

**IN THE SUPREME COURT
STATE OF GEORGIA**

EDIBLE IP, LLC

Petitioner

v.

GOOGLE, LLC

Respondent

Case No. _____

Court of Appeals Case No.
A20A1594

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Court of Appeals has wiped away one of the most fundamental property protections for Georgia businesses: every property owner's right to exclude others from their property. And the Court of Appeals has done so because the defendant that violates those property rights is Google, LLC and because Google commits this conduct hundreds of times every day. At bottom, the Court of Appeal's opinion holds as a matter of law that Google has a special exemption that allows it to intrude on the intellectual property rights of every business in Georgia without permission or compensation.¹

If this case is permitted to stand, then every business in Georgia will lose its state law rights to prevent Google from taking its trade names, trademarks, and business goodwill without permission and selling it for Google's own benefit. The Court of Appeals opinion ignores Georgia statutes as well as decades of precedent from this Court and the U.S. Supreme Court. To do all that, the Court of Appeals rewrote the Complaint's allegations to recharacterize Google's advertising practices as described in a single New York district court case where Google was not even a party.

¹ The Court of Appeals Opinion is attached as Exhibit 1.

This is error, and it sets a dangerous precedent. It comes at a time when Google, and companies like Google, have amassed so much power over the commercial activity of our economy that every other business in Georgia is struggling to protect the value that it has created. This Court of Appeals opinion not only tips the balance further in Google's favor, but destroys fundamental property law protections. Thus, this issue is of great concern, gravity, and importance to the public.

As detailed below, every day, without permission, Google takes Plaintiff Edible IP, LLC's ("Edible's") intangible property and auctions it to the highest bidder. What's more, Google sells this property to Edible's competitors who could not otherwise acquire it without buying a license from Edible or its licensees. Google does this to countless other victims, brushing past the victims' legal right to exclude others from their property, taking the fruits of their labor and goodwill, appropriating it for Google's profit, and keeping the money from the sale. Taking someone else's property without permission and selling it is theft. And it violates Georgia law.

Georgia law expressly establishes that Edible's intangible property rights are "property" within the meaning of the theft statute. The statutory definition of "property" includes "*anything of value*, including but not limited to . . . *tangible*

and intangible personal property, [and] contract rights” O.C.G.A. § 16-1-3(13) (emphasis added). As the Model Penal Code and Commentaries reflect, “The definition of “property” . . . includes *anything that is part of one person’s wealth and that another person can appropriate*” Model Penal Code and Commentaries at 166–67 (emphasis added).

The Georgia theft statute couples this broad definition of “property” with a broad definition of how that property may be “taken.” As Georgia courts have explained, the “theft by taking statute [O.C.G.A. § 16-8-2] contains the catch-all phrase ‘*regardless of the manner in which the property is taken or appropriated,*’ which renders the statute broad enough to encompass theft by conversion, theft by deception or *any other of the myriad, and even yet-to-be-concocted, schemes for depriving people of their property.*” *State v. Meeks*, 309 Ga. App. 855, 860 (2011) (emphasis added).

Edible’s Complaint alleges that Google has concocted exactly such a scheme for invading Edible’s property rights and depriving Edible of the goodwill, reputation, and other intangible property Edible owns in the “Edible Arrangements” name. As the Complaint states, “[i]n today’s economy,” Edible’s “goodwill and reputation are manifested when consumers enter the EDIBLE ARRANGEMENTS name in an internet search engine.” V-2/R-44. As a property owner, Georgia law gives Edible—not Google—the right to decide who may use

its property. Yet, Google auctions off Edible’s trademark and trade name and all of its associated goodwill. V-2/R-46–47. This is unlawful misappropriation:

Google unlawfully takes and otherwise appropriates Edible IP’s property by selling that personal property without permission to others and keeping the proceeds for itself. Google intended to, and in fact did, deprive Edible IP of that property because, among other things, Google deprived Edible IP of (a) its rights to exclude others from using its intellectual property without a license, and (b) its rights to the proceeds from any sale or license of that intellectual property.

V-2/R-53. If Edible proves those allegations, it proves a violation of the Georgia theft statute and the other alleged torts.

The Court of Appeals re-wrote the Complaint’s allegations to conclude—apparently as a matter of fact and law—that Google merely sells “advertising.” That recharacterization and finding (a) is entirely inappropriate on a motion to dismiss, and (b) is dead wrong. In fact, Google’s conduct is not “advertising” at all. When Google auctions off tradenames and trademarks that belong to Edible (or any other business), Google collects money not only from the value of any advertising space that Google created, but it collects additional money by selling the goodwill and business reputation that belongs exclusively to Edible (or other businesses). Google has no right to sell that property, and Edible has every right to prevent Google from selling it.

The Court of Appeals’ conclusion that Edible has not been “deprived” of its intellectual property is particularly dangerous because it ignores the fundamental

property right to exclusive use. In the digital age, “exclusive use” is the only right in the “bundle of property rights” that protects intangible property. The Court of Appeals’ application of “deprivation” would make it impossible for intangible property to ever be “taken” for purposes of theft or conversion, and it could make it impossible for software, digital photographs or other files, credit card numbers, access codes, or any number of crucial types of intellectual property to be stolen because that theft leaves a copy with the victim.

If this Court believes it is bad *policy* to enforce Georgia’s existing laws against Google, then it can so indicate, and the legislature can address it. If after discovery and factual development in the trial court it somehow turns out that, as a matter of fact, Google is not violating the law, summary judgment would be available. But this Court should not permit one of most important business property issues of our time to be decided by a ten-page Court of Appeals opinion that does not accurately reflect the Complaint’s allegations and is not based on any factual record about how Google’s “advertising” policy works. As alleged, Google’s conduct violates the law. This issue is of grave public importance because Google’s conduct affects virtually every consumer-facing business in Georgia, and because the Court of Appeals opinion could have other far-reaching effects on Georgia’s law of property.

