

SUPREME COURT OF NORTH DAKOTA

Case No. 20050056

John J. Gosbee,)
)
 Plaintiff and Appellant,)
)
 vs.)
)
 Rob Martinson,)
)
 Eskrawl, Inc.;)
)
 Mailwiper, Inc.;) APPELLANT'S BRIEF
)
 Spy Deleter, Inc.;)
)
 Defendants and Appellees,)
)
 and)
)
 John and Mary Does 001)
)
 through 100, and)
)
 Doe & Doe, Inc., 101-200,)
)
 Defendants)

APPEAL FROM THE SOUTH CENTRAL DISTRICT COURT,
MORTON COUNTY,

HONORABLE RONALD L. HILDEN, PRESIDING

APPELLANT:

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. ISSUES PRESENTED FOR REVIEW. ¶001

1. If a party files a timely objection to costs and disbursements, may a trial court ignore the party's request to schedule a hearing under Rule 54(e)(1), NDR CivP? ¶001

2. If a party files a motion under Rule 3.2, NDROc, and makes a timely request for oral argument under Rule 3.2(a), NDROc, may a trial court ignore that request and rule on the motion without giving the moving party an opportunity to present oral argument? ¶002

3. If a trial court grants a defendant's motion for summary judgment, citing variances between the plaintiff's complaint and the plaintiff's theory and argument advanced in resisting summary judgment, is the plaintiff entitled to amend the complaint to conform to the theory and argument so advanced? ¶003

II. STATEMENT OF THE CASE. ¶004

A. Nature of the Case. ¶004

B. Proceedings Below. ¶005

C. Statement of Facts. ¶014

III. ARGUMENT -- SYNOPSIS. ¶021

A. Summary. ¶021

B. Appellate Jurisdiction and Timeliness of Appeal ¶022

C. Standard of Review. ¶024

IV. ARGUMENT -- PARTY IS ENTITLED TO HEARING AFTER FILING TIMELY OBJECTION TO COSTS AND DISBURSEMENTS.	¶025
A. Statement of Issue.	¶025
B. Timely Service of Objection.	¶026
C. Propriety of Objection.	¶028
V. ARGUMENT -- RULE 3.2 REQUIRES ORAL ARGUMENT ON TIMELY REQUEST OF MOVING PARTY.	¶032
A. Statement of Issue	¶032
B. Gosbee's Timely Request for Oral Argument.	¶033
VI. ARGUMENT -- AMENDMENT OF COMPLAINT SHOULD HAVE BEEN ALLOWED.	¶034
A. Statement of Issue	¶036
B. Felony Intrusion into Gosbee's Computers.	¶037
C. Martinson's RICO Violation.	¶039
D. Trespass.	¶042
E. Gosbee's Entitlement to Discovery Before Decision on Motion for Summary Judgment.	¶046
VII. SUMMARY, CONCLUSION, AND RELIEF REQUESTED.	¶050
CERTIFICATE OF SERVICE	p. 25

TABLE OF AUTHORITIES

<u>Cases</u>	<u>¶(s)</u>
<i>America Online, Inc. v. National Health Care Discount</i> , 174 F.Supp.2d 890 (N.D.Iowa)	044
<i>Amyotte v. Rolette County Housing Authority</i> , 2003 ND 48, 658 N.W.2d 324	024
<i>de Llano v. North Dakota State University</i> , 951 F.Supp. 168 (D.N.D. 1997)	030
<i>Hector v. Metro Centers, Inc.</i> , 498 N.W.2d 113	042
<i>Kramer v. Cash Link Systems</i> , 2004 WL 2952561 (S.D.Iowa)	044
<i>In re Pharmatrak, Inc.</i> , 329 F.3d 9 (1st Cir. 2003) .	044
<i>Physicians Interactive v. Lathian Systems, Inc.</i> , 2003 WL 23018270 (E.D.Va.)	043
 <u>Statutes</u>	 <u>¶(s)</u>
28 U.S.C. §1920	030
42 U.S.C. §2000-e5 (g) (2) (B)	030
NDCC §12.1-06.1-01(2) (e)	039
NDCC §12.1-06.1-01(3) (a)	038
NDCC §12.1-06.1-01(3) (i)	038
NDCC §12.1-06.1-08(1)	038
NDCC §28-26-02(2)	031
NDCC §28-26-06	030
NDCC §28-26-06(1)	031

