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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE SCO GROUP, INC., a Delaware corporation, Plaintiff, vs. NOVELL, INC., a Delaware corporation, Defendant.	Case No. 2:04CV00139 **NOVELL'S RULE 50(a) MOTION AT THE CLOSE OF PLAINTIFF'S CASE** Judge Ted Stewart

I. INTRODUCTION

To support its claim for punitive damages, SCO must prove, by clear and convincing evidence, that Novell's allegedly slanderous statements were motivated by personal malice – *i.e.*, ill will, hatred, or an intent to injure. SCO has failed to adduce sufficient evidence to carry its burden.

The individuals responsible for issuing the accused statements (Messrs. Messman, Stone, and LaSala) have all testified that they were acting to protect Novell's interests, not to injure SCO. Each of Novell's statements had the legitimate purpose of setting forth Novell's position on the public dispute between the parties concerning ownership of the UNIX copyrights. SCO has produced no evidence to contradict the testimony of Messrs. Messman, Stone, and LaSala regarding the intent behind Novell's December 22, 2003 press release, the copyright registrations of September and October 2003, the January 13, 2004 press release, or Mr. Stone's March 2004 speech.

SCO's only evidence directed to establishing personal malice is the testimony of journalist Maureen O'Gara. Ms. O'Gara accused Mr. Stone of deliberately issuing the May 28, 2003 press release on the same day as SCO's earnings announcement in order to impact SCO's stock price. But Ms. O'Gara's testimony suffers from at least two fatal flaws: First, it is completely uncorroborated either by another witness or a written record; and second, Ms. O'Gara admitted that she could recall no specific words of Mr. Stone's suggesting an intent to harm SCO – she merely surmised his intent from his "laughter" and "chortling." This is far from the clear and convincing evidence that is required to establish personal malice to support punitive damages.

In the absence of any credible evidence to contradict the testimony of Novell's witnesses, a reasonable jury could not find, by clear and convincing evidence, that Novell's statements were motivated by personal malice. Accordingly, judgment should be granted as a matter of law on SCO's claim for punitive damages.

II. STANDARD

A party is entitled to judgment as a matter of law if the Court concludes, after drawing all reasonable inferences in favor of the nonmoving party, that all of the evidence in the record reveals no legally sufficient evidentiary basis for a claim under controlling law. *Wagner v. Live Nation Motor Sports, Inc.*, 586 F.3d 1237, 1244 (10th Cir. 2009). Because the "clear and convincing" requirement applies to SCO's punitive damages claim, the question is whether the evidence in the record could support a reasonable jury finding that SCO has shown personal malice by clear and convincing evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-256 (1986) (clear and convincing evidence requirement for actual malice element applies at directed verdict stage). Rule 50(a) provides:

> If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient basis to find for the party on that issue, the court may . . . grant a motion for judgment as a matter of law against the party. . .

Fed. R. Civ. P. 50(a)(1). A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. *See* Fed. R. Civ. P. 50(a)(2). Motions under Rule 50 must "specify the judgment sought and the law and facts that entitle the movant to the judgment." Fed. R. Civ. P. 50(a)(2).

III. THE EVIDENCE DOES NOT SUPPORT AN AWARD OF PUNITIVE DAMAGES

In order to award punitive damages, the jury must first find two forms of malice: (1) knowledge of falsity or reckless disregard of falsity (constitutional malice),[1] and (2) hatred, ill will, or intent to injure (personal malice). (Court's Instruction No. 38; MUJI 10.12.) The evidence in the record cannot support a reasonable jury finding that SCO has shown personal malice by clear and convincing evidence. The Court should therefore grant Novell's motion for judgment as a matter of law, and dismiss SCO's punitive damages claim. *Tabor v. Metal Ware*

[1] This motion is limited to the issue of whether the evidence in the record supports SCO's claim for punitive damages. Because constitutional malice goes to the merits of SCO's slander of title claim, Novell will not brief that issue here, but will include it instead in its Rule 50(a) Motion at the close of all evidence.

Corp., 2009 U.S. Dist. LEXIS 9689, at *10 (D. Utah Feb. 6, 2009) (dismissing punitive damages claim on summary judgment where the plaintiff failed to establish malice or reckless indifference by clear and convincing evidence).

Because the "clear and convincing" requirement applies, SCO's punitive damages claim should be dismissed even if there is some evidence by which a jury could infer personal malice. For example, in *Beck's Office Furniture & Supplies v. Haworth*, 1996 U.S. App. LEXIS 20608 (10th Cir. 1996) (unpublished),[2] the Tenth Circuit affirmed the district court's grant of judgment as a matter of law on the issue of punitive damages on a tortious interference claim. The Court found that even if the plaintiff could argue that the jury might have "reasonably inferred" that the defendant acted maliciously, "these inferences could not lead a reasonable jury to find the evidence was clear and convincing, particularly in light of the plausible legitimate reasons" given by the defendant. 1996 U.S. App. LEXIS 20608, at *33. As the Tenth Circuit has elsewhere noted, the question is "not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party." *Mackey v. Burke*, 751 F.2d 322, 325 (10th Cir. 1984) (district court erred in denying motion for directed verdict and submitting punitive damages to the jury where the evidence did not rise to the level of "clear and convincing" evidence needed under Kansas law to support the finding of fraud and the assessment of punitive damages.) Here, the jury could not properly find that SCO has established personal malice with convincing clarity.

