STATE OF MINNESOTA

IN SUPREME COURT

A06-396

A06-397

Susan Dunn, et al.

Appellants (A06-397)

vs.

National Beverage Corp., a Delaware corporation, et al.,

Respondents (A06-397)

RESPONDENTS' BRIEF

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ISSUES PRESENTED

(1)

Did the court of appeals err when it interpreted Minn. Stat. § 80C.17 as lacking a mandatory directive to the district court to award attorney fees to the Petitioners?

(2)

Did the court of appeals err by declining to conclude that the district court abused its discretion in awarding no attorney fees under Minn. Stat. § 80C.17 to these Petitioners, who: (a) obtained no relief under the Minnesota Franchise Act at any point during the lawsuit; (b) specifically urged the jury in closing argument to "do full justice" to the separate Special Verdict Form question of damages under the Franchise Act "even though you might conclude that damages are the same for the [breach of contract] action and the [Franchise Act] cause of action . . . ."; (c) were subsequently awarded "$0" in damages by the jury on their claim under the Minnesota Franchise Act; and (d) did not preserve any argument that this award of "$0" was against the substantial weight of the evidence?

STATEMENT OF THE CASE

The question accepted by this Court for review involves the Order for Judgment of the district court (the Dakota County District Court, the Honorable Rex Stacey), dated November 18, 2005. In that Order the district court denied the Petitioners' motion "for an Order of the Court determining that Plaintiffs are entitled to attorney fees under Minn. Stat. § 80C.17, Subd. 3." Instead, the district court ordered entry of a judgment that included no recovery for Petitioners of its attorney fees, consistent with the American Rule. A panel of the Minnesota Court of Appeals, in a memorandum opinion dated April 3, 2007, affirmed the judgment of the district court in its entirety.

Ruling on the cross-appeal of the Petitioners (respondents in the court of appeals) with respect to the portion of the district court's Order for Judgment relating to attorney fees, the court of appeals determined that the district court did not err, and concluded that "where, as here, the sole relief sought under the franchise act was damages, the party seeking attorney fees must have sustained 'actual damages' under the statute to qualify for attorney fees as a matter of law."

National Beverage asks this Court to uphold the judgment of the district court as affirmed by the court of appeals. Either through the analysis articulated by the court of appeals, or through the analysis set forth herein by National Beverage, the Order for Judgment of the district court as it pertains to attorney fees should stand.

The Court of Appeals, the Petitioners, and National Beverage, for their primary analyses of Section 80C.17, subd. 3, and its implications for this case, have advanced three distinct statements. Paraphrased, they are:

(1) by the Court of Appeals:

Where a Franchise Act plaintiff seeks only a damages remedy under the Franchise Act and is not awarded actual damages under the statute, a district court is *prohibited* from any exercise of discretion to award attorney fees under Minn. Stat. § 80C.17.

(2) by Petitioners:

The Court should read the phrase "plus reasonable attorney's fees" as separate and disconnected from the rest of the provision. Accordingly, Minn. Stat. § 80C.17, subd. 3, *mandates* that the district court award attorney fees to all plaintiffs who assert a claim under the Franchise Act.

(3) by National Beverage:

Minn. Stat. § 80C.17, subd. 3, *permits*, but does not require, a district court to exercise its discretion in deciding whether to depart from the American Rule on attorney fees in *certain circumstances*. Even if the Court of Appeals was incorrect and, in this case, the district court indeed *had discretion* to decide to depart from the American Rule, its decision not to do so was not an abuse of discretion in the context of this case.

STATEMENT OF FACTS

In 1999, National Beverage[1] acquired the right to make and sell Mr. Pure brand products through an Asset Purchase Agreement made with the prior manufacturer of Mr. Pure, American Citrus Products, Inc. (A-1-24.) At the time of the transaction, National Beverage and American Citrus were clear with each other and with all prior wholesale buyers of Mr. Pure – including petitioner[2] Susan Dunn ("Dunn") and the business owned and controlled by Dunn and her father, Home Juice Citrus Products Mid-West, Inc. ("Twin City") – that "any and all distributor agreements maintained by you with American Citrus . . . are not being assigned to us as part of the acquisition." (A-25.)

This was restated on multiple occasions over the next two years, and wholesale customers received this message and understood it (Tr. 598-99, 970, at A-26-28; *see also* Tr. 358-60, 374-75, Ex. 236, at A-29-34), even while – in the specific case of Twin City – expressing unhappiness about it. (Exs. 237, 265, at A-35-37.) At no point in this time period did Dunn or anyone else at Twin City ever show National Beverage any written distribution contract with American Citrus.

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[1] National Beverage Corp. and a wholly-owned subsidiary corporation (HJMP Corp.) were named as defendants in this action. In this brief as below, all National Beverage corporate entities are referred to, individually or collectively, as "National Beverage."

[2] While Dunn and Twin City (and plaintiff Richard Newstrom) are all apparently Petitioners to this Court, National Beverage submits that only a single plaintiff, the purported "franchisee," Twin City, has standing to litigate the question presented to this Court. Nevertheless, this brief will refer to all of the plaintiffs in the trial court, collectively, as "Petitioners."

In 2001, unbeknownst to National Beverage, Dunn decided to quit active involvement in the beverage distribution business. She did this after Twin City came into a $646,320 payment from South Beach Beverage Company (newly owned by PepsiCo) as Pepsi took over the distribution of Twin City's largest product line. (Tr. 601-03, at A-38-40; Ex. 324, at A-41-48.) Shortly thereafter, without informing her remaining suppliers (including National Beverage), Dunn began dismantling the rest of Twin City's beverage distribution business, selling all but one of its trucks (Tr. 238-239, at A-49-50), selling newly created "sub-distribution" rights (Ex. 254, at A-51-59), releasing employees (Tr. 814, at A-60), and making contractual promises to stay out of the business. (Ex. 254, p. 3., at A-53; Ex. 281, at A-61-65.) Dunn pursued her real estate license and became a licensed real estate broker in June 2002. (Tr. 674, at A-66.)