<u>Court Rules</u>	<u>¶(s)</u>
Rule 4(a)(1), NDRAppP	023
Rule 54(e)(1), NDR CivP	001, 025, 026
Rule 56(f), NDR CivP	046, 049
Rule 609, NDREvi	048
Rule 609(a)(i), NDREvi	048
Rule 609(b), NDREvi	048
Rule 3.2, NDRoC	002, 032, 034
Rule 3.2(a), NDRoC	001, 032, 034
Rule 3.2(c), NDRoC	034

I. ISSUES PRESENTED FOR REVIEW.

- [¶001] 1. If a party files a timely objection to costs and disbursements, may a trial court ignore the party's request to schedule a hearing under Rule 54(e)(1), NDRCivP?
- [¶002] 2. If a party files a motion under Rule 3.2, NDROc, and makes a timely request for oral argument under Rule 3.2(a), NDROc, may a trial court ignore that request and rule on the motion without giving the moving party an opportunity to present oral argument?
- [¶003] 3. If a trial court grants a defendant's motion for summary judgment, citing variances between the plaintiff's complaint and the plaintiff's theory and argument advanced in resisting summary judgment, is the plaintiff entitled to amend the complaint to conform to the theory and argument so advanced?

II. STATEMENT OF THE CASE.

A. Nature of the Case.

[¶004] This case is an appeal from the lower Court's decision granting summary judgment dismissing a complaint for

invasion of computers by a "Spyware Trojan" computer hacking program.

B. Proceedings Below.

[¶005] In March 2004, John Gosbee (Gosbee) sued Rob W. Martinson (Martinson), corporations of which he was an officer, and unknown Doe defendants,¹ asserting a claim of computer fraud arising from a Spyware Trojan program, allegedly devised by Martinson, that seized control of Gosbee's computers without Gosbee's permission. Complaint, Docket Item 02, Appx., pp. 2-11. The case was not filed with the District Court until Martinson made a demand for filing in November 2004. Notice of Filing of Summons and Complaint, Docket Item 03.

[¶006] On November 5, 2004, Martinson filed an Answer. Docket Item 04, Appx., pp. 12-15. Simultaneously, he filed a motion to dismiss for failure to state a claim upon which relief may be granted, or for summary judgment, with supporting brief and an affidavit of Martinson. Docket Items 06-08.

1. Defendants other than Martinson were not served. Thus allusions in this brief will be to Martinson.

[¶007] Because Gosbee is a lawyer practicing in the district, all local judges were routinely disqualified. Docket Item 09. In an order apparently not made part of the record in this case, the Honorable Ronald L. Hilden was appointed to "preside over all proceedings of [the] case. Order Assigning Judge, December 8, 2004, Supreme Court File No. 11216-200412.

[¶008] On December 7, 2004, Gosbee filed a timely answer brief opposing the motion to dismiss, with supporting affidavit. Docket Items 10-11. Martinson filed a timely reply brief on December 14, 2004. Docket Item 12.

[¶009] On January 11, 2005, the District Court entered its Memorandum Opinion and Order granting the motion to dismiss. Docket Item 13, Appx., pp. 16-23. On January 12, 2005, Martinson filed a Verified Statement of Costs and Disbursements. Docket Item 14, Appx., pp. 24-26. Judgment, including the costs requested by Martinson, was entered on January 19, 2005. Docket Item 16, Appx., p. 27.

[¶010] On January 24, 2005, Gosbee filed a timely objection to some of the costs claimed by Martinson, namely the \$66.20 for photocopies, \$14 in fax charges, and \$65.03 for research with West Publishing. Docket Item 18, Appx., pp. 28-30. Simultaneously, Gosbee filed a motion for reconsideration

and to amend the complaint, including a proposed amended complaint. Docket Item 19, Appx., pp. 31-36, 37-45.

[¶011] On January 24 and 25, 2005, Gosbee tried to contact Judge Hilden's office to arrange oral argument on the motion for reconsideration and to amend. Plaintiff's Objection to Failure to Allow Hearing, at 2-3 (entries for Monday, January 24, 2005, and Tuesday, January 25, 2005), Docket Item 22, Appx., pp. 52-54.