STATEMENT OF THE CASE²

I. The Complaint Alleges Verbatim Violations Of The Theft Statute And Other Torts Based On Google’s Taking Of Edible’s Property Rights.

A. Edible Owns Goodwill And Other Rights In The Business Name “EDIBLE ARRANGEMENTS.”

Over the last two decades, Edible and its licensees have created enormous value in the business name “EDIBLE ARRANGEMENTS.” V-2/R-39–41. Beginning with a few small shops, the founder of the Edible Arrangements business created the idea of selling cut fruit designed to look like flowers. V-2/R-39. The business has expanded exponentially, growing its reputation and goodwill through the hard work and investment of thousands of small-business owners and the careful management of its intellectual property by Edible and its licensees. V-2/R-39–41. Today, there are almost 1,200 Edible Arrangements stores worldwide, mostly owned as family businesses. In 2017, the 42 stores in Georgia made almost 175,000 Edible Arrangements deliveries. V-2/R-39. Thus, the name “EDIBLE ARRANGEMENTS” has become widely known and carries valuable goodwill and reputation. V-2/R-42.

While Edible has licensed use of the name “EDIBLE ARRANGEMENTS” to a franchisor (and ultimately many franchisees), it owns all the goodwill and

² On the motion to dismiss, the allegations of the Complaint are taken as true.

intellectual property associated with the brand, including the federally registered (and incontestable) trademark and service mark “EDIBLE ARRANGEMENTS,” and the state statutory and common law rights to use the name. V-2/R-40–41. It has numerous contracts to protect this intangible property. *Id.* Edible has the exclusive right to license this name for another’s use. V-2/R-43–44. And critically, Edible has the legal right to prevent others from using the name without permission. *Id.*

Edible’s goodwill and reputation generate business for its franchise because consumers seek out “Edible Arrangements” by name. V-2/R-44. This goodwill and reputation are manifested when consumers enter “EDIBLE ARRANGEMENTS” in an internet search engine. Decades of successful business and careful cultivation of the goodwill and reputation of the business imbues that name with meaning (and value) and drives these searches. V-2/R-44.

B. Without Permission, Google Auctions Off Edible’s Property To Edible’s Competitors And Keeps The Profits.

As the Court is no doubt aware, Google is the world’s dominant internet search engine. V-2/R-44–45. When a user inputs a search, Google’s series of algorithms provide relevant search results. V-2/R-45.

Among its products, Google sells “keywords” that trigger advertisements on the search results page for the selected terms. V-2/R-46–48. For example, Google sells non-proprietary search queries, like “shoes,” “mother’s day gift,” or

“mesothelioma.” V-2/R-48. The purchaser’s advertisement will appear to those searching the purchased term, and Google will get paid. V-2/R-46–48.

Google sells these “keywords” through an automated auction. Businesses (or others) bid by identifying the maximum amount they will pay for access to the people who search for that term. V-2/R-46–47.

The price that Google charges for a keyword depends on the *value* of the keyword as a search query. V-2/R-47. That value is driven by the business that a keyword generates. V-2/R-49.

The problem arises when Google goes beyond selling non-proprietary terms and begins selling property that it has no right to sell—including the name “EDIBLE ARRANGEMENTS.” Without first obtaining Edible’s permission, Google offers to sell the name “EDIBLE ARRANGEMENTS” to third parties, and in fact sells the name to Edible’s direct competitors. V-2/R-48. But the value of “EDIBLE ARRANGEMENTS” as a search query is derived exclusively from the goodwill created by the business and owned by Edible. V-2/R-49. A user only Googles “EDIBLE ARRANGEMENTS” because they are seeking the products and services associated with that name. Both Google and its third-party advertisers know this. *Id.*

When Google sells the term “EDIBLE ARRANGEMENTS,” the third-party purchaser is buying more than “advertising space.” It is purchasing, and Google is selling, the full benefit of Edible’s trademark, trade name, goodwill, and reputation among consumers. V-2/R-48–49. While Google has no right to sell this property, Google appropriates for itself that goodwill and the proceeds of the sale, and Edible receives nothing. *Id.* Edible is damaged again when the purchaser is a competitor of Edible’s licensees. Google sells Edible’s property and keeps the money; Edible’s competitors leverage Edible’s goodwill to compete with Edible’s licensees without Edible’s consent. V-2/R-49.

C. The Complaint Alleges Every Element Of Theft, Conversion, Money Had And Received, And RICO.

As a result of Google’s conduct, Edible asserted its rights to exclusive use of its property under Georgia’s fundamental property protections: theft and conversion. V-2/R-51–55 (Counts I and II). In addition, because Google has kept the proceeds from its illegal invasion of Edible’s property rights, Edible asserted a claim for money had and received. V-2/R-55–56 (Count III). And because Google has repeated its theft many times in a pattern of illegal activity conducted over years, Edible asserted a claim under Georgia’s RICO statute. V-2/R-56–60 (Count IV). The Complaint alleges every element of each of these claims.

II. The Trial Court Signed Google’s Prepared Order Dismissing The Complaint, And The Court Of Appeals Erroneously Affirmed On Other Grounds.

After hearing argument, the trial court dismissed the Complaint by signing Google’s prepared order that included a laundry list of reasons for dismissal. V-2/R-6–33.

The Court of Appeals affirmed, but for a limited reason. Without regard to Edible’s allegations, the Court of Appeals opinion decides, as a matter of fact and law, that

Google has not taken Edible IP’s trade name or sold it for profit. Rather, Google has auctioned off the opportunity to advertise on the results page produced when an individual types the keyword phrase “Edible Arrangements” into the Google search bar.