A. SCO Has Not Shown Personal Malice By Clear and Convincing Evidence

SCO must prove, by clear and convincing evidence, that Novell acted with personal malice when publishing the allegedly slanderous statements. MUJI §10.12. Malice is defined as conduct where "defendant acted with hatred or ill will towards the plaintiff, or with an intent to injure the plaintiff, or acted willfully or maliciously towards the plaintiff." MUJI §10.12; Utah Ann. Code § 78B-8-201 (punitive damages may only be awarded if "it is established by clear and

[2] Unpublished decisions by the Tenth Circuit "may be cited for their persuasive value." 10th Cir. Rule 32.1(A).

convincing evidence that the acts or omissions of the tortfeasor are the result of willful and malicious or intentionally fraudulent conduct, or conduct that manifests a knowing and reckless indifference toward, and a disregard of, the rights of others."). SCO failed to present sufficient evidence to rebut the testimony of Novell's witnesses that they issued the accused statements to protect Novell's interests, not to harm SCO.

1. The Evidence Shows Novell Acted to Protect Its Interests, Not to Injure SCO

Novell published the press releases and registered the copyrights to protect its business interests. Novell's story is corroborated by numerous knowledgeable witnesses. Joseph LaSala, Novell's general counsel from July 2001 through mid January 2008, testified that Novell published the press releases and registered the copyrights to protect Novell's interests and nothing more. (Trial Tr. 1924:24-1925:6; 1935:17-1936:17, Mar. 22, 2010.)

> Q. What was the reason for putting out the letter and responding to Mr. McBride? Was it done in order to somehow injure SCO or Mr. McBride, or was it done to protect Novell's interests?
>
> A. It was totally motivated to protect Novell's interests. I have explained to you a little bit about our initiative into this business, this Linux business. As you can imagine, for a company that was preparing to devote a lot of resources and spend a lot of money getting into the business, this campaign of SCO's and Mr. McBride's really had the potential to disrupt all of that.
>
> With due respect, I had no opinion and I had really no care, per se, with respect to Mr. McBride or Mr. McBride's business. I was concerned about Novell's business and Novell's business interests.

(*Id.* at 1894:1-15.)

Chris Stone, Novell's senior vice president in corporate development from 1997 to 1999 and who returned to Novell in 2002 as vice chairman, testified that SCO's claim to ownership "was hurting Novell's business" and they were receiving "enormous pressure" from shareholders, clients, and customers to respond publicly. (Trial Tr. 1625:3-17; 1636:2-5; 1636:6-19, Mar. 19, 2010.)

Jack Messman, Novell's CEO at the time the press releases were issued, testified that Novell published the claims of ownership and copyright registrations to protect Novell's

business, not to harm SCO. (Trial Tr. 2286:2-5, Mar. 24, 2010.) Both Mr. Messman and Greg Jones, Novell's in-house counsel, also testified that the statements were made publicly because Novell wanted to be "transparent" and allow the public to "make their own judgments." (*Id.* at 2231:14-23; 2287:19-2288:7.)

Novell's intent all along was to protect its business interests. SCO has offered no evidence of any kind to rebut the testimony of Novell's witnesses and support a finding that Novell acted maliciously with respect to its December 22, 2003 press release, the copyright registrations of September and October 2003, the January 13, 2004 press release, or Mr. Stone's speech of March 2004.

2. There is No Credible Evidence Showing That Novell's May 28, 2003 Press Release Was Malicious

With respect to the press release of May 28, 2003, SCO relies solely on the testimony of journalist Maureen O'Gara to draw an inference that Novell acted maliciously. Ms. O'Gara testified regarding a phone conversation she had with Mr. Stone in which Mr. Stone purportedly said that Novell's May 28 press release was intentionally timed to coincide with SCO's earnings announcement on that day. (Trial Tr. at 1652:14-1654:5, Mar. 19, 2010.) Ms. O'Gara inferred that Novell's intent was to "confound SCO's stock positions." (*Id*. at 1653:8-21.) Yet, Ms. O'Gara admitted that she could not recall any words spoken by Mr. Stone confirming his intent to harm SCO – she simply inferred his intent from his "laughter" and "chortling":

> Q. Q. Did Mr. Stone say anything about harming SCO?
>
> A. Logically, there wouldn't be any other reason.
>
> Q. So you -- you understood that to be the intent?
>
> A. That's what I understood.
>
> . . .
>
> Q. And what words or substance of the conversation do you precisely recall him using in order for him to convey that, as opposed to you to infer it?
>
> A. Maybe it was the laughter that I remember most about it.
>
> . . .