[¶012] On January 31, 2005, Martinson filed a brief opposing the motion for reconsideration and to amend the complaint. Docket Item 20, Appx., pp. 46-50. On February 1, 2005, the District Court entered its Order Denying Motions for Reconsideration and to Amend Complaint, which stated in its entirety, "Plaintiff's Motions for Reconsideration and to Amend Complaint are groundless, and denied." Docket Item 21, Appx., p. 51.

[¶013] On February 8, 2005, Gosbee filed Plaintiff's Objection to Failure to Allow Hearing. Docket Item 22, Appx., pp. 52-54. On February 11, 2005, Gosbee filed the Notice of Appeal. Docket Item 23, Appx., p. 55. On February 14, 2005, the District Court Clerk notified the parties and the Supreme Court of the notice of filing of the appeal. Notice of Filing

of Notice of Appeal, Appx., p. 56.

C. Statement of Facts.

[¶014] Long before Gosbee and Martinson had ever heard of each other, the scam that led to this lawsuit was under way:

In November 2003, complaints started trickling in to the Atlanta office of the Better Business Bureau. The nature of the complaints was similar: While the computer user was surfing the Web, his CD-ROM drive door mysteriously opened. A pop-up ad appeared on his screen that said, "WARNING!" It went on to explain that if the CD-ROM drive opened, "you DESPERATELY NEED to rid your system of spyware" and that you should "download Spy Wiper NOW!"

Fennessy, "A hated man, A story of spam, spyware, and second chances," *Creative Loafing Atlanta*, August 12, 2004. Answer Brief on Motion to Dismiss or for Summary Judgment, Exh. JJG-04, p. 4, (arrow 7). Docket Item 10.²

[¶015] In March 2004, unaware that he was about to embark on a well-trod path, Gosbee was using his laptop computer at home when the CD tray opened, and the laptop soon "ran amok." Affidavit of John J. Gosbee (Gosbee Affidavit), ¶4, Docket Item 11. The computer emitted a high-pitched voice saying

2. The story is still available on the Internet at:
<http://atlanta.creativeloafing.com/2004-08-12/cover.html>
(last viewed 2005-03-28).

"oh-oh;" Gosbee's Internet browser homepage was hijacked, and often ads appeared for a Spy Wiper program displaying the warnings reprinted in Complaint, Exhs. JJG-01 to JJG-03.³ *Ibid.* One of the warnings, apparently generated by Norton Antivirus, described the attacking program as a "Download Trojan," stating that Norton was "unable to repair the file." Complaint, Exh. JJG-03, Appx., p. 11.

[¶016] The next day, essentially the same problems appeared on Gosbee's office computer. Gosbee Affidavit, ¶5, Docket Item 11. Gosbee did some digging, and the trail eventually led to Martinson and companies controlled by him. *Ibid.*, ¶6. Gosbee sent Martinson a Notice of Claim, which led to an exchange of e-mails between Gosbee and a representative of Spy Wiper. *Ibid.*, ¶8. Docket Item 10, Exh. JJG-07.

[¶017] Once this lawsuit was started, Martinson eventually acknowledged that Spy Wiper marketing methods caused problems similar to those described by Gosbee. Affidavit of Rob Martinson, October 5, 2004 (Martinson North Dakota Affidavit), ¶8, Docket Item 08. However, Martinson

3. For the ad pages, please see Complaint, Exhs. JJG-01 to JJG-03, Appx., pp. 9-11.

claimed the "script" was not approved by Mailwiper, but was created by an "affiliate" approved to market Spy Wiper. *Ibid.*, ¶11. Martinson claimed that "we immediately notified the affiliate to stop running the scripts on its website, or to stop running the Spy Wiper ad." *Ibid.*

[¶018] In a lawsuit brought by another Spy Wiper victim in Michigan, Martinson made the same claim, and admitted he was aware of the problem long before it affected Gosbee's computers:

In the Fall of 2003, I became aware of one affiliated website, owned by Seismic Entertainment, that was marketing several internet software products, including Spywiper, using some type of infiltrating software. I contacted Seismic Entertainment and demanded that it immediately cease marketing Spywiper using these methods.

