

Nos. A06-396 and A06-397

State of Minnesota  
In Court of Appeals

Susan Dunn, et al.,

*Respondents (A06-396),  
 Appellants (A06-397),*

vs.

National Beverage Corp., et al.,

*Appellants (A06-396),  
 Respondents (A06-397),*

DTM Distributing, Inc.,

*Defendant (A06-396),  
 Respondent (A06-397).*

**APPELLANTS' REPLY BRIEF (A06-397)**

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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") appeal (A06-397) of the Dakota County District Court's Order denying Twin City's post-trial motion for attorneys' fees, Respondent National Beverage Corporation ("NBC") incorrectly alleges that attorneys' fees may only be granted pursuant to the Minnesota Franchise Act along with damages sustained by the plaintiff and identifies an inappropriate standard of review. Additionally, NBC manufactures two holdings from decisions of this Court it holds out as controlling legal authority which simply do not exist. Further, NBC presents distinguishable and irrelevant legal authority from other jurisdictions in a desperate attempt to support the district court's deficient and incorrect order. For these and all of the reasons that follow, the Court of Appeals should reverse the district court's denial of Twin City's motion for attorneys' fees.

## ARGUMENT

### **I. NBC MISCONSTRUES THE APPLICABLE STANDARD OF REVIEW.**

NBC claims that the standard of review in considering Twin City's appeal of the district court's denial of its post-trial motion is abuse of discretion. However, Twin City's appeal requires an interpretation of the language and meaning of Minn. Stat. § 80C.17. Accordingly, the applicable standard of review is de novo. See Wilson v. Comm'r of Revenue, 619 N.W.2d 194, 197-98 (Minn. 2000) (statutory construction is a question of law subject to de novo review); Brookfield Trade Ctr. Inc. v. County of

Ramsey, 584 N.W.2d 390, 393 (Minn. 1998) (statutory construction is a question of law reviewed de novo by the appellate courts).

For its part, NBC relies on Pathmanathan v. St. Cloud State University, 461 N.W.2d 726 (Minn. Ct. App. 1990). However, the claim at issue in Pathmanathan and the plain language of the statute interpreting that claim are distinct from the issues involved in Twin City's appeal. Therefore, it is of no value in considering Twin City's appeal.

In Pathmanathan, the plaintiff claimed a violation of the Minnesota Data Practices Act ("MDPA"). 461 N.W.2d at 727. With respect to the recovery of attorneys' fees upon establishing a violation of the MDPA provided:

[A]ny aggrieved person may bring an action in district court and may recover costs and disbursements, including reasonable attorney's fees, as determined by the court.

Id. at 728 (citing Minn. Stat. § 13.08, subd. 4). Relying on the plain language of the statute, the appeals court held the permissiveness of the language that an aggrieved person may recover costs, disbursements and attorneys' fees as determined by the court was discretionary and that the proper standard of review was therefore abuse of discretion. Id. (emphasis added).

In stark contrast to Pathmanathan, the Minnesota Franchise Act does not contain such permissive and discretionary plain language. With respect to the recovery of attorneys' fees, it 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. Thus, it is evident from this language that the Minnesota Franchise Act, unlike the MDPA, does not contain similar permissive language with respect to the recovery of attorneys' fees upon establishing a statutory violation and the distinction is telling. Indeed, NBC is unable to locate any decision from the Minnesota courts holding that the language of the Minnesota Franchise Act concerning the recovery of attorneys' fees is subject to abuse of discretion review. Moreover, as a practical matter, to the extent that this analysis requires an interpretation of the Minnesota Franchise Act, the appropriate standard of review is de novo.<sup>1</sup>

**II. IRRESPECTIVE OF THE STANDARD OF REVIEW, THE COURT OF APPEALS SHOULD REVERSE BECAUSE THE DISTRICT COURT ERRED IN DENYING TWIN CITY'S REASONABLE ATTORNEYS' FEES.**

Irrespective of the standard of review applied by the Court of Appeals, it should still reverse as the Noble v. C.E.D.O., Inc. and Steve Parker Supply, Inc. v. Ecolab, Inc. decisions cited by NBC (and apparently relied upon by the district court) have no application to the issue before the appeals court and are not controlling legal authority. Additionally, the plain language of the Minnesota Franchise Act and interpretation of similarly-situated statutes belie NBC's position and the legal support cited by NBC from other jurisdictions is distinguishable and without merit. Further, to the extent that the

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<sup>1</sup> In any event, the Pathmanathan court reversed and remanded the trial court's ruling concerning the issue of attorneys' fees because it failed to state adequate reasons for its decision. This issue, which also constitutes cause for reversal here, will be discussed later in this brief.

