Roger Cleveland Golf Company Inc v. Prince et al Doc. 140 Att. 3

Exhibit C

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

ROGER CLEVELAND GOLF COMPANY, INC.,	)	C/A No. 2:09-2119-MBS
Plaintiff,	)	
VERSUS	)	Columbia, SC March 8 & 9, 2011
CHRISTOPHER PRINCE, PRINCE DISTRIBUTION, LLC, and BRIGHT BUILDERS, INC.,	)	
Defendants.	)	

EXCERPTS OF JURY TRIAL
DISCUSSIONS RE JURY CHARGES AND MOTIONS

BEFORE THE HONORABLE MARGARET B. SEYMOUR
UNITED STATES DISTRICT JUDGE, and a jury.

Appearances:

For the Plaintiff: JEFFREY S. PATTERSON, ESQ.
JOHN C. MCELWAINE, ESQ.
151 Meeting Street, Sixth Floor
Charleston, SC 29401

For Defendant Prince: CHRISTOPHER D. LIZZI, ESQ.
36 Broad Street
Charleston, SC 29401

For Defendant Bright Builders: PAUL J. DOOLITTLE, ESQ.
DOUGLAS M. FRASER, ESQ.
P.O. Box 2579
Charleston, SC 29401

1 names of the two in there.
2 MR. DOOLITTLE: Thank you, Your Honor.
3 THE COURT: Anything else?
4 MR. DOOLITTLE: No, Your Honor.
5 THE COURT: 10.3, contributory vicarious trademark
6 counterfeiting liability.
7 MR. MCELWAINE: No objection, Your Honor.
8 MR. DOOLITTLE: Obviously we think it's an improper
9 instruction, Judge. We do believe that you would need to add
10 the willful language that we discussed from the Tiffany-eBay
11 case. I understand the court's -- excuse me, I apologize for
12 sitting -- I understand the court's view on that and don't wish
13 to reargue with you. But I just wanted my objection to the
14 charge noted, that we think it should include the language from
15 the Hard Rock Cafe defining what should have known means,
16 meaning willful blindness, and willful blindness being defined
17 as actual knowledge.
18 THE COURT: I think I have already addressed your
19 objection in my ruling on your directed verdict motion. I
20 think that the way it's presented here is an accurate statement
21 of the law. Unless you can show me some Fourth Circuit law to
22 the contrary, I think this is what the charge should be.
23 MR. DOOLITTLE: I understand the court's position.
24 THE COURT: Okay. Now also it's not on the draft but
25 we talked about it, prior to 10.3, just above that where it

1 says -- the paragraph above, I was going to add a charge that
2 ignorance is no defense to violations of the Lanham Act.
3 MR. MCELWAINE: No objection here, Your Honor.
4 MR. LIZZI: No objection.
5 MR. DOOLITTLE: No objection, Your Honor.
6 THE COURT: 10.4, trademark damages, statutory
7 damages.
8 MR. DOOLITTLE: No objection, Your Honor.
9 MR. MCELWAINE: No objection.
10 MR. LIZZI: No objection.
11 MR. DOOLITTLE: Oh, excuse me, Your Honor, I
12 apologize. I do think that -- I don't have any objection to
13 the language of the statutory damages with regards to what is
14 willful, not willful, and the ranges. What I do object to is
15 the language where the court is charging what the purpose is of
16 the damages, to deter future conduct and to punish infringers.
17 We think that there has been no testimony -- they
18 could have easily brought in an expert to testify about the
19 damages done in that regard. They didn't do that, they chose
20 not to present expert testimony regarding that.
21 And I think it's improper for the court to now charge
22 them what the purpose of the statute is, when there has been no
23 testimony elicited in -- from anybody as to the expert standard
24 of care as to what the purpose of that statute is, and what the
25 statutory damage penalties are for.

1 conversations yesterday.

2 MR. DOOLITTLE: But the second part would still be

3 relevant, that we continued to supply the product after we knew

4 that such infringement was taking place.

5 THE COURT: And that's in number 2, that's in the

6 charge at number 2.