Affidavit of Robert Martinson (Martinson Michigan Affidavit), ¶11, in *McCandliss v. Mail Wiper, Inc., et al.*, Case No. 04-0712-GC, 37th Judicial District Court, Michigan, emphasis added. Exh. JJG-06 to Answer Brief on Motion to Dismiss or for Summary Judgment, Docket Item 10. McCandliss's suit was eventually settled for \$2,000.00. Docket Item 10, Exh. JJG-04, p. 5, 3rd and 4th paragraphs (beginning "While that" and "In an affidavit"). Seismic Entertainment (Seismic) is the company blamed by Martinson and his wife in the *Creative*

Loafing Atlanta story. *Ibid.*, pp. 4-5, starting with first paragraph below arrow 9.

[¶019] There were legions of Spy Wiper victims both before and after Gosbee's computer was invaded. Exh. JJG-05 to Answer Brief on Motion to Dismiss or for Summary Judgment, Docket Item 10.

[¶020] Gosbee contacted what purported to be a support staff for Spy Wiper, and several e-mails were exchanged. Exh. JJG-07 to Answer Brief on Motion to Dismiss or Summary Judgment, Docket Item 10. Spy Wiper's "support" staff gave inaccurate information about how to solve the home-page hijacking problem, claiming that resetting the home page would solve the problem and that rebooting was necessary. Docket Item 10, Exh. JJG-07, E-Mail 01. Similar advice was provided to other victims of the Spy Wiper scam. See, e.g., Docket Item 10, Exh. JJG-05, p. 48. Gosbee never was able to learn the identity of the person at "SW Support" with whom he was dealing. Docket Item 10, Exh. JJG-07, E-Mail-07; Gosbee Affidavit, ¶10, Docket Item 11.

III. ARGUMENT -- SYNOPSIS.

A. Summary.

[¶021] This Court has jurisdiction and the appeal is timely.

B. Appellate Jurisdiction and Timeliness of Appeal.

[¶022] This Court has jurisdiction over the appeal. The judgment dismissing the complaint was filed on January 19, 2005. Docket Item 16, Appx., p. 27. Notice of Entry of Judgment was served by mail on January 20, 2005. Notice of Entry of Judgment, at 2. Docket Item 17. The Notice of Appeal was filed on February 11, 2005. Docket Item 23. Appx., p. 55. No transcript was ordered, as no transcribed proceedings were held.

[¶023] This appeal is timely. Gosbee filed the Notice of Appeal 22 days after the service of Notice of Entry of Judgment, well within the required 60 days. Rule 4(a)(1), NDRAppP.

C. Standard of Review.

[¶024] The ruling on appeal was on application of law. Therefore it is fully reviewable on appeal. *Amyotte v. Rolette County Housing Authority*, 2003 ND 48, ¶15, 658 N.W.2d 324.

**IV. ARGUMENT -- PARTY IS ENTITLED TO HEARING AFTER FILING
TIMELY OBJECTION TO COSTS AND DISBURSEMENTS.**

A. Statement of Issue.

[¶025] If a party files a timely objection to costs and disbursements, may a trial court ignore the party's request to schedule a hearing under Rule 54(e)(1), NDR CivP?

B. Timely Service of Objection.

[¶026] Once a party has certified its costs to the clerk for inclusion in the judgment, the other party may object to the costs claimed:

... Objections must be served and filed with the clerk, either within 7 days after notice of entry of judgment or within such longer time the court may fix by order made within the 7 days. Objections must specify the ground thereof. If objections are filed, the clerk shall promptly submit them to the judge who ordered the judgment. *The court by ex parte order shall fix a time for hearing the objections. ...*

Rule 54(e)(1), NDR CivP, emphasis added. Martinson served notice of entry of judgment on January 20, 2005. Docket Item 17, p. 2. Gosbee served his objection to the costs (along with the motion for reconsideration and to amend) 2 days later. Docket Item 19, p. 6, Appx., p. 36.

[¶027] Thus the objection was timely. Gosbee was entitled to a hearing on the objection, and scheduling a

hearing was not a matter of the District Court's discretion.