While some other suppliers terminated their dealings with Twin City in 2001 or 2002 (Exs. 266, 269-70, 271, at A-67-75; Tr. 816-21, at A-76-81), National Beverage continued to sell to Twin City, which began undisclosed discussions about the sale of Twin City's business to Plymouth-based Service Distributing, Inc. ("Service") in late 2001. (Tr. 822-23, 1051, at A-82-84.) In April 2002, with no advance notice to National Beverage (Tr. 635, 844, at A-85-86), Dunn announced that Twin City had been "purchased" by Service. (Ex. 287, at A-87.)

Twin City's last order to National Beverage was invoiced on April 3, 2002. (Ex. 347, at A-88.) From that point forward, Petitioners did not actively engage in beverage distribution in any form. (Tr. 1094, at A-89.) After April 5, 2002, any valid contract rights were held by Service, not Twin City (Tr. 845-46, at A-90-91). Indeed, as part of the 2002 transaction with Service, Petitioners agreed to refrain from selling Mr. Pure. (Tr. 872, at A-92; *see* Ex. 281, at A-61-65 ¶ 2.1.)

On April 17, 2002, following the closing of the Twin City/Service transaction, Service met with National Beverage. National Beverage explained that it did not have a written agreement with Service's predecessor and that it would go forward with Service under an oral agreement. Service agreed, and National Beverage began selling Mr. Pure products to Service thereafter. (Ex. 347, at A-88; Tr. 1088-89, at A-93-94.)

Sales of Mr. Pure in Minnesota had been declining since Dunn's intent to quit was formed in 2001, and the trend continued into 2002. (Ex. 334, at A-95.) In May 2002, Service introduced National Beverage to a new "sub-distributor," DTM Distributing, Inc. ("DTM"), who Service said would be supplying the trucks, and doing the actual distribution, of Mr. Pure product to be bought by Service. (Tr. 1089-91, 1389-93, at A-94, A-96-102.)

Then, in the summer of 2002, Service stopped ordering products altogether, deciding that it no longer wanted to be in the business of selling Mr. Pure products because it caused too much strain on Service's employees and did not make money as anticipated. (Tr. 876, 1096-97, at A-103-05.) Petitioners were aware of Service's change of heart by June 2002, but nevertheless elected not to step in, despite being asked to do so by Service. (Tr. 892, at A-106; Tr. 1095-97, at A-107, 104-05.)

By mid-July 2002, Service had stopped ordering products and was running its inventory down to zero. (Tr. 1100, at A-108; *see* Ex. 347, at A-88.) National Beverage was faced with a deteriorating sales situation in a peak season and only one entity (DTM) that was both capable and interested in its product distribution in the Twin Cities. (Tr. 1395-99, at A-109-113; Ex. 335, at A-114.) On August 19, 2002, National Beverage informed Petitioners and Service by letter that "our market share has continued to plummet and our brand equity has been severely damaged . . . [and] . . . we plan to take all steps necessary to protect our Mr. Pure brand in the Minnesota market." (Ex. 103, at A-115.)

National Beverage and DTM then agreed to begin an at-will business relationship involving DTM's purchase and resale of National Beverage's products. (Tr. 1402-03, at A-116-17; Ex. 343, at A-118.) Beginning with an order placed by DTM on August 27, 2002 (Ex. 347, at A-88), National Beverage sold products directly to DTM, on a nonexclusive basis (Exs. 114, 302, at A-119-20; Tr. 1176, at A-121), for resale in the flagging Minnesota market. National Beverage neither heard from, nor knew of, any other Minnesota entity interested in buying the products.

Thereafter, Petitioners undertook additional transactions to support a lawsuit. A document executed in September 2002 purported to unwind the Twin City/Service transaction. (Ex. 300, at A-122-23; Tr. 1004, at A-124.) Petitioners also purported to document the sale of the stock and assets of Twin City to Tri County Beverage & Supply, Inc. ("Tri County"), an unrepresented and unadvised third party. (Tr. 456-57, at A-125-26.) Neither Petitioners nor their counsel informed Tri County about National Beverage's August 19 letter (Tr. 471-75, 905, at A-127-32), even though Petitioners' transaction counsel knew that this information was material to any Twin City/Tri County transaction. (Tr. 737, at A-133.) The purported Twin City/Tri County deal called for Dunn to be paid $375,000 for the stock of Twin City (Ex. 298, at A-134-56), with an additional $450,000 forthcoming to Dunn and her husband under consulting agreements (Ex. 301, at A-158-59) that Dunn, in contemporaneous oral conversation, assured Tri County would not be enforced. (Tr. 223-24, at A-159-60.)

A letter from Petitioners' counsel dated September 13, 2002 purported to inform National Beverage that Petitioners had terminated the relationship with Service and also made some form of new agreement with Tri-County involving the sale of Twin City. (Ex. 112, at A-161.)

On September 24, 2002 (Ex. 303, at A-162), and again on October 10, 2002 (Ex. 305, at A-163), National Beverage asked Petitioners' counsel for additional information about Tri-County, but received none. In fact, Petitioners' counsel never even informed Tri-County about these inquiries from National Beverage. (Tr. 482-85, 907, at A-164-68.) Instead, Petitioners' counsel wrote to National Beverage asserting that "our client has directed us to commence litigation . . . and we will do so forthwith." (Ex. 304, at A-169-70.)

