiff's surname and its publication on defendants' website are within the public affairs exception of that section. Disclosure that plaintiff owns a residence located in the coastal zone is itself a matter of public interest and within the public affairs exception to section 3344. Plaintiff is clearly a public figure who expresses herself on the Internet on matters of environmental policy. She has a matter of potential impact on the costal zone pending before a local agency. Posting Image 3850 on the Internet is relevant to plaintiff's expression of views on environmental matters.[32]

---

[32] While other legal principles could preclude repetitive "flyovers", had plaintiff been in the backyard at the time of the "flyby" in this case, and even if her image were identifiable as that word is defined by section 3344(b)(1), the public affairs exception would preclude application of the statute to these defendants under the circumstances presented in this case. *See, e.g.*, *Montana v. San Jose Mercury News*, *supra,* 34 Cal.App.4th 790 [newspaper's reproduction of plaintiff football player's likeness in poster sold to the general public in connection with team winning Super Bowl was a matter within the public interest exception of statute]; *Dora v. Frontline Video*, *supra*, 94 Cal.App.4th 536 [use of plaintiff's name, voice and likeness in surfing video exempt under public affairs exemption].

Further, it is unlikely that plaintiff can meet the requirements of section 3344(a) in any event. That section requires a direct connection between the use of the name and the commercial activity alleged to be objectionable. It is obvious that the identifier was not used to promote sales of prints of Image 3850; the "tag" line is not accessible until a person is already on defendants' website and the use of the name is descriptive rather than of any significant commercial value. *See Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal.App.3d 880, 894-895.

Nor would there be a claim for common law misappropriation. The subject of the image is clearly a matter of public interest for reasons set forth, *ante*. As such, no common law claim can be established. *Montana v. San Jose Mercury News, supra*, 34 Cal.App.4th at 793 [football player could not maintain action against newspaper which reproduced and sold posters including plaintiff's likeness]; *Dora v. Frontline Video, Inc., supra,* 15 Cal.App.4th at 542 [self-proclaimed legendary surfer cannot maintain action to prevent sale of video containing his name and likeness]. Nor can plaintiff successfully maintain this statutory action; her worldwide fame makes images of her unadorned and unoccupied back yard newsworthy and of public interest.

3. *Civil Code section 1708.8*

Plaintiff's assertion that "[d]efendants are liable for constructive invasion of privacy for using a visual enhancing device in an 'attempt' to photograph Streisand engaging in a 'personal or familial activity' [Opposition to Motion to Strike, page 11, ll. 15 - 17], is without factual merit or legal support.

Section 1708.8 provides:

"(b) A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device,

regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used."

The facts do not support the legal contention asserted: Plaintiff does not appear in Image 3850 and the image is devoid of the "personal or familial activity" which are necessary conditions precedent to application of the statute. Further, there is no evidence that any defendant made any attempt to photograph plaintiff. There is no evidence that Adelman knew that it was Streisand's property that he was capturing on his digital camera at the time the image was taken; his focus was on the coastline — almost all 1200+ miles of which he has now photographed for the purpose of making a permanent record of its current condition for his environmental interests. The facts preclude the granting of relief to plaintiff. For similar reasons, posting of Image 3850 on defendants' website cannot constitute a violation of this statute.

4. *Summary*

Defendants have met their burden on the first prong of section 425.16 analysis and plaintiff cannot meet her burden on the second prong, viz., she cannot establish a legally sufficient claim or that her claim is supported by a prima facie showing of facts that is sufficient to sustain a favorable judgment if the evidence submitted by plaintiff is credited. Accordingly, the special motion to strike is granted and the complaint is stricken without leave to amend.

DATED: DECEMBER 31, 2003

Allan J. Goodman
Judge

ALLAN J. GOODMAN
JUDGE OF THE SUPERIOR COURT