C. Propriety of Objection.

[¶028] Martinson certified \$200.23 in costs. Verified Statement of Costs and Disbursements, at 2, Docket Item 14, Appx., p. 25. Gosbee does not object to Martinson's claim for \$5 for pre-trial proceedings and the \$50 filing fee for his answer. If Martinson is still the prevailing party after this appeal, Gosbee acknowledges that Martinson is entitled to those items.

[¶029] However, Martinson sought nearly quadruple the costs and disbursements to which he was entitled. Gosbee objected to three elements of Martinson's costs, totaling \$145.23: the \$66.20 in photocopies, the \$65.03 to West Publishing for "research," and the \$14 in "fax charges." Plaintiff's Objection to Costs, at 2, Docket Item 18, Appx., p. 29.

[¶030] "Costs and disbursements must be allowed as provided by *statute*." Rule 54(e)(1), emphasis added. Thus, unless a statute authorizes the costs claimed by Martinson, he is not entitled to them. By statute, only a few types of costs, formally called "disbursements," are allowed:

In all actions and special proceedings, the clerk

of district court shall tax as a part of the judgment in favor of the prevailing party the following necessary disbursements:

1. The legal fees of ... clerks of district court; ... ;
2. The necessary expenses of taking depositions and of procuring evidence necessarily used or obtained for use on the trial;
3. The legal fees for publication, ... ;
4. The legal fees of the court reporter for a transcript of the testimony ...; and
5. The fees of expert witnesses.

NDCC §28-26-06. There does not appear to be any reported North Dakota case on disbursements such as photocopies, faxes, and research. However, federal case law supports Gosbee's position. "[C]harges [] for telephone calls, *facsimile transmissions*, postage, mileage, lodging, and *computerized legal research are not recoverable as "costs" under 28 U.S.C. §1920.*" *de Llano v. North Dakota State University*, 951 F.Supp. 168, 172 (D.N.D. 1997), emphasis added (overruled on other grounds, and allowing those items as expenses under Civil Rights attorney-fee shifting statute, 42 U.S.C. §2000e-5(g)(2)(B)). Similarly, if allowable at all, legal research expenses are allowable only under a fee-shifting statute. 951 F.Supp., at 172.

[¶031] Therefore, Martinson was entitled to at most the statutory costs of \$5 under NDCC §28-26-02(2) and the \$50 for filing his answer under NDCC §28-26-06(1). The District Court should have granted a hearing under Rule 54(e)(1), NDR CivP, and should have denied Martinson the improper \$145.23.

V. ARGUMENT -- RULE 3.2 REQUIRES ORAL ARGUMENT ON TIMELY REQUEST OF MOVING PARTY.

A. Statement of Issue.

[¶032] If a party files a motion under Rule 3.2, NDRoC, and makes a timely request for oral argument under Rule 3.2(a), NDRoC, may a trial court ignore that request and rule on the motion without giving the moving party an opportunity to present oral argument?

B. Gosbee's Timely Request for Oral Argument.

[¶033] Gosbee filed and served his motion for reconsideration and to amend complaint on January 24, 2005. Docket Item 19, Appx., p. 36. The same day, he contacted the court administrator's staff in Dickinson to arrange oral argument; he spoke to Linda, who said she would check the judge's schedule and call Gosbee back. Plaintiff's Objection to Failure to Allow Hearing and Oral Argument, at 2, entry for Monday, January 24, 2005, 3:33 PM, CST, Docket Item 22, Appx.,

p. 53. At 2:23 PM, CST, the next day, Linda left this message on Gosbee's voice-mail:

Mr. Gosbee, this is Linda, the calendar control clerk in Dickinson, calling back on the Morton County case; ah, I've been in touch with Judge Hilden's court reporter, and she said that *he's reviewing this ah, at the present time; so I'm not going to be setting it up for a hearing until I hear something from him*; I just wanted to let you know where we're at with that, thank you.

Ibid., at 2-3, entry for Tuesday, January 25, 2005, 2:23 PM, CST, emphasis added. Docket Item 22, Appx., pp. 53-54.