Op. at 5. The Court continued, stating that “Ultimately, however, the challenged conduct involves the sale and placement of advertisements.” *Id.* at 6. And the Court held—broadly and erroneously—that Google’s conduct had not “deprive[d]” Edible of its property:

Such conduct does not constitute a taking or appropriation of Edible IP’s property. And it does not “deprive” Edible IP of any property. Within the concept of theft, the term “deprive” means to, without justification, “withhold property of another permanently or temporarily; or . . . dispose of the property so as to make it unlikely that the owner will recover it.” OCGA § 16-8-1 (1). Nothing in the complaint brings Google’s use of keywords within this definition.

Id. The Court then made a specific, broad holding regarding Google’s advertising program, citing a district court opinion from New York to establish the facts:

On the contrary, as noted by one federal court, keyword advertising is “akin to the product placement marketing strategy employed in retail stores, where, for example, a drug store places its generic products alongside similar national brand products to capitalize on the latter’s name recognition. The sponsored link marketing strategy is the electronic equivalent of product placement in a retail store.”

Id. (quoting *Merck & Co. v. Mediplan Health Consulting*, 431 F. Supp. 2d 425, 427 (I) (S.D.N.Y. 2006)) (citation omitted).

ARGUMENT AND CITATION OF AUTHORITIES

I. The Court Of Appeals Opinion Commits Fundamental Errors With Far Reaching Consequences.

The Court of Appeals opinion ignores the Complaint’s allegations and long-standing property laws that guarantee a remedy for violations of property rights, including Georgia’s theft statute. The opinion’s cursory analysis—including its application of the term “deprive”—ignores and dramatically undermines the fundamental property right to “exclusive use” of personal property. And based on a fundamental misunderstanding of the facts surrounding Google’s keyword program, the opinion immunizes Google to invade personal property rights and violate Georgia’s theft statute, as long as its conduct purports to be “advertising.”

A. The Law Unequivocally Protects Edible’s Intangible Property In Its Business Goodwill And Reputation, Including The Right To Exclude Others From Unauthorized Use.

Edible owns the trademark, trade name, and other aspects of the goodwill associated with the name “EDIBLE ARRANGEMENTS.” V-2/R-43. The “good

will and reputation of a business is as much an asset as its physical properties.” *Kay Jewelry Co. v. Kapiloff*, 204 Ga. 209, 215 (1948). “The trade name of a partnership is a part of its good will and is an asset of the firm . . . subject to sale as any other firm property.” *Richter v. Richter*, 202 Ga. 554, 556–57 (1947).

A fundamental aspect of property ownership is the right to exclude others from using it. “The term property comprehends not only the thing possessed, but also, in strict legal parlance, means the rights of the owner in relation to land or a thing; the right of a person to possess, use, enjoy, and dispose of it, and *the corresponding right to exclude others from the use.*” *Bowers v. Fulton Cnty.*, 221 Ga. 731, 737 (1966) (citation omitted, emphasis added).

As this Court has held repeatedly, this right to exclude applies to intangible property like trade names and business goodwill. As this Court summarized in *Reis v. Ralls*, “[a]s the symbols of a business’s reputation and good will, trade names, trademarks and service marks employed to identify distinctly, by meaning or association, one’s business, products or services are generally regarded as a species of *intangible property capable of exclusive ownership and entitled to legal protection from encroachment.*” 250 Ga. 721, 722 (1983) (emphasis added, citation omitted). Similarly, “[t]here can be no doubt . . . but that a corporation has the exclusive right to the use of its own name; or that it may acquire a trade name

descriptive of its goods or services that will be protected in a court of equity.”

Gano v. Gano, 203 Ga. 637, 639 (1948).

Courts have long protected intangible business property to ensure that businesses maintain the *exclusive use* of the value they create. For example, in *International News Service v. Associated Press*, 248 U.S. 215, 239–40 (1918), another news agency was obtaining news gathered by the Associated Press. After the AP made that news public on the east coast, the other news service merely telegraphed that already public news to the west coast, where it still had value as “fresh” news, and used the news in its west coast papers. The Supreme Court held that the Defendant was *not entitled to take* the intangible property at issue—that intangible property was the “fresh” nature of the already-public news stories. As the Court stated, “in appropriating [the public intangible business property] and selling it as its own[, the Defendant] is endeavoring to reap where it has not sown, and by disposing of [the property] . . . is appropriating to itself the harvest of those who have sown.” *Id.*

Similarly, courts have recognized that the legislature may criminalize violations of this exclusive right to intangible business property. *See Carpenter v. United States*, 484 U.S. 19, 25 (1987) (“intangible nature” of property “does not make it any less ‘property’ protected by the mail and wire fraud statutes”).

Edible alleges the very same thing: Google is invading Edible’s property rights and reaping the fruits of Edible’s business property, all in violation of Edible’s right to its exclusive use.

B. The Court of Appeals Opinion Ignores This Property Right Entirely And Violates Georgia’s Theft Statute And Established Common Law

The Court of Appeals analyzed Edible’s claim for theft by ignoring the right to exclusive use of its intellectual property and thus misconstruing the theft statute. Importantly, Georgia’s theft by taking statute applies to the taking of *any* property “regardless of the manner in which the property is taken or appropriated.”³

The definition of “property” expressly includes intangible property: “‘Property’ means *anything of value*, including but not limited to real estate, *tangible and intangible personal property, contract rights*, services, choses in action, and other interest in or claims to wealth” O.C.G.A. § 16-1-3(13) (emphasis added). This “definition of “property” . . . includes *anything that is part of one person’s wealth and that another person can appropriate.*” Model Penal Code and Commentaries at 166–67 (emphasis added).

³ O.C.G.A. § 16-8-2 states in full:

A person commits the offense of theft by taking when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated.