Petitioners served and filed a 17-count complaint, dated October 29, 2002, against National Beverage, HJMP, DTM, and National Beverage's chief executive officer, Nicholas Caporella. (A-171-84.) Neither this 2002 Complaint nor Petitioners' 2003 Amended Complaint (A-185-199) made any reference to the Twin City/Service transactions, or indeed to Service at all.

Count I of the Amended Complaint (**"Violation of the Minnesota Franchise Act – National Beverage, and HJMP"**) alleged that a franchise, as defined by Minnesota law, existed between Twin City as franchisee and National Beverage as franchisor, and that National Beverage had violated Minn. Stat. § 80C.14, subd. 3, which prohibits termination without good cause, notice, and opportunity to cure. (A-188; Special Verdict Form, at A-200-209.)

In connection with the next count of the Amended Complaint, Count II (**"Breach of Contract – National Beverage"**), Petitioners – for the very first time ever – identified and provided to National Beverage a copy of the purportedly governing written "franchise" contract, dated August 1, 1972 – twenty-seven years before National Beverage acquired the Mr. Pure brand. The contract was made among three entities – Home Juice Co., Associated Citrus Enterprises, and Twin City Home Juice Co. (A-189, A-210-13.)

Count II alleged that National Beverage made sales to DTM in breach of Paragraph 6 of this 1972 contract, which read:

> Home agrees that it will not sell the products which it manufactures to any customer within Twin City's marketing area as described in Exhibit A, without first obtaining written approval from Twin City.

(A-189; A-212.) The Amended Complaint then asserted the following additional counts: Count III -- Specific Performance; Count IV -- Breach of Contract (by DTM); Count V -- Violation of the Minnesota Deceptive Trade Practices Act; Count VI -- Violation of the Minnesota Trade Secrets Act; Count VII – Defamation; Count VIII -- Tortious Interference with Contractual Relations and Prospective Business Advantage (by DTM); Count IX -- Tortious Interference with Contractual Relations and Prospective Business Advantage; Count X -- Tortious Interference with Contractual Relations and Prospective Business Advantage of Susan Dunn and Richard Newstrom; Count XI -- Fraud and Negligent Misrepresentation; Count XII -- Preliminary and Permanent Injunction ; Count XIII -- Preliminary and Permanent Injunction (against DTM); Count XIV -- Violation of the Minnesota Consumer Fraud Act; Count XV -- Common Law Business Disparagement; and Count XVI -- Declaratory Judgment.

On multiple motions during the discovery period and before trial, the district court dismissed some counts of the Amended Complaint under Rules 12 and 56. The remaining claims (Counts I, II, IV, V, VI, VII, VIII, IX, and XV) were a tried to a jury from September 12-26, 2005.

At the conclusion of the trial, the jury was instructed on the elements of each of the various claims. The special verdict form – originally drafted by Dunn's counsel -- ran nine pages long and contained 49 questions including subparts. (A-200-09.) Questions 1-4 concerned the breach of contract claim against National Beverage. (A-200-01.) Questions 5-10 concerned the Minnesota Franchise Act claim against National Beverage. (A-201-02.) Questions 15-23 concerned the defamation claim against both defendants, and the remaining questions concerned other claims. (A-2043-09.)

In total, the special verdict form as drafted by Dunn's counsel contained thirteen separate questions on damages (*see* Question Nos. 4, 10, 14, 20a, 20b, 20c, 22a, 22b, 22c, 26, 31, 36, and 43, at A-200-09.)

In his closing argument, Petitioners' counsel walked the jury through the special verdict form questions in order. (Tr. 1554, at A-214.) After speaking specifically about the breach of contract liability questions (Question Nos. 1-3) and the breach of contract damages question (Question No. 4), he moved on to discuss the separate claim under the Franchise Act. (Tr. 1563-68, at A-215-20.) As he talked specifically about the Franchise Act damages question (Question No. 10), counsel implored the jury to award damages *in response to Question No. 10* if the jury felt that Petitioners had been damaged by any violation of the Franchise Act.

> [MR. KRASS:] . . . . If I could make this comment now, so I don't forget, all of these individual claims are important. They all have legal significance. ***So even though you might conclude that the damages are the same for the first cause of action and the second cause of action, don't skip one or not do it full justice. We need answers to all of them even if the damage answer remains the same.***

(Tr. at 1571-72 (emphasis added), at A-221-22.)

In its second day of deliberation, the jury returned the special verdict form with "$0" entered in response to Question No. 10. (A-202.) This was one of the ten damages questions (Question Nos. 10, 14, 20b, 22a, 22b, 22c, 26, 31, 36, and 43) on which the jury determined that Dunn and Twin City were entitled to recover no damages. (A-202-07.) The jury did assess $288,000.00 in damages against National Beverage for breach of contract (Question No. 4) and $64,369.45 in damages against National Beverage for defamation (Question Nos. 20a, 20c). (A-201, 204.) The jury awarded no damages against DTM. (A-204.)

On November 18, 2005, the court issued an Order for Judgment attaching the jury's special verdict form. (A-223-24, A-200-09.) The parties filed post-trial cross-motions. National Beverage moved for judgment notwithstanding the jury's verdict on Questions 1-4 (breach of contract); 7-9 (violation of the Franchise Act), and 15-21 (defamation.) (A-225-26.) Dunn filed a motion "for an Order of the Court determining that Plaintiffs are entitled to attorney fees under Minn. Stat. § 80C.17, Subd. 3," and

> [a]dditionally, should such be necessary to authorize the Court to enter its Order granting Plaintiffs' reasonable attorneys fees, Plaintiffs move for a judgment notwithstanding the verdict to award damages in the amount of $288,000, as and for the jury's response to Question No. 10.