C. Gosbee's Entitlement to Oral Argument.

[¶034] "If any party who has timely served and filed a brief requests oral argument, the request *must* be granted." Rule 3.2(a), NDRoC, 6th sentence, emphasis added. The Rule requires that the notice of motion indicate the time of oral argument, "or that the motion will be decided on briefs unless oral argument is timely requested." Rule 3.2(a), NDRoC, 2nd sentence. Since Gosbee could not get oral argument scheduled, he did the best he could to comply with the second sentence of Rule 3.2:

A hearing will be held on Gosbee's motions and objection to costs. The hearing will be before the Honorable Ronald L. Hilden, District Court Judge. The hearing will be held in Dickinson, North Dakota at a time and date to be determined. Appropriate notice of the exact time and date will be served

when that information is available.

Plaintiff's Motion for Reconsideration and to Amend Complaint, at 1-2, under "Notice of Hearing." Docket Item 19, Appx., pp. 31-32. Once a party has made a timely request for oral argument, the matter is no longer discretionary with the trial court. "We therefore believe that when a party requests a hearing under Rule 3.2(c) such a hearing must be held and *it is not discretionary with the trial court.*" *Anton v. Anton*, 442 N.W.2d 445, 446 (N.D. 1989), emphasis added. "Rule 3.2 of the North Dakota Rules of Court *guarantees* oral argument for parties who have timely served and filed their brief and request oral argument." *Huber v. Oliver County*, 529 N.W.2d 179, 183 (N.D. 1995), citing *Anton*. Gosbee did all he could. He asked the court administrator's staff to arrange oral argument and his request was rebuffed.

[¶035] Accordingly, the trial court erred in not allowing oral argument and the case should be remanded to allow hearing and oral argument on the motion for reconsideration and to amend the complaint. Alternatively, Gosbee should be allowed to amend the complaint as requested.

**VI. ARGUMENT -- AMENDMENT OF COMPLAINT SHOULD HAVE BEEN
ALLOWED.**

A. Statement of Issue.

[¶036] If a trial court grants a defendant's motion for summary judgment, citing variances between the plaintiff's complaint and the plaintiff's theory and argument advanced in resisting summary judgment, is the plaintiff entitled to amend the complaint to conform to the theory and argument so advanced?

B. Felony Intrusion into Gosbee's Computers.

[¶037] In District Court, Martinson argued that there had been no felony on which to base a RICO claim. Defendants' Brief on Motion to Dismiss, etc., pp. 8-9, Docket Item 07. Martinson's argument ignored both the facts and the law.

[¶038] The law is clear. The hijacking of Gosbee's computers was a Class C felony:

A person commits computer fraud by gaining or attempting to gain access to, altering, damaging, modifying, copying, disclosing, taking possession of, or destroying any computer, computer system, computer network, or any part of the computer, system, or network, without authorization, and with the intent to devise or execute any scheme or artifice to defraud, deceive, prevent the authorized use of, or control property or services by means of false or fraudulent pretenses,

representations, or promises.

NDCC §12.1-06.1-08(1), emphasis added. Gaining access includes "[making] use of any resources of a computer." NDCC §12.1-06.1-01(3)(a). Thus, Martinson committed computer fraud by gaining access to Gosbee's computers, causing their CD-trays to open, hijacking the home pages, and presenting the deceptive advertisements that are Exhs. JJG-01 to -03 of the Complaint. Docket Item 02, Appx., pp. 9-11. Of necessity, the Spy Wiper Trojan consumed time on Gosbee's computers, which is covered by the allusion to "services." NDCC §12.1-06.1-01(3)(i). Computer fraud is a Class C felony. NDCC §12.1-06.1-08(1).

C. Martinson's RICO Violation.

[¶039] The intrusion into Gosbee's computers occurred multiple times, and all within the last 10 years. Gosbee Affidavit, ¶¶4,5, Docket Item 11. Thus, Gosbee has evidence of the "pattern" required by NDCC §12.1-06.1-01(2)(e).

[¶040] Further, even if Martinson did not devise the Spy Wiper Trojan (a point not conceded by Gosbee), Martinson became liable once he failed to stop Seismic from its "affiliation" with Spy Wiper. Martinson's own time line shows his culpability. He told the court in Michigan that he became

aware of Seismic's actions in "the Fall of 2003." Martinson Michigan Affidavit, ¶11, Docket Item 10, Exh. JJG-06, p. 3. Yet, as late as March 5, 2005, he was pretending, in e-mails to Gosbee, to be unaware of what was causing the problem. See, e.g., E-Mail 09 at Docket Item 10, Exh. JJG-07, p. 3. Rather, Martinson tried to blame Gosbee: "Why don't you quit visiting Kazaa or whatever illicit websites that are changing your homepage." *Ibid.* The tone of the final paragraph of that e-mail suggests Martinson personally wrote it: "Court is your prerogative." *Ibid.* Someone who is "just a technician" (as was the professed author of E-Mail-07) isn't likely to be speaking for the company in challenging a customer to take the company to court.