By its plain terms, the statute protects all of Edible’s property, including the trademark, trade name, and goodwill associated with the name “EDIBLE ARRANGEMENTS,” V-2/R-43, the exclusive right to license use of the name for profit, and the right to prevent others from using the name for commercial advantage. V-2/R-43–44. As discussed above, this is “intangible property” and constitutes a “thing of value.”⁴ Indeed, Edible alleges that this property is its primary asset. V-2/R-42–43. *See An-Hung Yao v. State*, 975 N.E.2d 1273, 1281 (Ind. 2012) (holding, under almost identical statutory language, that “[t]he definition of property as ‘anything of value’ including ‘intangibles’ is extremely broad and we see no reason it could not encompass the charged ‘trademarks and/or markings or symbols of identification’”).⁵

The theft statute couples this broad definition of “property” with a broad definition of how property may be “taken.” As Georgia courts explain, the “theft by taking statute contains the catch-all phrase *‘regardless of the manner in which*

⁴ As another example, Google’s unauthorized taking of a license to sell Edible’s property would be theft of a “contractual right” within the meaning of the statute.

⁵ Given the explicit inclusion of intangible property, Georgia cases have found that theft-by-taking does not require physical items. *See Brown v. State*, 177 Ga. App. 284 (1985) (services were property under theft-by-taking statute). And Georgia courts have repeatedly held that intangible property can be taken. *See Trotman v. Velociteach Project Mgmt., LLC*, 311 Ga. App. 208, 213 (2011) (“[I]ntangible teaching materials on the laptop”); *Jones v. Turner Broad. Sys., Inc.*, 193 Ga. App. 768 (1986) (idea for TV show).

the property is taken or appropriated,’ which renders the statute broad enough to encompass theft by conversion, theft by deception or *any other of the myriad, and even yet-to-be-concocted, schemes for depriving people of their property.*” *State v. Meeks*, 309 Ga. App. 855, 860 (2011) (emphasis added).

Here, the Complaint specifically alleges several ways that Google takes Edible’s property, including by selling it to other people and keeping the profits. V-2/R-48–50, 52–53.

1. *The Opinion’s Factual Assertions Regarding Google’s Advertising Are Both Inappropriate On A Motion To Dismiss And Simply Wrong.*

As discussed above, the Complaint specifically alleges that Google’s auction and sale of Edible’s intangible property is an unauthorized and illegal taking of Edible’s right to exclusive use of its trade name and business goodwill. The Court of Appeals dismisses this claim based on its own factual assertion that this case is merely about “the sale and placement of advertisements.” Op. at 6. This misreads the Complaint and immunizes Google’s sweeping violation of business property rights.

Initially, and contrary to the Court of Appeals’ conclusion, there is no “advertising” exception to Georgia’s property laws. Of course, if an alleged advertising program violates another’s rights, then the injured party is entitled to recover. For example, in *Miller & Meier & Assocs. v. Diedrich*, the plaintiff

alleged that the defendant “used [plaintiff’s] name and logo without authority and therefore infringed on plaintiff’s rights to sole use.” 174 Ga. App. 249, 256–57 (1985). This Court held, expressly, that a cause of action must exist because “when the law requires a person . . . to refrain from doing an act which may injure another . . . the injured party may recover for the breach of such legal duty if he suffers damage thereby.” *Diedrich v. Miller & Meier & Assocs., Architects & Planners, Inc.*, 254 Ga. 734, 736 (1985) (quoting O.C.G.A. § 51-1-6).

Further, there is no doubt that the conduct alleged in the Complaint causes enormous injury to the plaintiff here and virtually every other consumer-facing business in Georgia. Contrary to the Court of Appeals’ factual conclusion, Google’s conduct goes beyond “selling advertising” in crucial ways that render it illegal. First, as alleged in the Complaint, the value of the keywords at each auction is related *solely* to the value of the intangible property that is being sold. V-2/R-47. Thus, while Google might sell “advertising space,” that is not all that Google sells. Google is also selling the good will associated with a trade name, and that is the most valuable thing Google’s customers are buying.

Indeed, Edible expects that discovery in this case will reveal that much of Google’s so-called “advertising” would have *no value at all* but for the fact that Google has appropriated others’ intangible property. For example, none of Edible’s competitors would pay Google to place an advertisement on a random

Google search results page. But Edible’s competitors can (and do) pay huge sums for the right to access those consumers who specifically enter the trade name “Edible Arrangements.” In this situation, the true value that Google sells is access to the goodwill that Edible has created in its trade name over decades of use. This is not mere advertising. Google has no right to use or sell that property, and Edible has the right to prevent Google from infringing on it.

To paraphrase the U.S. Supreme Court, “defendant [Google] in appropriating [this property] and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to . . . competitors of [Edible Arrangements’] . . . is appropriating to itself the harvest of those who have sown.” *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 239–40 (1918). Google’s conduct is indistinguishable, and the Court of Appeals opinion directly authorizes it anyway.

Just like the *International News* case, this is an instance where the technological capabilities of the moment require the law to be applied in a new context. In that case, the ability to instantly telegraph news across the country threatened to destroy the value of the Associated Press’s work: “[S]ince in speed the telegraph and telephone easily outstrip the rotation of the earth, it is a simple matter for defendant to take complainant's news from bulletins or early editions of complainant's members in the eastern cities and at the mere cost of telegraphic

transmission cause it to be published in western papers” *Id.* at 238. Yet, as discussed above, the Court enforced the property rights in the value that the Associated Press accumulated through its work, and prohibited its competitors from infringing on it. *Id.* at 239; *see also, e.g., Nat’l Tel. News Co. v. W. Union Tel. Co.*, 119 F. 294, 297 (7th Cir. 1902) (protecting business property interest in telegraphed news).