(A-227-28.)

In the supporting memorandum, Dunn's counsel wrote:

> In the instant matter, the jury found a violation of the Minnesota Franchise Act but awarded Plaintiffs no damages. However, while considering the same facts, the jury determined that Defendant NBC

> breached its franchise agreement with Plaintiffs and awarded \$288,000.000 on that claim. Practically speaking, the evidence the jury considered on the breach of the franchise agreement claim was the same evidence the jury used to conclude that Defendant NBC terminated or cancelled Plaintiffs' franchise rights without good cause. Therefore, ***it is both illogical and contrary to the overwhelming weight of the evidence to find that although Plaintiffs suffered \$288,000.00 of damages as a result of Defendant NBC's breach of the franchise agreement, Plaintiffs suffered no damages as a result of the unjustified termination of its franchise's rights.***

(Petitioners' 10/12/05 Memo. at 13-14, at A-229-43) (emphasis added).

At the oral hearing on the cross-motions, however, counsel for Petitioners specifically withdrew the JNOV motion and any request to have the court alter or amend the jury's response to Question No. 10.

> MR. CONNELLY: .... We [National Beverage] would say, "We think 6, 7, 8 and 9 are wrong, and 10 is right on the money." But [Petitioners are] asking you for JNOV [on Question 10] right there. They are a little more candid about it in the brief. It would be this same standard. You know, the jury did what the jury did.
>
> MR. KRASS: We will withdraw that, by the way.

(Tr. 1613, at A-244.)

Accordingly, Petitioners' post-trial motions were for prejudgment interest and for an award of attorney fees on the existing special verdict form as returned by the jury. In an Order for Judgment dated November 17, 2005, the district court denied these motions by Petitioners "[f]or the reasons set forth in the Memoranda of Defendant NBC and HJMP."[3] (A-223-24.) The district court also denied

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National Beverage's post-trial motions.[4] On December 29, 2005, judgment in favor of Petitioners, and against National Beverage, was entered. (A-223-24.) Following a subsequent insertion of costs and disbursements, the final amount of the judgment is $360,235.34. (A-223-24.)

National Beverage appealed from the judgment of the district court. *Dunn v. Nat'l Bev. Corp.*, 729 N.W.2d 637, at *1-2 (Minn. App. 2007). Petitioners cross-appealed from the district court's denial of its motion for an order determining that they were entitled to attorney fees under Minn. Stat. § 80C.17. *Id.* The court of appeals affirmed the district court in all respects. *Id.* at *44. Petitioners petitioned this Court for further review of the court of appeals ruling, as set forth in Part IV of its April 3, 2007 opinion. National Beverage requested cross-review of the court of appeals' ruling on contract assumption, as set forth in Part I of the opinion. This Court granted Petitioners' petition and denied National Beverage's cross-petition.

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[3] National Beverage's Memorandum in Opposition to Plaintiff's Motion can be found at A-245-57.

[4] Relying on the district court's specific confirmation that no relief was being awarded to Petitioners on the Franchise Act claim, National Beverage focused its appeal to the court of appeals on the two causes of action – breach of contract and defamation – that had resulted in the award of damages. National Beverage nevertheless maintains that the district court erred in denying the multiple pretrial, in-trial, and post-trial motions made for judgment in National Beverage's favor on the Petitioners' claim under the Minnesota Franchise Act because, among other reasons, its business relationship with Petitioners was not a franchise within the meaning of Minn. Stat. § 80C.01 and its conduct did not constitute an actionable violation of Minn. Stat. § 80C.14, subd 3.

STANDARD OF REVIEW

"On review, this court will not reverse a trial court's award *or denial* of attorney fees absent an abuse of discretion." *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987) (emphasis added); *see also Hughes v. Sinclair Oil Corp.*, 389 N.W.2d 194, 200 (Minn. 1986) (concluding that the amount of an attorney fees award under Minn. Stat. § 80C.17, subd. 3, is subject to review for abuse of discretion).

In particular, this Court applies the abuse of discretion standard when reviewing a district court's decision to award attorney fees under a permissive fees statute. *Blattner v. Forster*, 322 N.W.2d 319, 321 (Minn. 1982) (interpreting Minn. Stat. § 549.21).

Statutory interpretation, on the other hand, is a question of law subject to *de novo* review. *F-D Oil Co. v. Comm'r of Revenue*, 560 N.W.2d 701, 704 (Minn. 1997). Here, the scope of this Court's *de novo* review is limited to this question (assuming that the question has been properly and adequately presented by the Petitioners): is the attorney fees provision in the Minnesota Franchise Act mandatory, or does it permit a district court to exercise its discretion?

ARGUMENT

I. THE LOWER COURTS PROPERLY INTERPRETED MINN. STAT. § 80C.17 AS LACKING A MANDATORY DIRECTIVE TO THE DISTRICT COURT TO AWARD ATTORNEY FEES IN THIS CASE

A. Minn. Stat. § 80C.17, Subd. 3, Is Permissive With Respect to Attorney Fees.

Implied in Petitioners' framing of the standard of review and overall argument is the premise that Minn. Stat. § 80C.17 contains a mandatory, rather than permissive, attorney fees provision. (*See, e.g.*, Petitioners' Brief at 11, 14-15, 19.) Setting aside for a moment the question whether even a mandatory attorney fees statute would require an award in the absence of an award of relief, the plain language of section 80C.17, when contrasted with that of other attorney fees statutes, demonstrates that section 80C.17 is permissive with respect to attorney fees.