[¶041] Martinson also contended that there is no "enterprise." The illegitimate enterprise was Seismic - even Martinson contends Seismic was illegitimate. The legitimate enterprises funded by Seismic's misdeeds included Spy Wiper, Inc. As noted, although Martinson might conceivably have been an innocent victim of Seismic in the "fall of 2003," he had long since lost that status by March 4, 2005, and had become a willing participant with Seismic to seize control of Gosbee's computers, to say nothing of computers from literally

around the world: people in "outback South Australia" and Kuwait also complained about the Spy Wiper Trojan. Docket Item 10, Exh. JJG-05, pp. 49, 63.

D. Trespass.

[¶1042] Gosbee sought to include, in the amended complaint, a claim for trespass to chattel and real estate. Proposed Amended Complaint, ¶¶14,18, Docket Item 19, Appx., p. 44,45. Martinson's Spy Wiper Trojan caused tangible intrusion at Gosbee's home and office - namely the opening of the CD-tray and playing the trouble sound.

*One who intentionally and without a consensual or other privilege is subject to liability to another for trespass, irrespective of whether he [t]hereby causes harm to any legally protected interest of the other, if he intentionally ... enters land in the possession of the other, or causes a **thing** or a third person to do so;*

... The phrase 'enters land' includes ... the presence upon the land of a third person or **thing** which the action has caused to be or remain there.

*A trespass may be committed by the continued presence on the land of a structure, chattel, or other **thing** which the actor has placed on the land ... pursuant to a privilege conferred on the actor irrespective of the possessor's consent, if the actor fails to remove it after the privilege has been terminated, by the accomplishment of its purpose or otherwise.*

Hector v. Metro Centers, Inc., 498 N.W.2d 113, 116 (N.D.

1993), emphasis added (approving jury instruction defining trespass after fill dirt left on neighboring property during construction project). Although the "thing" in *Hector* was tangible -- fill dirt -- a "thing" invaded Gosbee's land just as destructively. Here, it was a malicious script designed to carry out the Spy Wiper Trojan.

[¶043] Although the issue apparently hasn't been addressed in North Dakota, there is ample authority for the proposition that an unauthorized intrusion into another's computer is trespass. Physicians Interactive, based in Virginia, operated a website, open only to its subscribers, having as its "most valuable asset ... its data lists on medical professionals. These client lists consist of the medical professional's name, title, occupation, speciality, mailing address, e-mail address, telephone number, and fax number." *Physicians Interactive v. Lathian Systems, Inc.*, 2003 WL 23018270, at *1 (E.D.Va.)). Things were going fine for Physicians Interactive until Lathian allegedly used "electronic robots" to invade Physicians Interactive's computers and steal that information. *Ibid.* Physicians Interactive successfully sought a TRO to stop Lathian from using the ill-gotten data. *Ibid.* Of relevance here is the

Court's holding that Physicians Interactive would likely prevail on a number of legal theories, including common law trespass to chattels. "A common law claim of trespass on chattels occurs 'when one party intentionally uses or intermeddles with personal property in rightful possession of another without authorization.' Moreover, trespass occurs when the chattel 'is impaired as to its 'condition, quality, or value'" *Ibid.*, at *9, emphasis added, citations omitted. It cannot be doubted that Gosbee's computers were intermeddled with, and the their condition, quality, or value were impaired.

[¶044] Other similar holdings include *Kramer v. Cash Link Systems*, 2004 WL 2952561 (S.D.Iowa)), at *2 (spam is trespass and conversion); *in re Pharmatrak, Inc.*, 329 F.3d 9 (1st Cir. 2003); and *America Online, Inc. v. National Health Care Discount*, 174 F.Supp.2d 890 (N.D.Iowa 2001) (spam, and also principals liable for "agents'" spamming activities).