More than a century later, Google has developed technology that allows it to similarly invade the property rights of others by identifying the goodwill, for example, associated with the “EDIBLE ARRANGEMENTS” tradename, and selling that goodwill to others. While the specific context and mechanics may be different, the law remains the same: Edible has enforceable rights to exclude Google from its property and Google has no right to reap where it has not sown. *See Int’l News Serv.*, 248 U.S. at 239–40; *see also, e.g., Diedrich*, 254 Ga. 734 at 736; *Reis*, 250 Ga. at 722 (business trade names and goodwill “capable of exclusive ownership and entitled to legal protection from encroachment”); *Gano v. Gano*, 203 Ga. at 639 (“There can be no doubt . . . but that a corporation has the exclusive right to the use of its own name.”).

To paraphrase the U.S. Supreme Court *Carpenter*, the goodwill associated with the term “EDIBLE ARRANGEMENTS” is “the stock in trade” of Edible’s business, “gathered at the cost of enterprise, organization, skill, labor and money.”

484 U.S. at 26. Edible sells this intellectual property through licenses “to those who will pay money for it.” *Id.* But Google has developed a way to sell that same name and that same goodwill to Edible’s competitors without Edible’s permission. This property does not belong to Google, and when Google sells it, it is invading and violating Edible’s property rights, just as in *Carpenter*, and is committing theft under Georgia law.

Rather than apply binding law to these new facts, the Court of Appeals wipes away this law and reaches its own factual conclusions with no analysis whatsoever. Op. at 5–6. This violates the longstanding standards governing such motions:

On a motion to dismiss, a complaint should be construed in the light most favorable to the plaintiff with all doubts resolved in his favor. The plaintiff is entitled to the most favorable inferences that can reasonably be drawn from the complaint, even if contrary inferences are also possible. The motion to dismiss should not be granted unless the averments in the complaint disclose with certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of his claim.

Snooty Fox, Inc. v. First Am. Inv. Corp., 144 Ga. App. 264, 265 (1977).

Further, the single case cited in the opinion, *Merck & Co. v. Mediplan Health Consulting*, 431 F. Supp. 2d 425, 427 (S.D.N.Y. 2006), is a completely inapplicable federal trademark case where Google was not a party and Google’s conduct was not challenged. And even then, that court recognized the substantial disagreement among federal courts about how to characterize Google’s keyword

program. *Id.* at 426 (recognizing “that the issue [of how to characterize the keyword program under trademark law] is a difficult one” and acknowledging numerous decisions that disagreed).

This Court should not permit the Court of Appeals to rely on inapposite federal authority to justify a factual conclusion contradicted by the Complaint in this case. And it certainly should not do so when the result is that the Court of Appeals has issued a Google-specific ruling that could permanently immunize Google from its pervasive violation of fundamental property rights in a program that affects virtually every consumer-facing business in Georgia.

Lastly, the Court of Appeals’ analogy to “supermarket shelves” misses a number of crucial points. As discussed above, Google has created a platform that allows it to specifically identify Edible’s business goodwill, and then specifically price and sell Edible’s intangible property to others without permission. No mere “placement” can do that.

Further, Google’s platform is also affirmatively misleading. It effectively represents to consumers that they are receiving the “Edible Arrangements” information that they specifically sought, when in fact the information they are receiving comes from some other entity.

This diversion of consumers is much more akin to the common-law unlawful conduct in the “Sapolio” case, cited more than a century ago by the Court of

Appeals in *Hagan & Dodd Co. v. Rigbers*, 1 Ga. App. 100, 103 (1907). In that case, when consumers entered a store looking for a particular product (“Sapolio”), the storekeeper gave a different one (“Pride of the Kitchen”). *Id.* As the Court of Appeals noted, “*the act of the salesman in offering ‘Pride of the Kitchen,’ in response to a demand for ‘Sapolio,’ was, though done silently, a positively unlawful act; and that its unlawfulness consisted in an attempt to steal away the business of the complainant for the benefit of the manufacturers of the ‘Pride of the Kitchen.’ . . .*” *Id.* (discussing *Enoch Morgan’s Sons Co. v. Wendover*, 43 F. 420 (C.C.D.N.J. 1890)) (emphasis added).

Google’s conduct here, while more sophisticated and targeted, is similarly unlawful. When a consumer seeks “Edible Arrangements” by name, Google—because it has been paid—responds with a different product for the benefit of Edible’s competitors. This is not mere “advertising” nor shelf placement in a supermarket. It is an unlawful “attempt to steal away the business of [Edible] for the benefit of its competitors,” and it is an infringement on Edible’s property. *Id.* at 104.

Ultimately, there are numerous ways in which Google’s conduct violates Edible’s property rights, and would be unlawful for purposes of theft, conversion or money had and received (and because the theft was repeated as part of a pattern, RICO). The Court of Appeals’ analysis of Google’s widespread conduct was

erroneous and otherwise insufficient in light of the importance of the property rights at issue and the number of companies that are affected every day.

2. *The Opinion’s Legal Analysis Regarding “Deprivation” Violates The Law And Could Eliminate Protections For All Intangible Property.*

In addition to immunizing Google’s specific misconduct, the Court of Appeals created dangerous new law regarding “deprivation.” It held that Google did not “deprive” Edible of any property based on the following analysis: “Within the concept of theft, the term ‘deprive’ means to, without justification, ‘withhold property of another permanently or temporarily; or . . . dispose of the property so as to make it unlikely that the owner will recover it.’ OCGA § 16-8-1 (1).” Op. at 6.

This simplistic analysis ignores the right to exclusive use that can itself be “[withheld] . . . permanently or temporarily; or . . . dispose[d] of . . . to make it unlikely that the owner will recover it” O.C.G.A. § 16-8-1(1).