Court of Appeals employs the abuse of discretion standard, the district court's failure to make any findings to support its decision and its apparent reliance on inapplicable law constitutes an abuse of discretion and should be reversed. Moreover, the jury awarded damages to Twin City for NBC's breach of the franchise agreement, which also established a violation on the Minnesota Franchise Act, and therefore served as a basis upon which to award attorneys' fees.

**A. The Noble v. C.E.D.O., Inc. and Steve Parker Supply, Inc. v. Ecolab, Inc. Decisions do Not Support The District Court's Decision to Deny Twin City Its Reasonable Attorneys' Fees.**

NBC takes great pains to convince the Court of Appeals that the Noble v. C.E.D.O., Inc. and Steve Parker Supply, Inc. v. Ecolab, Inc. decisions serve as controlling legal authority to support the district court's decision to deny Twin City's post-trial motion. As discussed at length in Twin City's initial brief, however, NBC's efforts are unconvincing and without merit. Indeed, contrary to NBC's allegations, neither Noble nor Steve Parker Supply, Inc. ever reached the merits of whether to award attorneys' fees on the claimed Minnesota Franchise Act violations.

The Noble court rejected the complaining party's request for attorneys' fees on the basis that the three-year statute of limitations had expired on the franchise act claim and that, solely because of the statute of limitations issue, the application for attorneys' fees was barred. 374 N.W.2d at 742. The decision made no mention of the jury's failure to award actual damages on the Minnesota Franchise Act claim as a prohibition to obtaining attorneys' fees. Id. In Steve Parker Supply, Inc., the issue on appeal was whether the

plaintiff was entitled to costs and disbursements pursuant to Minn. Stat. § 549.04 as it recovered less than it sought on the breach of contract claim and recovered nothing on the franchise claim. (Respondents Addendum at Add. 2-3). The issue of whether an award of attorneys' fees was appropriate pursuant to Minn. Stat. § 80C.17, subd. 3 was not even before the appeals court as the jury rejected the franchise act claim and plaintiff did not appeal it. (Id. at Add. 3).

Accordingly, even a cursory examination of the decisions cited by NBC, and apparently relied upon by the district court, results in the inescapable conclusion that they have no application to the case at bar and the district court erred (and indeed abused its discretion) in apparently accepting them.<sup>2</sup>

**B. The Plain Language of the Minnesota Franchise Act and Similarly-Situated Remedial Statutes Mandates Reversal.**

The plain language of the Minnesota Franchise Act indicates that to be entitled to the remedies contained therein, Twin City must establish an authorized lawsuit. Minn. Stat. § 80C.17, subd. 3. An authorized lawsuit requires two elements: the existence of a franchise and a violation of the Act. See id. at 80C.17, subd. 1 (a person who violates any provision of this chapter shall be liable to the franchisee).

In the instant matter, the special verdict form establishes that Twin City had a franchise with NBC and that NBC violated the franchise by selling directly to DTM in

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<sup>2</sup> As stated in its brief in chief, the district court made no findings and did not include a memorandum of law explaining its ruling in denying Twin City's motion for attorneys' fees. Instead, it simply referenced NBC's memorandum of law opposing Twin City's motion. (App. at A-99). This constitutes an abuse of discretion.

contravention of the franchise agreement's exclusivity provision. NBC's App. at A-101-02. NBC does not challenge either of these findings on appeal. As stated previously, the plain language of the Act does not require Twin City to be awarded actual damages or be the "prevailing party" to recover attorneys' fees.<sup>3</sup> Accordingly, Twin City should have been awarded its reasonable attorneys' fees for establishing a franchise and a violation of that franchise and the district court erred in ruling otherwise.

Additionally, pursuant to the similarly-situated Minnesota Agricultural Equipment Dealership Act ("MAEDA"), attorneys' fees are properly awarded upon proof that a manufacturer violated the Act. See Wadena Implement Co. v. Deere & Co., Inc., 480 N.W.2d 383 (Minn. Ct. App. 1992). In this matter, Twin City proved that NBC violated the Minnesota Franchise Act, which is similar in language and intent to the MAEDA. Therefore, there is a basis upon which the district court should have relied to award Twin City its attorneys' fees reasonably incurred in proving NBC's Minnesota Franchise Act violation. Accordingly, the Court of Appeals should reverse and award Twin City its reasonable attorneys' fees.