Mandatory fees statutes are easy to spot by their plain language. *See, e.g.*, Minn. Stat. § 47.69, subd. 5 (consumer privacy violation) ("the defendant *shall be liable for* actual damages, or $500, whichever is greater, punitive damages when applicable, *together with the court costs and reasonable attorney fees* incurred by the plaintiff."); Minn. Stat. § 53C.12, subd. 2 (action against seller under Motor Vehicle Retail Installment Sales Act) ("In case of a fraudulent violation of any provision of sections 53C.01 to 53C.14, the buyer *shall have a right to recover* from the person committing such violation, to set off or counterclaim in any action by such person to enforce such contract an amount as liquidated damages, the whole of the contract due and payable, *plus reasonable attorneys' fees*."); Minn. Stat. § 571.72, subd. 6 (bad faith claim of exemption from garnishment) ("If, in a proceeding brought under section 571.91, or a similar proceeding under this chapter to determine a claim of exemption, the claim of exemption is not upheld, and the court finds that it was asserted in bad faith, the creditor *shall be awarded* actual damages, costs, *reasonable attorney fees* resulting from the additional proceedings, and an amount not to exceed $100.") (emphasis added).

In Minn. Stat. § 80C.17, the only relevant "shall" language appears in a subdivision that conspicuously lacks any reference to attorney fees. Subdivision one (entitled "Damages, rescission, and other relief") provides: "A person who violates any provision of this chapter or any rule or order thereunder *shall be liable* to the franchisee or subfranchisor who may sue for *damages caused thereby*, for *rescission*, or *other relief as the court may deem* appropriate," without any mention of attorney fees. If the Legislature intended to make an attorney fees award mandatory, it would have logically included "reasonable attorney fees" in section 80C.17, subd. 1. *See, e.g.,* Minn. Stat. § 325F.6643(b) ("A person injured by a violation of sections 325F.664 to 325F.6642 *shall recover* the actual damages sustained, *together with costs and disbursements, including reasonable attorney fees*."); *cf. Holiday Recreational Indus. v. Manheim Servs. Corp.*, 599 N.W. 2d 179, 184 (Minn. App. 1999) ("Section 325F.6643(b) *mandates* that an injured party 'shall recover . . . reasonable attorney fees.'") (emphasis added).

Moreover, when attorney fees are mentioned in Minn. Stat. § 80C.17, at subdivision three, the language merely provides that a plaintiff *may* sue for relief, including attorney fees.

> Subd 3. Recovery.
> 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.

Under Minn. Stat. § 645.44, subds. 15, 15a, 16 (2006), "may" is permissive, "must" is mandatory, and "shall" is mandatory. The plain language of subdivision 3 therefore does not indicate that a court is required to award attorney fees simply because the plaintiff requests them.

Indeed, the Sixth Circuit Court of Appeals, on facts and statutory language nearly identical to those in this case, upheld a district court's refusal to award attorney fees. *Little Caesar Enters., Inc. v. OPPCO, LLC*, 219 F.3d 547 (6th Cir. 2000). In *Little Caesar*, a former franchisee brought a variety of claims against the franchisor, including a claim under the South Dakota Franchise Act. *Id.* at 552-54. The appellate court upheld the district court's finding that the franchisor had violated the South Dakota Franchise Act, but nevertheless upheld the district court's ruling denying attorney fees under the Act. *Id.* at 552.

The Court noted that the South Dakota statute, which is substantively identical to the Minnesota Franchise Act, provided that parties who violated the statute "'shall be liable to the franchisee . . . who may sue for damages caused thereby, for rescission, or other relief as the court may deem appropriate.'" *Id.* at 554 (quoting S.D. Codified Laws § 37-5A-83); *cf.* Minn. Stat.§ 80C.17, subd. 1 (same). The Court recognized that "it is mandatory that a person who violates the statute be found liable." *Little Caesar*, 219 F.3d at 554. In contrast, the provision governing the award of fees, which provided that "'any suit [authorized under the Act] *may be* brought to recover the actual damages sustained by the plaintiff together with costs and disbursements plus reasonable attorney's fees . . .'" was deemed permissive. *Id.* (quoting S.D. Codified Laws § 37-5A-85); *cf.* Minn. Stat. § 80C.17, subd. 3 (same). Indeed, the appellate court upheld the district court's denial of attorney fees, notwithstanding the fact that the district court actually awarded some relief to plaintiffs, namely, a rescission of the franchise agreements. *Little Caesar*, 219 F.3d at 554.

The Sixth Circuit's holding that an attorney fees provision substantively identical to Minn. Stat. § 80C.17 is permissive in nature is consistent with the American Rule that a prevailing party must bear its own legal expenses absent clear statutory fee-shifting language or the application of a judicially fashioned exception. *See* Derfner & Wolf, Court Awarded Attorney Fees v. 1, § 1.01 (LexisNexis 2006) ("Because of the American Rule, federal courts are loathe to read statutory language to permit an award of attorney fees unless the language is unmistakably clear."); *see also Barr/Nelson, Inc. v. Tonto's, Inc.*, 336 N.W.2d 46, 53 (Minn. 1983) ("We have long held that attorney fees are not recoverable in litigation unless there is a specific contract permitting or a statute authorizing such recovery."). Based on the plain language of Minn. Stat. § 80C.17, the Legislature's demonstrated capability of using unmistakable mandatory fee language in other statutes, and case law interpreting substantively identical statutory language as permissive, the only logical conclusion can be that section 80C.17 *permits* the award of attorney fees in certain circumstances, but does not mandate them.