> Q. What do you recall of the exact words Mr. Stone used with you in reporting to you the planned announcement?
>
> A. I can't.

(*Id.* at 1653:25-1654:5, 1656:7-11, 1659:5-8.) For his part, Mr. Stone denies telling Ms. O'Gara that the May 28 press release was timed to coincide with SCO's earning announcement. (*Id.* at 1637:12-15.) Indeed, Mr. Stone was not even aware at that time that SCO was releasing its earnings announcement on May 28, 2003. (*Id.* at 1604:15-1605:3.) Mr. Stone, Mr. LaSala and Mr. Messman all testified that the timing of the May 28 press release was coincidental. (Trial Tr. 1606:22-25, Mar. 19, 2010; Trial Tr. 1961:15-19, Mar. 22, 2010; Trial Tr. 2253:20-23, Mar. 24, 2010.)

Furthermore, Ms. O'Gara's testimony regarding Mr. Stone's allegedly malicious intent was completely uncorroborated, either by other witnesses or in a written record. She admitted that she had no notes of her conversation with Mr. Stone. (Trial Tr. 1660:1-3.)

A showing of personal malice requires clear and convincing evidence. Ms. O'Gara's testimony does not rise to the level of clear and convincing evidence that Novell acted maliciously in issuing the press release on May 28, 2003. *See Nikols v. Goodman*, 206 P.3d 295, 298 (Utah App. 2009) ("The quality and quantity of Plaintiff's evidence does not meet the 'minimum standards of being clear and convincing'" where, inter alia, Plaintiff's testimony was uncorroborated).

3. There is No Credible Evidence Showing That Novell's December 22, 2003 Press Release Was Malicious

SCO presented no direct evidence that Novell acted maliciously in publishing the December 22, 2003 press release. SCO would like the jury to infer, based on the timing alone, that this press release was intended to harm SCO. (Trial Tr. at 33:16-19, Mar. 9, 2010.) However, there is no documentary or testimonial evidence of any kind that Novell deliberately timed the press release to coincide with SCO's earnings reports. To the contrary, Mr. LaSala and Mr. Stone both testified that they were not aware that SCO was announcing its earnings on that day. (Trial Tr. 1622:10-13, Mar. 19, 2010; Trial Tr. 1980:12-14, Mar. 22, 2010.) Mr. Messman also testified that the timing was a coincidence. (Trial Tr. 2277:15-17, Mar. 24, 2010.) Novell

chose to issue the December 22 press release because SCO had been making public statements erroneously asserting that Novell agreed with SCO's claims to UNIX copyright ownership, despite private letters from Novell to the contrary. (Trial Tr. 1919:22-1920:10, 1935:12-1936:17.) Novell felt it was important for the public to hear Novell's side of the story.

Additionally, the December 22 press release included a link to copies of correspondence between SCO and Novell in which each side explained their positions on the copyright ownership dispute. (Trial Tr. 1935:12-1936:17.) As Mr. LaSala testified, "we finally got to the point where we, again, felt it was important to allow the public to see both sides of the argument so that they could make some judgments, themselves, about this very important question." (*Id.*) Novell's publication of SCO's letters, along with its own, undermines any inference of malicious intent in Novell's press release.

4. There is No Evidence Showing That Mr. Stone's March 2004 Trade Show Remarks Were Malicious

There is no evidence that Mr. Stone's remarks at the open source business conference were intended to harm SCO. To the contrary, Mr. Stone testified that his speech was intended to champion the open source technology movement because it provided a "much more open and freer model of developing software applications." (Trial Tr. 1624:21-1625:2, Mar. 19, 2010.) He further testified that SCO's assertion that there was UNIX in Linux was affecting Novell's ability to promote Linux in the open source movement as business for Novell, and that he was concerned it was "harming Novell's future business." (*Id.* at 1625:3-1625:17.) Like Novell's other ownership claims, Mr. Stone's remarks were intended to protect Novell's business, not injure SCO. SCO has presented no evidence to rebut this testimony.

IV. CONCLUSION

SCO has no evidence to support its theory that Novell acted maliciously in connection with its press releases of December 22, 2003 and January 13, 2004, its copyright registration applications filed in September and October 2003, or Mr. Stone's public statement of March 2004. The testimony presented makes clear that Novell made those statements to protect

its own business interests, not to harm SCO. As to the May 28, 2003 press release, Ms. O'Gara's testimony does not establish malice by clear and convincing evidence.

For the reasons set forth above, Novell respectfully requests that the Court find as a matter of law that no reasonable jury could award SCO punitive damages.

DATED: March 24, 2010 Respectfully submitted,

By: /s/ Sterling Brennan
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