**C. The Legal Authority Submitted by NBC is Distinguishable and Unavailing.**

NBC cites to several cases outside Minnesota to support its position that the district court correctly declined to grant Twin City's motion for attorneys' fees. These cases, however, are distinguishable and unavailing. More importantly, should the appeals court apply the abuse of discretion standard to Twin City's appeal, these cases support a

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<sup>3</sup> The jury in the instant case did award Twin City \$288,000.00 in damages on the breach of contract claim, the contract being an undisputed franchise agreement.

determination that the district court in fact abused its discretion in denying Twin City's motion.

For example, NBC cites to Dennis Simmons, D.D.S., P.A. v. Modern Aero, Inc., 603 N.W.2d 336 (Minn. Ct. App. 1999) for the proposition that the district court appropriately denied Twin City's motion for attorneys' fees because the jury did not award it actual damages on that claim. In Dennis Simmons, D.D.S., P.A., an employee of Modern Aero damaged Simmons' aircraft in 1990 and agreed to and in fact undertook to complete all repairs. 603 N.W.2d at 337-38. In 1996, however, Simmons' aircraft was vandalized and during the insurance inspection the adjustor identified defects in the 1990 repairs. Id. at 338. Simmons commenced a lawsuit to recover for the improper repairs. Id. After discovery, Simmons attempted to amend his complaint to add a claim under Minnesota's Uniform Deceptive Trade Practices Act ("DTPA"). Id. The district court denied the amendment, concluding that Simmons did not have a viable DTPA claim and Simmons appealed. Id.

The Court of Appeals affirmed, holding that the DTPA provided for only injunctive relief and because Simmons pursued damages – and not an injunction – he did not state a claim upon which relief could be granted. Id. at 339. With respect to the issue of attorneys' fees, the appeals court acknowledged that because the DTPA's unambiguous language specifically required the aggrieved party to be the "prevailing party," and because Simmons sought only damages in clear contravention to the DTPA, he could not prevail as a matter of law. Id. Accordingly, the appeals court determined

that Simmons could not amend his complaint to allege a claim to recover his attorneys' fees and could not recover such fees on the basis of already existing negligence and breach of contract claims. Id.

In the instant matter, in stark contrast to the DTPA, the plain language of the Minnesota Franchise Act does not require Twin City to be a prevailing party for an entitlement to attorneys' fees. Moreover, the Dennis Simmons, D.D.S., P.A. court merely recognized that because Simmons sought relief not authorized by the statute, he could not be a prevailing party. Such is not the case here and on that basis Dennis Simmons, D.D.S., P.A. is distinguishable and inapplicable.

Additionally, NBC relies on Bachovchin v. Stingley, 504 N.W.2d 288 (Minn. Ct. App. 1993). However, this case is also distinguishable. The statute at issue in Bachovchin provided that “[a]ny person injured by a violation of sections 325E.13 to 325E.16 shall recover the actual damages sustained together with costs and disbursements, including a reasonable attorney’s fee.” 504 N.W.2d at 290. Specifically, the appeals court held that to be considered “injured” as that term was used in the statute a person must have been awarded actual damages. Id. Because the aggrieved party did not obtain any damages on his claim in Bachovchin, the court held he was not injured as a matter of law. Id. Because there was no injury, the party could not obtain attorneys’ fees. Id.

The Minnesota Franchise Act is tellingly distinct from the statute at issue in Bachovchin. The Minnesota Franchise Act states that any “suit authorized under this

section” may be brought to recover damages, costs and attorneys’ fees. Minn. Stat. § 80C.17, subd. 3. An authorized suit is one for wrongful termination without good cause. Id. at 80C.14, subd. 3. In this appeal, NBC does not challenge that it wrongfully terminated Twin City’s franchise without good cause. Thus, as a matter of law, Twin City was injured and its suit was authorized under the Minnesota Franchise Act’s attorneys’ fee statute. Accordingly, Bachovchin is distinguishable.

NBC also relies on the recent decision County of Blue Earth v. Wingen, 2006 WL 1738182 (Minn. Ct. App., June 27, 2006) (NBC Addendum at p. 13). County of Blue Earth merely holds that an award of attorneys’ fees under the Minnesota Condemnation Act is permissive. 2006 WL 1738182 at \*1-2 (NBC Add. at p. 14). However, as is plain from a review of the pertinent condemnation statute, the language of the Minnesota Franchise Act is significantly distinct. Additionally, the district court in County of Blue Earth made specific and detailed findings that the fees incurred were attributable due to the unnecessary and unreasonable actions of the Wingens themselves to support its conclusion that the attorneys’ fee award was inappropriate. Id. at \*2-3 (NBC Add. at pp. 14-5). The appeals court merely held that these findings were supported by the record. Id.

