CASE NO. A06-397

State of Minnesota
In Supreme Court

SUSAN DUNN, et al.,

Appellants (A06-397),

vs.

NATIONAL BEVERAGE CORP., et al.,

Respondents (A06-397)

DTM DISTRIBUTING, INC.,

Respondent (A06-397)

APPELLANTS' REPLY BRIEF

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INTRODUCTION

For its response to Appellant Susan Dunn, Richard Newstrom and Home Juice Citrus Products Mid-West, Inc.'s (collectively "Twin City") brief, Respondent National Beverage Corporation ("NBC") expends substantial effort to re-try this case and convince the Minnesota Supreme Court that it should have prevailed at trial. However, the jury, trial court and Minnesota Court of Appeals have all determined that NBC breached its franchise agreement (the "Franchise Agreement") with Twin City (in what is clearly a violation of the Minnesota Franchise Act ("Franchise Act")), as well as committed business defamation. Additionally, this Court expressly declined review of those issues in its June 19, 2007, Order granting Twin City's petition for review and denying NBC's conditional petition. Accordingly, the only issue before the Court is whether the district court and Court of Appeals erred in failing to award Twin City its reasonable attorneys' fees pursuant to Minn. Stat. § 80C.17. For all of the reasons set forth in Twin City's Appellant's Brief and for the reasons that follow, the Minnesota Supreme Court should reverse the Court of Appeals' rejection of Twin City's attorneys' fees request.

LEGAL ARGUMENT

I. TWIN CITY IS ENTITLED TO ITS REASONABLE ATTORNEYS' FEES PURSUANT TO MINN. STAT. § 80C.17, SUBD. 3.

A. NBC Misinterprets the Franchise Act.

With respect to remedies, the Minnesota Franchise Act provides:

> Any suit authorized under this section may be brought to recover the actual damages sustained by the plaintiff together with costs and disbursements plus reasonable attorney's fees.

Minn. Stat. § 80C.17, subd. 3.

NBC contends this language renders awards of attorneys' fees in actions to redress violations of the Franchise Act permissive rather than mandatory. As an initial matter of statutory interpretation, Twin City disagrees.[1] While Minn. Stat. § 645.44 generally provides that the term "may" suggests a permissive directive and the term "shall" suggests a mandatory directive, the plain language of Minn. Stat. § 80C.17, subd. 3 alone fails to necessarily create a direct link between the permissive concept that a person wronged may, as opposed to must, bring an action pursuant to the statute and the idea that the remedies recoverable for its violations include "the actual damages sustained by the

[1] Had the Minnesota Legislature inserted the word "shall" instead of "may," Minn. Stat. § 80C.17, subd. 3 would make no sense as it would mandate that a "suit authorized under this section [shall] be brought to recover the actual damages sustained by the plaintiff together with costs and disbursements plus reasonable attorneys fees." As the Court is aware, the Legislature can not require individuals to bring lawsuits. Additionally, accepting NBC's interpretation would by its plain language preclude plaintiffs in a franchise relationship from asserting causes of action other than violations of the Franchise Act. Accordingly, NBC's interpretation is unavailing. See Amaral v. Saint Cloud Hosp., 598 N.W.2d 379, 384 (Minn. 1999) (statutory interpretation should not be conducted in a way that it renders words, phrases, or sentences as superfluous, void, or insignificant).

plaintiff together with costs and disbursements plus reasonable attorneys fees." NBC's attempt to link these distinct phrases simply does not give a fair reading to the Franchise Act's plain and unambiguous language. See Minn. Stat. § 645.08 (words and phrases are construed according to their common and approved usage and the rules of grammar).