B. Even if Minn. Stat. § 80C.17, Subd. 3, Is Mandatory in Nature, an Award of Attorney Fees Is Not Mandated Unless Plaintiff Prevails.

In this case, the court of appeals did not reach an explicit conclusion that the attorney fees provision of the Minnesota Franchise Act is permissive. As the court of appeals saw it, such a conclusion was not necessary in order to affirm the district court. Rather, the court of appeals opinion is most fairly read as concluding that a district court is *prohibited* from awarding attorney fees under Minn. Stat. 80C.17 where no relief is awarded under the Minnesota Franchise Act.[5] *Dunn,* 729 N.W.2d 637, at *29-30.

National Beverage believes that the proper reading of the statute is the one that the Sixth Circuit employed in *Little Caesar* for the substantively identical South Dakota Franchise Act provision. Minnesota Statutes § 80C.17, subd. 3, is a permissive attorney fees statute under which the district court exercises its

[5] While National Beverage does not contest this interpretation, it is not necessary for the Court to adopt this reasoning in order for National Beverage to prevail on this appeal. Rather, it is only necessary for this Court to conclude that § 80C.17 is permissive and the district court did not abuse its discretion in declining to award fees on these facts.

discretion in ruling on attorney fees motions. Even if this Court disagreed, it is hard to imagine a bright-line rule mandating an award of attorney fees in this case. Indeed, even a new rule of law such as "Minn. Stat. § 80C.17 mandates an award of attorney fees in every case where a plaintiff establishes damages (or entitlement to equitable relief) proximately caused by a violation of the Minnesota Franchise Act" – could never be anything more than *dicta* here. As fully discussed in Section II below, the jury quite specifically determined that Petitioners *did not suffer damages* as the result of any Franchise Act violation.[6]

Petitioners have cited no authority (and National Beverage has found none) in which a plaintiff to whom a court or jury has specifically declined to award any relief under a statute has been awarded attorney fees under the same statute. (*See* Petitioners' Brief at 16-19.) The court of appeals correctly rejected Petitioners' argument that it was entitled to fees in the absence of relief, observing that the Franchise Act is not a strict liability statute, and concluding that when a plaintiff is not automatically entitled to damages upon a finding of a statutory violation (as in strict liability), the plaintiff is similarly not entitled to attorney fees based on a statutory violation that caused no actual damages. *Dunn*, 729 N.W.2d 637, at *42-43.

[6] Moreover, Petitioners withdrew their JNOV motion originally submitted to challenge this determination by the jury. *See, supra*, section II.C.

The conclusion drawn by the court of appeals is consistent with the general rule that only "prevailing" parties are entitled to attorney fees. *See* Derfner & Wolf, Court Awarded Attorney Fees v.1, § 1.01.

The court of appeals essentially determined that Section 80C.17, subd. 3 is, in one sense, "mandatory": if no relief is awarded under the Act, then the district court has no discretion to award attorney fees pursuant to the statute, and application of the American Rule is mandated. If this Court declines to adopt (or reach) National Beverage's argument on the permissive nature of Minn. Stat. § 80C.17 and the district court's reasonable exercise of its discretion, National Beverage urges the adoption of the court of appeals' reasoning on this point.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY RULING THAT PETITIONERS HERE SHOULD NOT RECOVER ATTORNEY FEES.

The circumstances here justify the district court's decision to award no attorney fees. That decision is easily defensible as within the bounds of the discretion Minnesota law grants trial judges to rule on attorney fees motions of this sort. Further still, if more were needed (and it is not), the district court's decision to award no attorney fees to Petitioners here is the *only* defensible decision under the unique facts of this case. This is true for several reasons:

A. Petitioners Obtained No Relief Under the Minnesota Franchise Act.

Here, despite finding (incorrectly, in National Beverage's long-argued view) that the Franchise Act applied and had been violated, the jury nonetheless refused to award *any* relief to Petitioners on their Franchise Act claim. (A-202.) Because Petitioners failed to obtain relief on their claim under the Franchise Act, the district court, exercising its discretion under the Act, properly denied Petitioners' motion for attorney fees.

As a threshold matter, the district court was cognizant that its decision to award or deny attorney fees was discretionary.[7] At the close of the hearing on Petitioners' motion for attorney fees, the district court acknowledged as much on the record.

> THE COURT: That surprised me more than anything. Well, you guys are worth your weight in gold. ***And it seems to me, I have a lot of discretion. I will try to use it wisely.*** Thank you.
> MR. CONNELLY: Thank you, Judge.
> MR. KRASS: Thank you, Your Honor.
> THE COURT: Have a good weekend.

(Tr. at 1626, at A-258) (emphasis added).

Petitioners have cited no case, and National Beverage has found none, decided at any point in the history of the Minnesota Franchise Act in which a plaintiff to whom a court or jury had specifically declined to award *any* relief under the Act has been awarded attorney fees under the Act. Nothing in the

---

[7] If this Court determines that the district court should have ruled as a matter of law, rather than as a matter of discretion, that Petitioners were not entitled to attorney fees, any application of the wrong legal standard by the district court was undoubtedly harmless error. *See* Minn. R. Civ. P. 61.

Franchise Act or the case law supports such a radical departure from case precedent and common sense.

Moreover, the reasoning of the appellate panel in *Little Caesar* -- upholding a district court's refusal to award attorney fees notwithstanding a finding of liability under a substantively identical franchise statute -- supports the district court's denial of attorney fees in this case.