In the instant matter, the district court made no findings to support its ruling to deny Twin City’s post-trial motion for attorneys’ fees. Instead, it merely relied on the memorandum of NBC. Without specific findings or reliance on applicable law, the district court’s ruling constituted an abuse of discretion. See Dailey v. Chermak, 709

N.W.2d 626, 629 (Minn. Ct. App. 2006) (a district court abuses its discretion when it makes unsupported findings of fact or improperly applies the law). Accordingly, County of Blue Earth does not apply to Twin City's appeal pursuant to the Minnesota Franchise Act except that to the extent that the appeals court considers application of the abuse of discretion standard, County of Blue Earth supports reversal due to the district court's failure to make findings.

Further, NBC relies on several cases from other jurisdictions. In addition to having no authoritative value to the Minnesota Court of Appeals, these cases are also distinguishable and inapplicable on their facts. For example, Little Caesar Enterprises, Inc. v. OPPCO, LLC, 219 F.3d 547 (6<sup>th</sup> Cir. 1999) is distinguishable because in that case, like County of Blue Earth, the trial court made findings that the franchisor's actions were not vexatious or unconscionable and that the franchisee bore some of the blame for the violation. 219 F.3d at 554. The Sixth Circuit held that these findings did not reflect a clear error in judgment and upheld the denial of attorneys' fees solely on that basis. Id.

Here, however, the trial court made no findings. As stated above, it merely concluded, without distinction to any specific argument, that the claim for attorneys' fees was denied for the reasons identified in NBC's memorandum. This distinction is fatal to NBC's attempt to allege Little Caesar Enterprises, Inc. is persuasive authority in this matter. See also Four Corners Service Station, Inc. v. Mobil Oil Corp., 51 F.3d 306 (1<sup>st</sup> Cir. 1995) (acknowledging that a claim brought pursuant to the Petroleum Marketing Act required the party seeking attorneys' fees to be the prevailing party as a matter of law);

Coey v. Dave Gill Pontiac-GMC, Inc., 2005 WL 289457 (Ohio Ct. App., Feb. 8, 2005)

(holding that claim pursuant to the Magnuson-Moss Warranty Act allows for the recovery of attorneys' fees only to the prevailing party).

**D. The Jury Awarded Damages on Twin City's Claim that NBC Breached Its Franchise Agreement.**

To the extent that the Court of Appeals determines that to obtain its attorneys' fees pursuant to the Minnesota Franchise Act, Twin City must establish damages, the jury in this matter determined that NBC breached a franchise agreement with Twin City, which is a violation of the Minnesota Franchise Act, and awarded Plaintiffs \$288,000 in damages. App. at A-101. As mentioned previously, it is a violation of the Minnesota Franchise Act for 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.

Because the jury found that NBC violated the Minnesota Franchise Act by breaching its franchise agreement with Twin City, it is entitled to the remedies found in Minn. Stat. § 80C.17, subd. 3, which includes an award of reasonable attorneys' fees. Therefore, to the extent that the Court of Appeals accepts NBC's contention that Twin City must prove actual damages in order to recover under Minn. Stat. § 80C.17, Twin City has presented adequate findings to support such an award. The district court erred in failing to make this ruling.

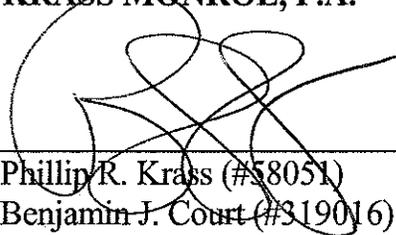
Additionally, because the district court made no findings and did not predicate its ruling on any applicable law, its denial of Twin City's motion constituted an abuse of discretion.

**CONCLUSION**

For all of the reasons stated herein, district court's decision to deny Twin City's motion for reasonable attorneys' fees should be reversed.

Dated: August 14, 2006

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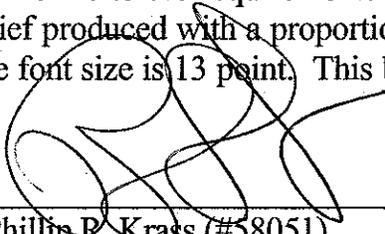
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**CERTIFICATION OF BRIEF LENGTH**

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 2,902 words, and the font size is 13 point. This brief was prepared using Microsoft Word 2003 software.

Dated: August 14, 2006



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