As the U.S. Supreme Court recognized in *Carpenter*, the crucial right to control intangible property and exclude others from using it can itself be stolen. In that case, the defendant was convicted of mail and wire fraud by violating a newspaper’s “property right” in keeping confidential and making exclusive use of certain newspaper columns. *Carpenter*, 484 U.S. at 25. The defendant argued, just as Google did here, “that [he] did not interfere with [the newspaper’s] use of the

information or did not publicize it and deprive the [newspaper] of the first public use of it.” *Id.* at 26. This argument “miss[ed] the point” because “*the business had a right to decide how to use [the information] prior to disclosing it to the public.*” *Id.* (emphasis added).

Indeed, in many instances intangible property can *only* be stolen or converted by violating the owner’s right to exclusive use. Most state law, like O.C.G.A. § 16-8-2, specifically protects intangible property from theft and, of course, in many instances this intangible property is the most valuable and important property that one owns. So it is not surprising that many cases affirm theft convictions against defendants who did not completely “deprive” the victim of the intangible property, but instead deprived the victim of its right to exclusive control. Examples include copying someone’s social security number, their debit card PIN, or other secret access codes. *See, e.g., State v. Cecil*, No. 35979-1, 2008 WL 2428517 (Wash. Ct. App. June 17, 2008) (credit card, social security number, and PIN); *Collins v. State*, 946 P.2d 1055 (Nev. 1997) (security access codes); *State v. Perkins*, 639 N.E.2d 833 (Ohio. Ct. App. 1994) (safe combination). In those instances, the theft is complete when the defendant violates the plaintiff’s right to exclusive use, regardless of what the defendant does with the stolen information.

Similarly, where a person copies a piece of property—like a digital photograph or a computer program—and leaves the original with the victim, that still constitutes theft. *See, e.g., State v. Nelson*, 842 A.2d 83 (N.H. 2004) (scanned photos); *Nat’l Surety Corp. v. Applied Sys., Inc.*, 418 So. 2d 847, 849–50 (Ala. 1982) (computer program).

The analysis is similar for conversion. Under Georgia Law, “[a]ny distinct act of dominion and control wrongfully asserted over another’s personal property, in denial of his right or inconsistent with his right, is a conversion of such property.” *Taylor v. Powertel, Inc.*, 250 Ga. App. 356, 358 (2001). “[I]t is not necessary that the defendant assert any right of ownership over the property; it is sufficient if the defendant wrongfully assumes dominion over the property inconsistent with the owner’s right.” *Levenson v. Word*, 294 Ga. App. 104, 106 (2008) (quoting *Md. Cas. Ins. Co. v. Welchel*, 257 Ga. 259, 261 (1987)).

As discussed above, Edible’s valuable intangible property rights, including the right to control its property and exclude others from using it, can be taken. *See, e.g., Trotman*, 311 Ga. App. at 213 (“intangible teaching materials on the laptop” were exclusive to plaintiff and thus subject to conversion); *Jones*, 193 Ga. App. 768 (conversion of idea for TV show); *see also English & Sons, Inc. v. Straw Hat Rests., Inc.*, 176 F. Supp. 3d 904, 921 (N.D. Cal. 2016) (permitting conversion claim for trademarks and trade names because they “can be precisely defined,

exclusively possessed and controlled, and they can be the subject of a legitimate claim to such exclusivity”).

Because Edible has the right to exclusive control of its property, Google cannot grant itself an unauthorized license to sell that property for Google’s profit. *See Automated Drawing Sys., Inc. v. Integrated Network Servs., Inc.*, 214 Ga. App. 122, 122–24 (1994) (appropriation of software source code for unlicensed profiteering was tortious taking and civil theft), *overruled on other grounds*, *Lyman v. Cellchem Int’l, Inc.*, 300 Ga. 475 (2017). And the Court of Appeals should not be permitted to authorize that license with no analysis.

Thus, for both theft and conversion, the Court of Appeals opinion undermines one of the only rights that can provide real protection for intangible property.

II. The Issues Raised By The Opinion Warrant This Court’s Review.

Google has positioned itself as one of the primary gatekeepers for consumer activity in our economy. The way this gate functions is crucial to the future of that economy and every consumer-facing business in it. The allegations in this Complaint raise important and unresolved issues about how the well-established law of intellectual property can be applied to Google’s platform. While the federal courts have struggled to apply federal trademark law to Google’s conduct, petitioners are aware of no court that has analyzed Google’s conduct under

traditional state law property protections. Of course, Federal trademark law does not preempt any state property protections. *Matal v. Tam*, 137 S. Ct. 1744, 1753 (2017) (“The federal system of registration and protection does not preempt parallel state law protection, either by state common law or state registration and in the vast majority of situations, federal and state trademark law peacefully coexist.”) (quotation marks, alterations, and citation omitted). And in a new technological context, where trademark law may not provide complete protection, this Court’s analysis of state property laws becomes paramount.

As alleged in the Complaint, it is clear that Google is selling and profiting from the intellectual property that Edible has created over the life of its business. The Court of Appeals dismissed these claims—without analysis of Google’s actual conduct and based on no facts whatsoever. This dispute raises issues of great concern, gravity, and importance to the public, it meets the requirements of this Court’s rules for granting *certiorari*, and it deserves this Court’s fulsome analysis and ruling.

CONCLUSION

For those reasons, this Court should grant this Petition and issue a writ of *certiorari* to review the Court of Appeals’ Opinion in this case.

Edible timely submits this petition on March 4, 2021. A copy of the order granting an extension of time in which to file this petition is attached as Exhibit 2.