[¶045] Thus, even if the RICO claim does not survive appeal, Gosbee is entitled to assert a claim against Martinson for trespass to chattel and to Gosbee's land.

E. Gosbee's Entitlement to Discovery Before Decision on Motion for Summary Judgment.

[¶046] Before ruling on Martinson's motion for summary judgment, the District Court should have granted Gosbee an opportunity to engage in discovery, particularly of Martinson himself. Rule 56(f), NDR CivP. As required by that rule, Gosbee advised the Court that, "Without discovery, Gosbee has no way of testing the accuracy of Martinson's claims." Answer Brief on Motion to Dismiss or For Summary Judgment, at 5. Docket Item 10. See also Gosbee Affidavit, p. 7, ¶11.⁴ Docket Item 11.

[¶047] The requested discovery is entirely appropriate. So far, Martinson's defense depends totally on his own testimony. According to the *Creative Loafing Atlanta* story, Martinson is a convicted felon. Docket Item 10, Exh. JJG-04, p. 3, at Arrow 2. Significantly, Martinson has not denied this assertion. Rather, he has just contended it is a "smear campaign." Defendants' Reply to Answer Brief on Motion to Dismiss or For Summary Judgment, at 2 [Docket Item 12].

4. There are mistakenly two ¶¶11 to the Gosbee Affidavit. The one relevant here is on p. 7 of Docket Item 11.

[¶048] By Martinson's definition apparently, any reliance on Rule 609, NDREvi, is a "smear campaign." Be that as it may, it is reasonable to infer that Martinson's testimony can be impeached under that rule. If the *Creative Loafing Atlanta* story is accurate, he was released in November 1998. Docket Item 10, Exh. JJG-04, p. 3, at Arrow 2. According to that story, Martinson was serving a 5-year sentence (*ibid.*), meeting the first element of Rule 609(a)(i), NDREvi. Since 1998 is less than 10 years ago, his testimony can be impeached under Rule 609(b), NDREvi.

[¶049] Maybe the *Creative Loafing Atlanta* story is all wrong. Maybe it isn't. Gosbee should at least be allowed to engage in discovery to test the veracity of Martinson's protestations that what in essence is a "rogue affiliate" is responsible for the Spyware Trojan that invaded Gosbee's computers. Therefore, the District Court erred when it granted summary judgment without an opportunity for discovery under Rule 56(f), NDRCivP.

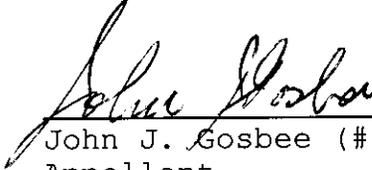
VII. SUMMARY, CONCLUSION, AND RELIEF REQUESTED.

[¶050] Gosbee was entitled to a hearing on his objection to Martinson's costs. Gosbee was guaranteed an oral argument on his motion for reconsideration and to amend the complaint.

Further, the proposed amendment should have been allowed as it stated a valid claim against Martinson for fraud, RICO liability, trespass to chattel, and trespass to real estate. Also, before summary judgment was entered, Gosbee should have been allowed to engage in discovery addressed at the issue of Martinson's involvement in the Spyware Trojan.

[¶051] Therefore, Gosbee asks that this Court reverse the judgment of the District Court and that this Court remand the case to the District Court with instructions to allow the proposed amendment to the Complaint, and to conduct other further proceedings consistent with that order.

Dated March 28, 2005.



John J. Gosbee (#3967)
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CERTIFICATE OF SERVICE

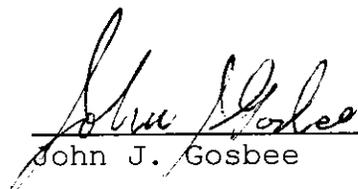
In accordance with Rule 25(d), NDRAppP, and Administrative Order 14, certify that I have served the Appellant's Brief and the Appendix to the Briefs by e-mail* to:

Scott K. Porsborg, Esq.
[sporsborg@sbolaw.com]

I certify that I have tested the e-mail to the Clerk of the North Dakota Supreme Court, and the e-mail to Mr. Porsborg, for viruses, and the virus-check reported none.

* Corrected versions e-mailed March 29, 2005.

Dated March 28, 2005.



John J. Gosbee

Word Count (entire document): 5,243