NBC's strained interpretation becomes entirely untenable when consideration is given to the remedy section of a similar remedial statute concerning sales and distribution relationships. Indeed, the section of the Sales Representative Termination Act governing remedies available to wrongfully terminated sales representatives, in stark contract to the Franchise Act, provides:

> (a) The sole remedy for a manufacturer, wholesaler, assembler, or importer who alleges a violation of any provision of this section is to submit the matter to arbitration. A sales representative may also submit a matter to arbitration, or in the alternative, at the sales representative's option prior to the arbitration hearing, the sales representative may bring the sales representative's claims in a court of law …
>
> (b) The arbitrator may provide any of the following remedies:
>
> > (1) sustainment of the termination of the sales representative agreement;
> >
> > (2) reinstatement of the sales representative agreement, or damages;
> >
> > (3) payment of commissions due under subdivision 4;
> >
> > (4) reasonable attorneys' fees and costs to a prevailing sales representative;
> >
> > (5) reasonable attorneys' fees and costs to a prevailing manufacturer, wholesaler, assembler, or importer, if the arbitrator finds the complaint was frivolous, unreasonable or without foundation ….

Minn. Stat. § 325E.37, subd. 5.

The plain language of the Sales Representative Termination Act provides for a permissive award of attorneys' fees in that it expressly states that a variety of remedies "may" be awarded. Examining this language side-by-side with its sister section of the Franchise Act leads to the inescapable conclusion that if the legislature wished to legislate awards of attorneys' fees under the Franchise Act as NBC contends, it could have easily done so. Its decision to insert substantially different language in the Franchise Act runs contrary to NBC's interpretation.

B. NBC's Reliance on Little Caesar Enters., Inc. is Fundamentally Flawed.

Additionally, NBC's reliance on Little Caesar Enters., Inc. v. OPPCO, LLC, 291 F.3d 547 (6^{th} Cir. 2000) is misplaced. First, it is a decision from the Sixth Circuit and is not binding legal authority in this jurisdiction. Second, the trial court was the United States District Court for the Eastern District of Michigan and it and the Sixth Circuit were interpreting the statutes of South Dakota, not Michigan. Significantly, no case in South Dakota (or for that matter no trial or appellate court anywhere in the United States) has endorsed or upheld the decision by the Little Caesar Enters., Inc. court concerning attorneys' fees.

Third, even if Little Caesar Enters., Inc. were of any persuasive value, it is distinguishable and inapplicable on its facts. Indeed, essential to the Sixth Circuit's holding that the trial court did err in declining to award the franchisee its reasonable attorneys' fees were findings made by the trial court that Little Caesar's actions in violating a registration provision of South Dakota's franchise act were "not vexatious or unconscionable," that "OPPCO bore some of the blame for failing to investigate the feasibility of the franchises," and that "Little Caesar's failure to register is South Dakota was unrelated to the failure of the franchises." 219 F.3d at 554. On that basis, the court concluded that an award of attorneys' fees was inappropriate because it would unduly penalize Little Caesar. Id.

In stark contrast to Little Caesar Enters., Inc., the trial court here made no findings. Also, the Franchise Act violation forming the basis of Twin City's claim was not merely a registration violation, but rather NBC's breach and improper cancellation of the parties' Franchise Agreement, or the violation of the rights of Twin City under a franchise created under the Franchise Act. Additionally, evidence was introduced at trial that NBC disregarded its statutory obligations under the Franchise Act and failed to even investigate what obligations it assumed as matter of law despite acknowledging its awareness that some states imposed laws governing these relationships. Finally, the jury rejected NBC's contention that it had good cause to terminate Twin City's franchise and accordingly placed no blame on Twin City for NBC's termination. As a result, these distinctions are fatal to NBC's attempt to offer Little Caesar Enters, Inc. as persuasive authority in this matter.

C. NBC Disregards the Remedial Nature of the Franchise Act and the Legal Authority Requiring it to be Interpreted Broadly.

Further, NBC's position disregards the remedial nature of the Franchise Act. Minnesota courts have repeatedly observed that the Franchise Act is a remedial statute designed to favor franchisees over franchisors. See Clapp v. Peterson, 237 N.W.2d 585, 586 (Minn. 1982) (observing that the Franchise Act "was adopted in 1973 as remedial legislation designed to protect potential franchisees within Minnesota from unfair contracts and other prevalent and previously unregulated abuses in a growing national franchise industry."); Pac. Equip. & Irrigation, Inc. v. Toro Co., 519 N.W.2d 911, 919-20 (Minn. Ct. App. 1994) (Amundson, J., concurring) ("The Minnesota Franchise Act is an attempt to protect the franchisee from undue usurpation of the franchise relationship and to establish balance of bargaining power .... Thus, I believe the Minnesota Franchise Act should be broadly construed ...."). When engaging in statutory construction, Minnesota courts are to interpret remedial legislation broadly to better effectuate its purpose. Harrison v. Schafer Constr. Co., 257 N.W.2d 336 (Minn. 1977).