Respectfully submitted this 4th day of March, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I have, this day, served the foregoing **PETITION FOR WRIT OF CERTIORARI** upon all counsel of record by filing a true and correct copy thereof with the Clerk of Court using the court's electronic filing system, which will electronically serve all parties of record. By prior agreement of the parties, mail service is not required, and the parties will be served by e-mail as follows:

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**SECOND DIVISION
MILLER, P. J.,
MERCIER, J., and SENIOR APPELLATE JUDGE PHIPPS**

**NOTICE: Motions for reconsideration must be
physically received in our clerk's office within ten
days of the date of decision to be deemed timely filed.
<https://www.gaappeals.us/rules>**

***DEADLINES ARE NO LONGER TOLLED IN THIS
COURT. ALL FILINGS MUST BE SUBMITTED WITHIN
THE TIMES SET BY OUR COURT RULES.***

January 29, 2021

In the Court of Appeals of Georgia

A20A1594. EDIBLE IP, LLC v. GOOGLE, LLC.

MERCIER, Judge.

Edible IP, LLC (“Edible IP”) sued Google, LLC (“Google”) for theft of personal property, conversion, money had and received, and civil RICO¹ violations relating to Google’s alleged use of Edible IP’s trade name. In response, Google moved to dismiss the complaint and/or to compel arbitration. The trial court granted Google’s motion, compelled the parties to arbitration, and dismissed the complaint. Edible IP appeals. For reasons that follow, we affirm.

On appeal from the grant or denial of a motion to dismiss, we review the trial court’s ruling de novo, construing the allegations in the complaint favorably to the

¹ The Georgia RICO (Racketeer Influenced and Corrupt Organizations) Act is codified at OCGA § 16-14-1 et seq.

claimant. See *Manzanares v. City of Brookhaven*, 352 Ga. App. 293 (834 SE2d 358) (2019); *Z-Space v. Dantanna's CNN Center*, 349 Ga. App. 248 (825 SE2d 628) (2019). So viewed, the complaint alleges that Edible IP owns the trademarks, trade names, and other intellectual property associated with Edible Arrangements, a business consisting of websites and “brick-and-mortar” franchises that sell, among other things, floral-shaped arrangements of fresh-cut fruit. To support these websites and franchises, Edible IP licenses the use of its intellectual property to various entities. Edible IP, however, maintains ownership of the intellectual property, which includes the trademark/trade name “Edible Arrangements,” as well as the goodwill generated by the brand.

Google operates an internet search engine that allows individuals to search for information by typing relevant words into a search bar. Using algorithms that analyze the search terms and requested information, Google returns “organic” results of the query on a results page. According to the complaint, Google monetizes its search engine by “sell[ing] . . . ‘keywords’” to advertisers that “trigger advertisements on the search results page when Google users search for the keyword term.”

Keyword advertising is purchased through an auction-like process, with prospective advertisers bidding on terms suggested by Google. The auction includes

general terms like “shoes” and “mother’s day gift,” as well as trade names such as “Edible Arrangements.” Google has never contracted with Edible IP for the right to use the Edible Arrangements trade name, and Edible IP has not otherwise given Google permission to include its trade name in the keyword advertising program. Nevertheless, Google began auctioning the trade name to advertisers in approximately 2011. As described by the complaint, Google places advertisements purchased through the keyword program “in a more attractive location on the results page than its ‘organic’ results in an effort to drive consumer behavior and get those consumers to click on the ad rather than Google’s ‘organic’ results.”

Based on these and other allegations, Edible IP sued Google for theft of personal property, conversion, money had and received, and civil RICO violations. Google moved to dismiss the complaint, arguing that any claims alleged by Edible IP needed to be arbitrated, that a forum selection clause deprived the trial court of personal jurisdiction over Google, and that the complaint failed to state a claim upon which relief could be granted. Google also requested that the trial court compel the parties to arbitration.

The trial court granted the arbitration request, determining that Edible IP was subject to an arbitration provision agreed to by one of Edible IP’s affiliates, which

had accepted the terms and conditions of Google’s advertising program. The trial court also found that a forum selection clause within those terms and conditions required that the litigation be filed in California. Alternatively, the court concluded that the complaint failed to state a claim. See OCGA § 9-11-12 (b) (6). Edible IP appeals, arguing first that it is not bound by the arbitration and forum selection clauses accepted by its affiliated company. Even assuming, without deciding, that Edible IP is correct in that regard, we agree with the trial court that Edible IP’s complaint does not state a claim for relief.

A complaint can be dismissed for failure to state a claim only if its allegations “disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof.” *Z-Space*, supra at 250 (citation and punctuation omitted). In other words, “if, within the framework of the complaint, evidence may be introduced which will sustain a grant of relief to the plaintiff, the complaint is sufficient.” *Id.* (citation and punctuation omitted). With this standard in mind, we review the sufficiency of each count of the complaint.

1. Count 1 alleges a claim for theft of personal property. Pursuant to OCGA § 51-10-6 (a), “[a]ny owner of personal property shall be authorized to bring a civil action to recover damages from any person who . . . commits a theft as defined in

Article 1 of Chapter 8 of Title 16 involving the owner's personal property.” Specifically, Edible IP claims that Google committed theft by taking as defined by OCGA § 16-8-2, which provides:

A person commits the offense of theft by taking when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated.

The complaint alleges that Google unlawfully took and appropriated Edible IP's trade name and associated goodwill by selling that property through the keyword auction program and “keeping the proceeds for itself.” Although such assertions appear at first blush to allege a theft, the complaint's factual allegations reveal otherwise. Google has not taken Edible IP's trade name or sold it for profit. Rather, Google has auctioned off the opportunity to advertise on the results page produced when an individual types the keyword phrase “Edible Arrangements” into the Google search bar.

As described by Edible IP, the keyword advertising program allows advertisers that successfully bid on a keyword to “trigger advertisements on the search results page when Google users search for the keyword term.” Edible IP complains that by tying purchased advertisements to keyword search terms, “Google's advertising

program controls what consumers see[] and . . . seeks (often successfully) to drive what consumers do.” Ultimately, however, the challenged conduct involves the sale and placement of advertisements.