Despite concluding that the Minnesota Franchise Act applied and was violated (Special Verdict Form Question Nos. 6-9, at A-201-02), the jury refused to award *any* relief to Petitioners on this claim. (Special Verdict Form Question No. 10, at A-202.) Because Petitioners did not succeed in obtaining relief on their claims under the Minnesota Franchise Act, the district court, exercising its discretion under the Act, properly refused to award Petitioners attorney fees. *Cf. Four Corners Serv. Station v. Mobil Oil Corp.*, 51 F.3d 306, 315 (1st Cir. 1995) (holding that court did not abuse its discretion under the Petroleum Marketing Practices Act by refusing to award attorney fees where plaintiff did not recover any damages or receive any injunctive relief).

Given the absence of any precedent supporting Petitioners' request for attorney fees, and the existence of case law (albeit from other jurisdictions) supporting the district court's ruling, the court did not abuse its discretion in ruling as it did. *Cf. State v. Laine*, 715 N.W.2d 425, 432-33 (Minn. 2006) (noting a movant's failure to cite authority supporting his position in concluding that the district court did not abuse its discretion in denying the motion).

B. Petitioners Specifically Urged the Jury to Award Damages Under the Franchise Act Even if Damages Were Already Awarded for Breach of Contract.

Petitioners assert that "[a] fair reading of the special verdict form confirms that the jury decided not to award damages for Claim II because such damages would be duplicative to those awarded [for Claim I]." (Petitioners' Brief at 15.) But Petitioners' assertion is not based on any *apparent* defect with the jury's special verdict form answers. (*See* Petitioners' Brief at 15-16.) In fact, there is no evidence on the face of the special verdict form supporting a conclusion that the jury was confused or that it intended a different result than it effected. Each question that requires an answer has one. (Special Verdict Form, at A-200-09.). The jury left blank lines for questions that did not require a response. (*Id.*) Finally, the jury entered "0" on appropriate lines rather than leaving them blank. (*Id.*)

But even accepting for the sake of argument that a special verdict form may sometimes require interpretation, Petitioners' closing argument to the jury demonstrates why no such interpretation is required here. During his closing argument, Petitioners' counsel urged the jury to award substantial damages on Lines 4 *and* 10 of the special verdict form. Counsel was well aware then that Lines 4 and 10 required distinct answers even if certain facts overlapped, and he conveyed this clearly to the jury.

> MR. KRASS: . . . . If I could make this comment now, so I don't forget, all of these individual claims are important. They all have legal significance. So even though you might conclude that the

> damages are the same for the first cause of action and the second cause of action, ***don't skip one or not do it full justice. We need answers to all of them even if the damage answer remains the same.***

(Trial Tr. at 1572, at A-222) (emphasis added).

The jury responded to this clear request for a full answer to Question No. 10 by writing "0" on the line for Question No. 10. There is no reason to presume anything other than that the jury understood what it was doing. It did not find damage for violation of the Franchise Act. It found damage for a breach of contract.

Furthermore, the jury was instructed on all of the elements of liability, including the significance of causation.[8] Accordingly, any arguments that the jury was confused, or insufficiently informed, or intended something other than the

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[8] The jury was instructed:

> A party's damages for harm to his or her property must not include any loss that the party could have prevented by reasonable care.
>
> A person has a duty to act reasonably to prevent or reduce his or her loss of earnings.
>
> He or she is limited to those damages that he or she would have experienced if he or she had acted reasonably in reducing her losses.
>
> A party asking for damages must prove the nature, extent, duration, and consequences of his or her injury.
>
> You must not decide damages based on speculation or guess.
>
> Damages are money. Damages means a sum of money that will fairly and adequately compensate a person for his or her injuries directly caused by a person's wrongful conduct.
>
> A "direct cause" is a cause that had a substantial part in bringing about the harm.
>
> It is the party asking for damages that has the burden to prove causation, and it cannot be proved by mere speculation or conjecture.

(Tr. 1463-64, at A-259-60.)

plain meaning of its special verdict form answer on Line 10 ("0") is completely without merit. At a minimum, it cannot be said under any circumstances that the district court abused its discretion by taking the jury at its word and using that word as the basis for its decision to deny an award of attorney fees.

C. Petitioners Have Waived Any Right to Attack the Jury's Answer to Question No. 10 in the Appellate Courts.

Beyond their arguments' failures on the merits, Petitioners have failed, as a procedural matter, to preserve any argument that the jury verdict is inconsistent, that the special verdict form was flawed, or that the district court erred in failing to grant judgment notwithstanding the verdict (JNOV) on the jury's answer to Question No. 10.

In conjunction with its motion for attorney fees, Petitioners prepared and filed an alternative motion for JNOV, arguing that the "$0" award for Question No. 10 was against the substantial weight of the evidence. In its memorandum in support of this JNOV motion, Petitioners had argued:

> In the instant matter, the jury found a violation of the Minnesota Franchise Act but awarded Plaintiffs no damages. However, while considering the same facts, the jury determined that Defendant NBC breached its franchise agreement with Plaintiffs and awarded $288,000.000 on that claim. Practically speaking, the evidence the jury considered on the breach of the franchise agreement claim was the same evidence the jury used to conclude that Defendant NBC terminated or cancelled Plaintiffs' franchise rights without good cause. ***Therefore, it is both illogical and contrary to the overwhelming weight of the evidence to find that although Plaintiffs suffered $288,000.00 of damages as a result of Defendant NBC's breach of the franchise agreement, Plaintiffs suffered no damages as a result of the unjustified termination of its franchise's rights.***

(Petitioners' 10/12/2005 Memo. at 13-14, at A-229-43) (emphasis added).