7 MR. DOOLITTLE: Your Honor, number 2 on your jury

8 charge says, "Continued to supply services to the infringer

9 after it knew or had reason to know that the services --" and

10 that's not -- the most recent statement of May 2010 from the

11 Fourth Circuit.

12 They don't say in here that Von Drehle directed and

13 induced -- or continued to supply its product to distributors

14 knowing or having reason to know that such infringement was

15 taking place. The case doesn't say that. It says that that is

16 what the requirement is, that they have to know that it was

17 taking place.

18 THE COURT: I will take a look at it. I will take it

19 under advisement and I will let you know.

20 MR. DOOLITTLE: Thank you, Your Honor.

21 THE COURT: Anything else?

22 MR. PATTERSON: No, Your Honor.

23 *

24 THE COURT: I'm going to revisit Mr. Doolittle's

25 objection to the jury charge. I went back and looked at the

1 Georgia Pacific case, and if you look at that case it says the
2 Supreme Court -- in resolving the issue, the Supreme Court held
3 "Liability for trademark infringement can extend beyond those
4 who actually mislabeled goods with the mark of another. Even
5 if a manufacturer does not directly control others in the chain
6 of distribution, it can be held responsible for their
7 infringing activities under certain circumstances. Thus, if a
8 manufacturer or distributor intentionally induces another to
9 infringe a trademark or if it continues to supply its product
10 to one whom it knows or has reason to know is engaging in
11 trademark infringement, the manufacturer or distributor is
12 contributorily responsible for any harm done as a result of the
13 deceit."
14 So it's an either/or, it can be done with --
15 intentionally induces or if it continues to supply. That's
16 right out of the Georgia Pacific case. It seems that Bright
17 Builders was objecting to the form of the draft instructions on
18 the contributory infringement liability, and your argument with
19 regard -- that Georgia Pacific stands for the proposition that
20 a defendant may only be held liable for contributory
21 infringement where the defendant proves that the defendant knew
22 of the infringing activity, in other words, that it requires
23 actual knowledge and not constructive knowledge.
24 And Georgia Pacific involved the inducement theory of
25 contributory infringement, a theory that is not at issue in

1 this particular case. And furthermore, the knowledge
2 requirement for contributory trademark infringement was not an
3 issue that was squarely before the court, before the Fourth
4 Circuit in Georgia Pacific.
5 Instead, the court's consideration of Georgia
6 Pacific's contributory trademark infringement claim was -- or
7 turned on whether the alleged trademark infringement or -- or
8 trademark infringement at issue was likely to cause confusion
9 in the relevant public, and whether the district court had
10 considered the appropriate population in defining the relevant
11 public.
12 To contrast, if you contrast Georgia Pacific with the
13 case here, in here the plaintiffs are alleging that Bright
14 Builders continued to supply services to the Prince defendants
15 after it knew or had reason to know that the services were
16 being used to infringe the mark.
17 The knew or had reason to know language comes
18 directly from the Supreme Court's case in Inwood, which holds
19 if a manufacturer, as I just told you, if a manufacturer or
20 distributor intentionally induces another to infringe a
21 trademark, or if it continues to supply its product to one whom
22 it knows or had reason to know is engaging in trademark
23 infringement, the manufacturer or distributor is
24 contributorily responsible for any harm done as a result of
25 that deceit.

1 And if you go back and look at Inwood, Inwood spoke
2 specifically of the supply of products. And courts have
3 routinely applied the Inwood test for contributory infringement
4 to service providers in cases where the service provider
5 exercises sufficient control over the infringing conduct.
6 And so based on that your objection to the charge is
7 overruled.
8 MR. DOOLITTLE: Thank you, Your Honor.
9 THE COURT: Anything else on that? Anything else on
10 that?
11 MR. PATTERSON: No, Your Honor, I'm sorry.
12 THE COURT: All right. So we are going to break for
13 lunch, come back at 2:15, and we will start with Mr. Cole's
14 testimony. And then from there, after his testimony, I will
15 excuse the jury, hear any motions, and then we will go with the
16 closings. All right, thank you.
17 (Lunch recess)
18 THE COURT: Are there any matters before we bring the
19 jury in?
20 MR. MCELWAINE: No.
21 THE COURT: Are there --
22 MR. DOOLITTLE: Your Honor on the -- shall we wait?
23 THE COURT: I don't want the jury to come in.
24 MR. DOOLITTLE: Your Honor, just on the jury
25 instructions themselves, page 2, right above instruction number