D. If Minn. Stat. § 80C.17, subd. 3 is Permissive, the Trial Court Abused its Discretion.

Moreover, even if the Court construes Minn. Stat. § 80C.17, subd. 3 as permissive, the facts and pertinent legal authority indicate an award of attorneys' fees is appropriate and that the trial court's refusal in this regard constitutes an abuse of discretion. Indeed, Minnesota courts have consistently held that an improper termination or refusal to recognize a written franchise agreement, as in the case at bar, is a violation of the Franchise Act. See Unlimited Horizon Marketing, Inc. v. Precision Hub, Inc., 533 N.W.2d 63, 67 (Minn. Ct. App. 1995) (terminating a written franchise agreement without good cause constitutes a violation of the Franchise Act); Modern Computer Systems, Inc. v. Modern Banking Systems, Inc., 858 F.2d 1339, 1344-45 (8^{th} Cir. 1988) (the improper termination of a written distributor agreement constitutes a violation of the Franchise Act);

Carlock v. Pillsbury Co., 1988 WL 404839 (D. Minn., Oct. 13, 1988)[2] (recognizing that a termination of a written franchise agreement stated a claim for violation of Minn. Stat. § 80C.14).

Additionally, this Court has determined that a plaintiff who establishes a violation of the Franchise Act is entitled to costs, disbursements and attorneys' fees. Nauman v. J's Restaurants Intern., Inc., 316 N.W.2d 523 (Minn. 1982); Martin Investors, Inc. v. Vander Bie, 269 N.W.2d 868, 875 (Minn. 1978) (upon establishing the elements of a franchise and a violation of the Franchise Act, the harmed party is entitled to the remedies set forth in Minn. Stat. § 80C.17).

A court abuses its discretion when it acts arbitrarily, without justification, or in contravention of the law. State v. Mix, 646 N.W.2d 247 (Minn. Ct. App. 2002); Pikula v. Pikula, 374 N.W.2d 705, 710 (Minn. 1985) (a court abuses its discretion if it makes findings unsupported by the evidence or improperly applies the law); Rutten v. Rutten, 347 N.W.2d 47, 50 (Minn. 1984) (a court abuses its discretion when it reaches a conclusion that is "against logic and the facts on the record.").

In this matter, and as described above, the trial court made no findings or conclusions of law to support its decision to deny Twin City's request for attorneys' fees. Accordingly, there are no findings to review to determine whether the trial court's decision is supported by the evidence or whether it properly applied the law. However, it is undisputed that the jury determined that NBC breached its Franchise Agreement with

[2] This unpublished decision of the United States District Court for the District of Minnesota is included in the Addendum accompanying Twin City's Appellant's Brief.

Twin City, which constitutes a violation of the Franchise Act, and awarded Plaintiffs $288,000 in damages. There is also no dispute that the jury's findings establish that Twin City and NBC became parties to the Franchise Agreement by virtue of NBC purchasing the assets of Chicago Home Juice (the original franchisor) which included the Franchise Agreement. The jury then found that NBC breached the Franchise Agreement by improperly terminating or cancelling it and substituting DTM for Twin City as the exclusive distributor of product in Twin City's exclusive area. The jury concluded that NBC's breach of the Franchise Agreement resulted in $288,000.00 in damages to Twin City. Neither the trial court nor the Court of Appeals disturbed those findings or those damages.

Based on those facts and the legal authority cited above, it was an abuse of discretion for the trial court to decline Twin City's request for attorneys' fees and an error of law for the Court of Appeals to uphold the trial court's unsupported decision. Accordingly, the Minnesota Supreme Court should reverse.

E. NBC Refuses to Acknowledge that a Breach of a Franchise Agreement is a Violation of the Franchise Act.

NBC continues to argue that since the jury awarded no damages in Count II of the special verdict form, Twin City can not receive attorneys' fees under the Franchise Act.