But Petitioners withdrew their JNOV motion on the record at the hearing. (Tr. at 1613, at A-244). Thus, the district court was never asked to rule whether the jury's award of "0" on line 10 was against the weight of the evidence, was caused by a flawed special verdict form, or should for any other reason not be taken at face value. Nor were any such arguments advanced to the court of appeals. Claims not raised below are not properly before this Court. *Cf. Azure v. State*, 700 N.W.2d 443, 447 (Minn. 2005). Accordingly, any attempts by Petitioners to argue before this Court that the jury's award of "0" damages on Line 10 was erroneous should be disregarded.

D. <u>Petitioners Advanced Distinct Causes of Action in the District Court.</u>

In their brief to this Court, Petitioners intentionally conflate the concepts of "breach of contract" and "statutory violation." This happens repeatedly. (*E.g.*, Petitioners' Brief at 12 ("NBC violated the Franchise Act by breaching Twin City's 1972 Franchise Agreement . . . NBC breached the franchise created by operation of the Franchise Act."); and at 14-15 ("Because the jury found that NBC breached its 1972 Franchise Agreement with Twin City, a plain violation of the Minnesota Franchise Act . . . .")).

First of all, the breach of a contract – even if that contract is determined to be a franchise agreement – is not a violation of the Franchise Act. The substantive provisions of the Franchise Act are found at Minn. Stat. § 80C.14, and breach of a franchise contract is nowhere to be seen there. As the court of appeals noted: "the jury's finding of the breach of the 1972 franchise agreement does not implicate the franchise act; the jury simply found the breach of a contract in the form of a franchise agreement." *Dunn*, 729 N.W.2d at *43-44. Franchise contracts, like other contracts, contain many provisions; when one of those provisions is breached, there is a breach of contract remedy at common law.

In this case, as it was framed and litigated by Petitioners, the clause in the 1972 contract alleged to have been breached by National Beverage *did not implicate* Minn. Stat. § 80C.14, subd.3 (prohibiting termination or cancellation of the relationship without good cause, notice, and cure). Rather, it dealt with an agreement to seek written consent before making any sales to other customers:

> 6. Home agrees that it will not sell the products which it manufactures to any customer within Twin City's marketing area as described in Exhibit A, without first obtaining written approval from Twin City.

(*Compare* Tr. 1561, at A-261, *with* Tr. 1571, at A-221.)

To maximize their chances of success, Petitioners proceeded in the district court on multiple and distinct theories. The separate breach of contract claim was prominent from the filing of the Complaint and the Amended Complaint through the close of the case. The breach of contract theory (for sales without written permission) was always independent of the Minnesota Franchise Act theory (for wrongful termination) – it concerned different conduct and it provided a separate bid to win damages in this case.

This separation served Petitioners' purposes well, from a strategic perspective, in that it partially insulated Petitioners from many of National Beverage's defenses and attacks on the Franchise Act claim, including: (1) the possibility that their contract or agreement with National Beverage did not meet the statutory definition of a franchise under Minn. Stat. § 80C.01 because no direct or indirect franchise fee was paid; or (2) the possibility that Petitioners' and Service's actions would be found to constitute abandonment under Minn. Stat. § 80C.14, or (3) the possibility that Petitioners' and Service's actions would provide statutory good cause for the "termination or cancellation."

None of these defenses to the Franchise Act claim posed similar danger to the breach of contract claim because the contract claim did not require proof of "franchisee" status, nor involve cancellation or termination, or concepts of good cause or abandonment. Rather, the breach of contract claim simply concerned the lack of written approval for sales to a second buyer during an otherwise ongoing business relationship. (*See* Tr. 1561, at A-261.)

The district court – which presided over pre-trial motion practice and the two-week trial, crafted the jury instructions, and worked with counsel over the construction of the special verdict form – acted well within its discretion in declining to turn a blind eye either to the jury's answers to the special verdict form or to the differences between Petitioners' breach of contract claim and their Franchise Act claim, which differences Petitioners had strategically exploited throughout the litigation.

The foregoing reasons, taken together or separately, provide ample justification for the district court to have exercised its discretion in the way it did: *i.e.*, awarding $0 in attorney fees commensurate with the jury award of $0 in damages on Petitioners' Franchise Act claim.

CONCLUSION

Petitioners advance a strained, unsupportable reading of Section §80C.17, subd. 3. In addition, they seek to rewrite the special verdict form that they had so carefully constructed at trial. Now, following the jury's verdict, they would like to merge two separate causes of action into one, after repeatedly arguing the claims were separate and distinct throughout the course of this litigation. This Court should reject these attempts. Plainly, there is no mandatory requirement to award attorney fees under Section 80C.17 when a plaintiff merely files a claim under – or indeed establishes a violation of – the Minnesota Franchise Act.

This Court should not upset the verdict form – which the jury carefully completed after detailed explanation by Petitioners' counsel – or eliminate the discretion afforded the trial judge in this case. Petitioners' belated efforts to challenge the jury's verdict and merge the two causes of action are improper and must be rejected.

The district court's decision to decline to award attorney fees to these Petitioners in these circumstances was fully justified. Under the plain language of Minn. Stat. § 80C.17 and the facts and circumstances of this case, the judgment of the district court on this issue, as affirmed in the carefully considered opinion of the court of appeals, should be affirmed by this Court.

Dated: August 20, 2007

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STATE OF MINNESOTA

IN SUPREME COURT

A06-397

Susan Dunn, et al.

Appellants (A06-397)

vs.

National Beverage Corp., a Delaware corporation, et al.,

Respondents (A06-397)

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 7,394 words. This brief was prepared using Microsoft Word 2003 software.

Dated: August 20, 2007

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