Such conduct does not constitute a taking or appropriation of Edible IP’s property. And it does not “deprive” Edible IP of any property. Within the concept of theft, the term “deprive” means to, without justification, “withhold property of another permanently or temporarily; or . . . dispose of the property so as to make it unlikely that the owner will recover it.” OCGA § 16-8-1 (1). Nothing in the complaint brings Google’s use of keywords within this definition. On the contrary, as noted by one federal court, keyword advertising is

akin to the product placement marketing strategy employed in retail stores, where, for example, a drug store places its generic products alongside similar national brand products to capitalize on the latter’s name recognition. The sponsored link marketing strategy is the electronic equivalent of product placement in a retail store.

Merck & Co. v. Mediplan Health Consulting, 431 FSupp.2d 425, 427 (I) (S.D.N.Y. 2006) (citation omitted).

Creative pleading cannot convert Google’s advertising program into a theft by taking. Edible IP has not alleged that it has a proprietary interest in Google’s search

results pages or any right to control the advertising on those pages. It claims only that it owns the intellectual property associated with “Edible Arrangements.” The alleged “sale” of that term for advertising placement does not constitute theft. To find otherwise would improperly broaden criminal liability. See *Mays v. State*, 351 Ga. App. 434, 436 (2) (831 SE2d 1) (2019) (“A criminal statute must be construed strictly against criminal liability and, if it is susceptible to more than one reasonable interpretation, the interpretation most favorable to the party facing criminal liability must be adopted.”) (citation and punctuation omitted). Because the facts pled in the complaint demonstrate that Edible IP is not entitled to relief for theft by taking, the trial court properly dismissed Count 1. See generally *Z-Space*, supra.

2. We reach a similar conclusion as to Count 2, which alleges that Google’s keyword auction resulted in a conversion of Edible IP’s intellectual property. Under OCGA § 51-10-1, “[t]he owner of personalty is entitled to its possession. Any deprivation of such possession is a tort for which an action lies.” The tort of conversion “involves the unauthorized assumption and exercise of right of ownership over personal property of another, contrary to the owner’s rights.” *Williams v. Ga. Dept. of Corrections*, 338 Ga. App. 719, 722 (2) (791 SE2d 606) (2016) (citation and punctuation omitted).

None of the complaint's allegations suggest that Google exercised ownership over Edible IP's intellectual property. Google simply sold advertising space on search results pages triggered by the phrase "Edible Arrangements." The complaint does not state a claim for conversion. See *ISP Alliance v. Physiotherapy Assoc.*, 238 Ga. App. 436, 437 (1) (519 SE2d 241) (1999) (counterclaim for conversion properly dismissed where "[a]s a matter of law, no conversion occurred"); *Trust Co. Bank v. Atlanta Speedshop Dragway*, 208 Ga. App. 867, 869 (432 SE2d 608) (1993) (complaint subject to dismissal where claimant "does not have a recognizable claim").

3. Edible IP's third claim alleges that Google is liable for money "had and received" in connection with the keyword advertising program. Specifically, Edible IP claims that "Google received . . . money by selling the 'Edible Arrangements' name and associated property to others without permission."

A claim for money had and received "is founded on the equitable principle that no one ought to unjustly enrich himself at the expense of another[.]" *Time Ins. Co. v. Fulton-Dekalb Hosp. Auth.*, 211 Ga. App. 34, 35 (1) (438 SE2d 149) (1993) (citation and punctuation omitted). "[R]ecovery is authorized against one who holds the money of another which he ought in equity and good conscience to refund." *Id.* (citation and punctuation omitted). The factual allegations in the complaint, however, reveal that

Google generated the money at issue by selling *advertisements* for its search results pages. The allegations do not permit an inference that Edible IP owns — or is entitled to — Google’s advertising revenue. The trial court, therefore, properly dismissed Count 3. See *id.* at 37 (2) (claim for money had and received dismissed where complaint demonstrated that claimant had no right to the funds at issue).

4. Finally, the complaint alleges that Google violated the Georgia RICO Act “by obtaining, directly or indirectly, an interest in or control of personal property, including but not limited to money, through a pattern of racketeering activity and/or by endeavoring to do the same.” According to the complaint, the racketeering activity supporting this claim includes the theft by taking alleged in Count 1.

The trial court dismissed the RICO allegation, concluding that Edible IP’s failure to state a claim as to theft was fatal to the RICO claim. With respect to this ruling, Edible IP argues only that “[b]ecause the [trial court’s] theft analysis is incorrect, there is no basis for dismissing the RICO claim.” As found in Division 1, however, the trial court properly dismissed the theft allegation. Accordingly, Edible IP has not demonstrated that the trial court erred in dismissing the RICO claim.² See

² In affirming the trial court’s dismissal of Edible IP’s claims, we express no opinion on whether keyword advertising might give rise to some other claim not addressed here.

Gallemore v. White, 303 Ga. 209, 210 (1) (811 SE2d 315) (2018) (appellant bears the burden of demonstrating error on appeal); see also *J. Kinson Cook of Ga. v. Heery/Mitchell*, 284 Ga. App. 552, 560 (f) (644 SE2d 440) (2007) (where claimant cannot establish tort claims upon which a RICO allegation is based, the RICO claim fails as a matter of law).

Judgment affirmed. Miller, P. J., and Senior Appellate Judge Herbert E. Phipps., concur.

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SUPREME COURT OF GEORGIA
Case No. S21T0735

February 15, 2021

The Honorable Supreme Court met pursuant to
adjournment.

The following order was passed.

EDIBLE IP, LLC v. GOOGLE, LLC.

The request for an extension of time to file a Petition for Writ of Certiorari in the above case is granted. You are given an extension until March 04, 2021 to file.

All the Justices concur.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

A handwritten signature in black ink that reads "Thiruse A Barnes". The signature is written in a cursive style.

, Clerk