NBC refuses to acknowledge that a breach of a franchise agreement is a violation of the Franchise Act.[3] If Twin City had never pled the alternative claim of violation of the Franchise Act and the jury answered the breach of the Franchise Agreement questions as it did, NBC would continue to argue that its breach of the Franchise Agreement does not constitute a violation of the Franchise Act. That logic is belied by the plain language of the Franchise Act and the legal authority interpreting it.[4] However, that was the holding of the Court of Appeals (that a breach of a franchise agreement "does not implicate" the Franchise Act). Twin City asks, what could implicate the Franchise Act more than a breach of a franchise agreement recognized and protected by the Franchise Act?

As explained in Twin City's Appellant's Brief, the special verdict form establishes that NBC violated the Franchise Act by breaching Twin City's 1972 Franchise Agreement which the jury determined NBC purchased and assumed and awarded Twin City $288,000 in damages. Indeed, Twin City clearly established, and the jury plainly found, that the 1972

[3] Actually, a strict reading of the Franchise Act would render any breach of a franchise relationship (wherein a franchisor refused to recognize the relationship or otherwise improperly terminated it), whether created by written or oral agreement, or simply by satisfying the elements set forth in Minn. Stat. § 80C.01, subd. 4, a violation of the Franchise Act entitling the aggrieved party to the relief set forth in Minn. Stat. § 80C.17, subd. 3.

[4] NBC's arguments that Twin City advanced distinct causes of action, has waived its right to attack the jury's answer to the special verdict form, and urged the jury to award damages under both Count I and Count II are simply unavailing and unnecessary. Because the jury determined that NBC wrongfully refused to acknowledge its franchise relationship with Twin City and improperly terminated that relationship by selling Mr. Pure produces directly to DTM in Twin City's exclusive territory, NBC has violated the Franchise Act. It simply makes no difference how many causes of action Twin City asserted or how the jury answered the other special verdict form questions.

Franchise Agreement, extended by Chicago Home Juice in 1995, is a franchise agreement. The Franchise Act prohibits a franchisor to terminate or cancel a franchise unless:

1. that person is given written notice setting forth all of the reasons for the termination or cancellation at least 90 days in advance of the termination or cancellation; and

2. the recipient of the notice fails to correct the reason stated for termination or cancellation in the notice within 60 days of receipt of the notice.

Minn. Stat. § 80C.14.

It is undisputed that no such notice was given to Twin City in the relevant time frame. Additionally, at trial it was undisputed that NBC refused to recognize Twin City's Franchise Agreement and that it instead began distributing product through DTM. It was also undisputed that NBC never gave any termination notice to Twin City. Moreover, it is the law of the case since that is what the jury found and those findings were undisturbed by the trial court and Court of Appeals. As stated in the legal authority cited above, Minnesota courts have consistently held that an improper termination or refusal to recognize a written franchise agreement is a violation of Minn. Stat. § 80C.14.

For its part, NBC alleges that its breach of the Franchise Agreement is distinct and separation from its violation of the Franchise Act, a position that was accepted by the Court of Appeals. However, Twin City consistently pleaded and argued that it was NBC's refusal to recognize Twin City's rights under the Franchise Agreement that caused its damages. The jury plainly agreed and neither the trial court nor the Court of Appeals disturbed that finding. According to Unlimited Horizon Marketing, Inc., Modern Computer Systems, Inc.

v. Modern Banking Systems, Inc., and Carlock v. Pillsbury Co., NBC's actions constitute violations of the Franchise Act as a matter of law. Further, the jury awarded Twin City $288,000 in damages for the breach of its Franchise Agreement.

Because the jury found that NBC breached its Franchise Agreement with Twin City, a plain violation of the Franchise Act, and awarded Twin City $288,000 in damages, Twin City is entitled to the remedies found in Minn. Stat. § 80C.17, subd. 3, including an award of reasonable attorneys' fees.

CONCLUSION

For all of the reasons stated herein, Twin City respectfully requests the Minnesota Supreme Court to reverse the district court and Court of Appeals' decision denying Twin City its reasonable attorneys' fees.

Dated: 8/30/07

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, Subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 2,506 words, and the font size is 13 point. This brief was prepared using MicrosoftWord 2003 software.

Dated: 8/30/07

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